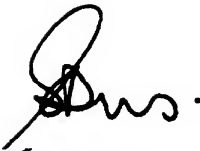


Criminal Cases

(January- December)

1930

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CRIMINAL CASES

1930

1930 Cr. Cases 1

(Lahore)

ZAFAR ALI, J.

Emperor

v.

Khushi Muhammad—Accused — Respondent.

Criminal Case No. 840 of 1929, Decided on 18th October 1929, reported by Dist. Magistrate, Gujranwala, on 11th May 1929.

Criminal P. C., S. 123—Imprisonment in default of furnishing security, if of shorter period, is bad in law.

According to S. 123 a person who is ordered to furnish security for good behaviour but fails to do so shall be detained in prison for the period for which security was demanded. The order of imprisonment for a shorter period is, therefore, bad in law. [P 102]

Report.—The accused on conviction by Khan Sahib Raja Muhammad Ikram Ullah Khan, exercising the powers of an Honorary Magistrate of the First Class in the Gujranwala District, was sentenced by order dated 5th April 1929, under S. 109, Criminal P. C., and ordered to execute a bond with one surety in Rs. 200 for one year, and in default to suffer 4 months' rigorous imprisonment only.

The facts of this case are as follows:

The prosecution story is that the accused *Khushi Muhammad* was about midnight on 14th March 1929 seen going inside village Jamke along with one other man. Hazur Singh, Police Constable, P. W. 1, who was on patrol duty along with Fateh Din Chowkidar P. W. 2, on seeing the accused and his companion called to them asking who they were, whereupon both of them took to their heels. They were pursued with the result that the accused was caught, while his companion made good his escape. The accused, who belongs to Gujrat District, on being questioned as to his name, at first gave a wrong name Muham-

mad Din, and could not give any reasonable explanation of his presence there. On his person being searched, a sand-lawa (house-breaking implement) along with a dang and a knife were found with him. He was accordingly challaned under S. 109, Criminal P. C., and convicted with the result above mentioned.

The proceedings are forwarded for revision on the following ground:

The order of the Honorary Magistrate sentencing accused to 4 months' rigorous imprisonment only in case he does not put in the security bond is illegal under S. 123, Criminal P. C. The period of imprisonment in default of furnishing security should be coterminous with the period of the security order. Otherwise the order requiring him to give security for one year would be without any real force.

I would therefore recommend that the period of imprisonment in default should be extended to one year or till such time as the accused does not put in the necessary security bond.

Order.—The learned District Magistrate's interpretation of S. 123, Criminal P. C., appears to be correct. According to that S. 123-A the person who is ordered to furnish security for good behaviour but fails to do so "shall be detained in prison for the period for which security was demanded." The order of imprisonment for a shorter period was therefore bad in law. I therefore modify that order and direct that the accused should suffer imprisonment for one year, i. e. the period for which security was demanded, or until he gives the security.

V.S./R.K.

Order accordingly.

1930 Cr. Cases 2

(Patna).

COURTNEY-TERRELL, C. J. AND
ROWLAND, J.*Babu Lal Mahton*—Petitioner.

v.

Ram Saran Singh—Respondent.

Criminal Revn. No. 311 of 1929, Decided on 2nd July 1929, against the decision of the Addl. Sess. Judge, Patna, D/- 16th March 1929.

(a) Criminal P. C., S. 403—S. 403 contains with certain limitations common law rule that no one may be punished twice for same offence.

It is a fundamental common law rule that no one may be punished twice for the same offence and this has long been held to mean that he may not be punished twice for the same acts or omissions irrespective of the exact terms of the charge, and that the test of similarity is whether or not the evidence to obtain a legal conviction on the first charge was in substance the same as that necessary to sustain the second charge. The specific statement of this common law rule together with its limitations is contained in S. 403.

[P 3 C 1]

(b) Criminal P. C., S. 403 (1) — Where more than one offence has been committed by same transaction, S. 403 (1) has no application.

As S. 236 does not contemplate a case in which the series of acts complained of may constitute more than one offence, therefore, S. 403 (1) has no application to a case where more than one offence has been committed by the same transaction.

[P 3 C 2]

(c) Criminal P. C., S. 403 (2)—S. 403 (2) has no application to case in which entire series of acts constitute both offences.

Section 403 (2) limits or rather explains the common law rule as meaning that the acquittal or conviction for the offence constituted by acts A, B and C, will not bar a subsequent trial in respect of the offence constituted by the acts B, C and D. The offences are distinct and the evidence necessary in the first case is different from the evidence necessary in the second. This subsection has no application to a case in which entire series or acts constituted both offences.

[P 3 C 2]

(d) Criminal P. C., S. 403 (4)—Accused must show on second occasion that former Court was competent to try and acquit or convict him — Words "competent to try" mean Court is "in a legal position to have tried and acquitted or convicted."

The words "competent to try the offence" mean that in order to obtain the advantage of the common law rule the accused on the second occasion must show that the former Court was in a position, had it so chosen, to try and acquit or convict the accused of the offence subsequently charged. The words "competent to try" are also equivalent to "in a legal position to have tried and acquitted or convicted." They refer narrowly to the legal position of the Court at the time of the former trial in relation to the particular offence com-

mitted by the accused and not broadly to the jurisdiction of the Court with regard to the class of offence in general: 37 All. 107 and 17 Bom. L. R. 678, Rel. on; 36 Mad. 308, not foll. [P 4 C 1, 2]

(e) Criminal P. C., S. 403—Accused shouting in Court and assaulting another with shoe — Magistrate exercising power under Criminal P. C., S. 480, convicting him under S. 238, Penal Code—Assaulted person lodging complaint against accused under S. 355, Penal Code—Conviction under S. 355—Accused cannot plead bar of S. 403, Criminal P. C., as Magistrate had no cognizance of offence of Penal Code, S. 355.

While a Magistrate, with first class powers, was conducting a trial, the accused, suddenly stood up in Court, shouted "Jai Mahabir" and beat another person with a shoe. The accused thereby committed two offences under Penal Code, Ss. 228 and 355. The presiding Magistrate exercising his powers under S. 480, Criminal P. C., punished him for the offence under S. 228, Penal Code. Thereafter the assaulted person filed a complaint in Sub-Divisional Officer's Court who convicted the accused under S. 355. In appeal and revision the accused pleaded bar of S. 403, Criminal P. C.

Held: that the Magistrate had no cognizance of the offence under S. 355, Penal Code and therefore, in the absence of this condition precedent, was incompetent to try the accused for it. Consequently the accused was never in peril of punishment and cannot rely on the plea of autrefois convict. [P 5 C 1]

K. P. Jayaswal, S. P. Asthana and A. Barman—for Petitioner.

Indu Bhuran Biswas—for Respondent.

Courtney-Terrell, C. J.—The facts of this case are unusual but simple and they give rise to an interesting point of law.

On 6th December 1928 a Deputy Magistrate with first class powers was conducting a trial. The petitioner Babu Lal Mahton, suddenly stood up in Court, shouted "Jai Mahabir" and beat one Ram Saran with a shoe. This conduct could be considered from two points of view. Firstly it was an offence under S. 228, I. P. C., that is to say, it was an interruption to a public servant sitting in a judicial proceeding. It was also an offence under S. 355, I. P. C., that is to say, an assault with intent to dishonour Ram Saran. The presiding Magistrate exercising his powers under S. 480, Criminal P. C. punished him for the offence under S. 228, I. P. C. by imposing a fine of Rs. 200 which was duly paid by the petitioner who accordingly purged himself of that offence. Thereafter the assaulted person Ram Saran filed a complaint in the Court of the Sub-Divisional

Officer who took cognizance of the offence under S. 355 and sentenced the petitioner to rigorous imprisonment for two years. This conviction and sentence were upheld on appeal by the Additional Sessions Judge and the petitioner now moves this Court in revision. His contention is and has been throughout, that he is entitled to rely upon the plea of *autrefois convict* by reason of his conviction by the Magistrate under S. 228, I. P. C.

It is a fundamental common law rule that no one may be punished twice for the same offence and this has long been held to mean that he may not be punished twice for the same acts or omission irrespective of the exact terms of the charge, and that the test of similarity is whether or not the evidence to obtain a legal conviction on the first charge was in substance the same as that necessary to sustain the second charge. This is a common law rule which subject to certain specific limitations operates in India as well as in England. The specific statement of this rule together with its limitations, is contained in S. 403, Criminal P. C. which contains four subsections. These subsections deal with four kinds of cases.

(1) deals with the case of one set of acts or omissions constituting one legal offence only.

(2) deals with the case of one series of acts involving more than one offence.

(3) deals with the case of one set of acts constituting more than one legal offence.

(4) deals with a special cases where a single act or set of acts has had a consequence unknown at or having occurred since the first trial.

Subsection (1) is as follows:

"A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under S. 236, or for which he might have been convicted under S. 237."

This is a special statement of the rule as applicable to circumstances in which only one offence has been committed. The phrase beginning with the words "nor on the same facts for any other offence" and having special reference to Ss. 236 and 237 also contemplates a

case where the facts only justified conviction for one offence although other offence may have been charged, *ex abundante cautela* under S. 236. The words "might have been charged" indicate that this subsection is no extension of the commonlaw rule and mean "might lawfully have been charged" under that section. But S. 236 does not (as does S. 235) contemplate a case in which the series of acts complained of may constitute more than one offence. In my opinion this subsection has no application to a case like the present where more than one offence has been committed.

Under S. 235, sub-S. (1):

"If in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person he may be charged with, and tried at one trial for, every such offence."

that is to say, if a person has performed a series of acts A, B, C, D, and if acts A, B, and C constitute one offence and acts B, C and D, constitute another offence he may be charged with, and tried at one trial, for both of such offences. Sub-S. (2), S. 403, limits, or rather explains the common law rule as meaning that the acquittal or conviction for the offence constituted by acts A, B and C, will not bar a subsequent trial in respect of the offence constituted by the acts B, C, and D. The offences are distinct and the evidence necessary in the first case is different from the evidence necessary in the second. So that the common law rule is still maintained and is not interfered with by this subsection. The subsection has no application to the present case in which the entire series of acts constituted both offences.

It is unnecessary for the purposes of this case to consider sub-S. (3). Sub-S. (4) is a further explanation and limitation of the general common law rule and is as follows:

"A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged."

It will be noted in the first place that the subsection involves in itself that part of the common law rule according

to which an accused cannot rely upon the pleas of autrefois acquit or autrefois convict unless the previous acquittal or conviction was arrived at by a competent tribunal. But a series of acts may constitute more than one offence and the subsection says that a person acquitted or convicted of an offence may nevertheless be subsequently tried for any other offence constituted by the same acts if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged. Therefore the common law rule has no application, if the first Court was not competent to try him for the offence subsequently charged, notwithstanding that the acts constituting the two offences are identical. In my opinion the words "competent to try the offence" mean that in order to obtain the advantage of the common law rule the accused on the second occasion must shew that the former Court was in a position, had it so chosen to try and acquit or convict the accused of the offence subsequently charged.

It has been contended before us that the words "competent to try" are merely indicative of the rank of the tribunal, that is to say, that if the former tribunal had legal power to try offences of that class the conditions of the subsection are fulfilled although the former tribunal might not have been able in the circumstances to have acquitted or convicted the accused of the offence subsequently charged. Some colour is given to this contention by certain decision of the Madras High Court and I refer particularly to the judgment in the case of "*In re, Ganapathi Bhatta* (1)." In this case the accused had been tried and acquitted of an offence under S. 211, I.P.C. He could have been charged on the same facts by the Magistrate at the same trial with an offence under S. 182, if the required sanction had been available. Later he was, after the necessary sanction had been obtained, charged under S. 182, and he pleaded autrefois acquit under S. 403, Criminal P. C.

It was contended for the prosecution that since at the time of the first trial no sanction had been given for a charge under S. 182, the Court was not "competent to try" him under that section.

The High Court held that sanction was only a condition precedent to the institution of proceedings under S. 182 and that it was the duty of the prosecution to have obtained it before the former trial in which event both sections could have been used. In these circumstances the Court held that the words "competent to try" in sub-S. (4) referred to the jurisdiction of the tribunal which was complete to deal with an offence under both sections, the absence of the sanction not affecting the competence of the tribunal. In my opinion the words "competent to try" are equivalent to "in a legal position to have tried and acquitted or convicted." That is to say, they refer narrowly to the legal position of the Court at the time of the former trial in relation to the particular offence committed by the accused and not broadly to the jurisdiction of the Court with regard to the class of offence in general. No other reading of these words is in harmony with the general common law doctrine of which a particular aspect only is set forth in the subsection and the broader reading would produce an unreasonable anomaly. For it would absolve the plea from the common law test of its validity, that is to say an enquiry whether the accused had been put in peril in respect of the offence.

The Madras decision merely states that in fact the accused had already been in peril of conviction under S. 182, I. P. C. But decisions in the Allahabad and Bombay High Courts, see for example, *Emperor v. Jivan* (2), lay down that the necessary sanction being a condition precedent to a trial under S. 182 therefore the accused in such circumstances had never been in peril in respect of the offence subsequently charged. In my opinion the latter view is correct and the Madras decision was wrongly decided. In *Emperor v. Tikaram Sakharam Kasar* (3), the accused had been tried and acquitted for offences under Ss. 366, 368 and 375, I.P.C. There had been no complaint by the husband of the woman. He was again convicted on the same facts, at the complaint of the husband, of an offence under S. 498.

(2) [1915] 87 All. 107=27 I. C. 208=13 A. L. J. 4.

(3) [1915] 17 Bom. L. R. 878=30 I. C. 641=16 Cr. L. J. 657.

(1) [1913] 36 Mad. 308=19 I. C. 210=21 M. L. J. 463.

1930 BENGALI PARIDA V. BANCHHANIDHI PANIGRAHI (Courtney-Terrell, C. J.)

It was held that a complaint by the husband being a condition precedent to the Court's jurisdiction to try under S. 498, the former Court not only did not in fact try the offence under S. 498, but was in law incompetent to try that offence and the subsequent conviction was good.

In this case the Magistrate had no cognizance of the offence under S. 355, and, therefore, in the absence of this condition precedent was incompetent to try the petitioner for it. Consequently the petitioner was never in peril of punishment and cannot rely on the plea of autrefois convict. I agree with the decisions of the Magistrate and the Sessions Judge and would dismiss this petition. But in the matter of the sentence I am of opinion that it is far too severe and I would reduce it from two years to six months rigorous imprisonment.

Rowland, J.—I have had the privilege of seeing the judgment of the learned Chief Justice and I concur in the proposed order. The ground for revision is thus stated in the application:

"For that the incident being one and the same and the accused having been sentenced to pay a fine of Rs. 200. the second trial under S. 355, I. P. C., is barred by S. 403, Criminal P. C."

Sub-section (1), S. 403, which alone imposes a statutory prohibition on a second trial has been set out in full in the judgment of the learned Chief Justice who has demonstrated that it does not apply to the facts of this case. There being no other statutory provision in bar of the second trial the applicant has not made out that the trial is barred by S. 403.

As regards S. 403 (4) I agree with the learned Chief Justice that the High Courts of Bombay and Allahabad in the decisions cited have correctly stated the law.

V.S./R.K.

Petition dismissed.

1930 Cr. Cases 5 (Patna)

COURTNEY-TERRELL, C. J. AND
ROWLAND, J.

Bengali Parida and others—Applicants.

• v.

Banchhanidhi Panigrahi—Opponent.

Criminal Ref. No. 38 of 1929, Decided on 22nd July 1929, made by Sess. Judge, Cuttack, D/- 16th May 1929.

Criminal P. C., S. 146—Parties not adducing evidence of possession even on adequate opportunities—Apprehension of breach of peace—No material to protect possession of either—Magistrate must attach property.

There is no obligation imposed by S. 146, on the Magistrate to make independent enquiry if the parties having been given adequate opportunities decline to adduce evidence as to possession. He is entitled to act on his apprehension of breach of peace founded on information he may have before him and in the absence of material which would enable him to protect the possession of one or the other of the parties he must attach the property: 14 C. W. N. 80 and A. I. R. 1922 Pat. 544, Ref.; 12 C. W. N. 896, Dist. and 40 Cal. 105, Diss. from. [P 6 C 1]

Courtney-Terrell, C. J.—This case has been referred to a Bench by Macpherson, J. It is a reference to the High Court by the Sessions Judge of Cuttack, who recommends that an order of attachment made by the Sub-Divisional Magistrate under S. 146, Criminal P. C., may be set aside and the case remanded for retrial.

The order sheet of the Sub-Divisional Magistrate shows that on 10th November 1928, he received a police report that a breach of the peace was likely to occur concerning an area of some 12 acres in mauza Panisiali upon which paddy was growing, there being two rival claimants. He called for a further report which when furnished on 22nd left it in doubt which party had grown the standing crop. The first party had got delivery of possession from the Court in 1926 but in 1927 the second party had cultivated it and had cut the crop. The Magistrate served notice under S. 144 on the first party not to interfere with the harvesting by the second party. On 26th November the first party showed cause. The Magistrate directed proceedings under S. 145, and attached the land and the crops directing the police to effect the harvesting and fixed 18th December for the written statements. On that date he granted further time until 16th January 1929, for the written statements which were duly filed on that day when the Magistrate fixed the hearing of evidence for 4th February and summoned the witnesses for that date. Neither party appeared on the 4th and the Magistrate stating that he was unable to find who was in possession made the order under S. 146 complained of.

The order was perfectly right. If the parties refused, after ample time had

been given them to adduce evidence, the Magistrate was not bound to make an enquiry on his own account. He is entitled to act on his apprehension of a breach of the peace founded on the police report. If the proceedings had been initiated by one of the parties and if neither party had appeared at the hearing the matter would have been on a different footing. The Sessions Judge mentions the case of *Parsuram Rai v. Shivajatan Upadhaya* (1). This case is very badly reported and there is no adequate statement of the facts upon which the decision was based.

In *Bijoy Madhub v. Chandra Nath* (2), a similar order was made. The parties did not file written statements and prayed for a local investigation which was refused. Neither side produced evidence and after delay the Magistrate made the order which was approved by the High Court. The case of *Sheikh Mansur Ali v. Mali Ullah* (3), is clearly distinguishable from this one because in that case the Magistrate gave the parties no time to produce evidence, in other words, he did not conduct the enquiry under S. 145 in a proper manner.

I do not agree with the reasoning of the Court in *Sheobalak Rai v. Bhagwat Pande* (4). I can find no obligation imposed by S. 146 on the Magistrate to make independent enquiry if the parties having been given adequate opportunity decline to adduce evidence as to possession. The Magistrate is then entitled to fall back on such information as he may have before him which would make him apprehensive of a breach of the peace. In the absence of material which would enable him to protect the possession of one or other of the parties he must attach the property. I would reject the reference.

Rowland, J.—I agree.

V.B./R.K.

Reference rejected.

1930 Cr. Cases 6

(Panna)

MACPHERSON, J.

Parmanand Brahmachari—Petitioner—

Emperor—Opposite Party.

Criminal Revn. No. 704 of 1927, Decided on 29th November 1927, from order of Sess. Judge, Muzaffarpur, D/- 23rd September 1927.

(a) Criminal P. C., S. 190—Cognizance properly taken—Subsequent events or anything in S. 195 (1) (b), cannot deprive Magistrate of jurisdiction.

Where a Magistrate has properly taken cognizance of a complaint nothing that can happen subsequently will suffice nor can anything in S. 195 (1) (b), operate to deprive him of jurisdiction to proceed thereon in accordance with law: *A.I.R. 1925 Pat. 717, Dist.* [P 8 C 1]

(b) Criminal P. C., S. 190—"Taking cognizance"—Meaning.

Taking cognizance occurs as soon as the Magistrate as such applies his mind to the suspected commission of an offence: 37 *Cal.* 412, *Foll.* [P 7 C 2]

(c) Criminal P. C., S. 202—Object and scope enunciated.

An enquiry or an investigation under S. 202 is designed to afford the Magistrate an opportunity of either confirming or removing such hesitation as he may feel in respect of issuing process against the accused. The nature of the enquiry varies with the circumstances of each case and it is certainly not contemplated that it should always be exhaustive. Frequently all that is required is the elucidation of some minor point or the summary determination of the sufficiency of the available evidence, but least of all is the enquiry—a preliminary trial of the accused at which he is entitled to adduce his evidence before process can issue upon him. The degree of formality of the proceedings and the width and the depth of the enquiry is entirely in discretion of the Magistrate (so long at least as he confines himself to the simple question of issue of process or dismissal of the complaint). The provision is enabling and not obligatory. As soon as he has satisfied himself that process should issue its object is fulfilled and it is certainly not incumbent upon him or ordinarily expedient that he should practically enter upon a trial of the case. [P 8 C 1, 2]

(d) Criminal P. C., S. 202—High Court will not interfere with details of enquiry, particularly on ground of inadequacy.

The High Court will not ordinarily interfere with the details of an enquiry or investigation under S. 202 and particularly will not do so on the ground that it was inadequate. [P 8 C 2]

(e) Criminal P. C., S. 204—Competing complaints—Magistrate has discretion to issue summons on consideration of circumstances of case.

When there are competing complaints it is manifestly within the discretion of the Magistrate on a consideration of the circumstances of the particular case to determine in which he should issue process first and not less so when he has made an enquiry under S. 202 in one of

(1) A. I. R. 1922 Pat. 544.

(2) [1910] 14 C. W. N. 80=5 I. C. 40=11 Cr. L. J. 27.

(3) [1908] 12 C. W. N. 896.

(4) [1922] 40 Cal. 105=15 I. C. 486=16 C. W. N. 1052.

them which necessarily involves also consideration of the other. . . [P 80 2]

(f) Criminal P. C. S. 202 — Complaint under S. 211 by public servant acting in discharge of his duties—It is open to Magistrate to issue summons without any notice to accused if complaint afforded sufficient ground for proceeding against him.

Where a public servant acting in discharge of his duties makes a complaint to the Magistrate under S. 211, Penal Code, it is open to the Magistrate to issue summons without any notice to accused if on reading the complaint he found sufficient ground for proceeding or to proceed under S. 202 for the purpose of ascertaining the truth or falsity of the complaint. [P 7 C 2]

M. K. Mukherjee—for Petitioner.

Judgment. — The petitioner Parmanand Brahmachari is under trial for an offence under S. 211, I. P. C., on the complaint of the Sub-Inspector in charge of the Motihari Police Station with whom he lodged a first information on 29th May last. On 7th June the Sub-Inspector reported that the whole case was maliciously false and preferred to the Sub-Divisional Magistrate a complaint against the petitioner of an offence under S. 211, I. P. C. The Magistrate gave the petitioner an opportunity to show cause why he should not be prosecuted and to prove his case. The petitioner on 27th June filed a petition showing cause and impugning the police report and on 21st July examined a medical witness. On that date the Magistrate who was apparently inclined to summon the accused since he remarked that the police had much evidence against him took time to peruse the police records and eventually passed orders on 18th August summoning the petitioner under S. 211. In the interval the latter had on 27th July presented a petition dealing with points of law but also asking that what he called his complaint be finally disposed of before process was ordered to issue on him on the complaint of the Sub-Inspector.

In support of the rule issued on the application of the petitioner to quash the proceedings and to order that he be given an opportunity to prove his case, reference is made on his behalf mainly to the case of *Daroga Gope v. Emperor* (1), and it is contended that the offence of laying a false information before the Sub-Inspector on 29th May has been committed "in relation to" the offence of instituting on 27th June a false case by

a complaint in the form of a petition impugning the police report on his first information, within the meaning of the words "in relation to" in S. 195 (1) (b), Criminal P. C. But a consideration of the case cited shows, as will presently appear, that the facts are distinguishable. Some older decisions also have been cited, but it is clear that in the amending Act of 1923 the legislature completely altered the law in respect of the procedure for prosecution under S. 211, I. P. C., resolutely or at least incidentally making a clean sweep of the cloud of interpreting rulings which had collected round the provisions of the statute. Those decisions on the provisions of the unamended Code of Criminal Procedure relating to an order or sanction to prosecute under S. 182 or S. 211, I. P. C., are at best lumber and at worst actively misleading in the interpretation of the provisions of the amending Code which supersedes the previous law and prescribes an entirely new procedure by complaint. In the present case there is manifestly nothing in S. 195 (1) to prevent the Sub-Inspector of Police from preferring a complaint of an offence under S. 211 against the petitioner. Equally there was nothing to prevent the Court from taking cognizance of the complaint. Taking cognizance occurs as soon as the Magistrate as such applies his mind to the suspected commission of an offence: *Sourindra Mohan v. Emperor* (2).

In the present instance the Magistrate took cognizance either before or at least as soon as he issued notice upon the petitioner. When taking cognizance of an offence on complaint a Magistrate acts under Ss. 200 to 204. In the present instance he was not required under S. 200 to examine the complainant who was a public servant acting in discharge of his public duties. The Magistrate if he does not dismiss the complaint must either issue process on the accused or proceed under S. 202 to make an inquiry or to direct a magisterial or police inquiry or investigation. It is clear that on 13th June the Magistrate though recording his reasons in language reminiscent of a procedure which obtained under the unamended Code, thought fit to set out to hold an inquiry under S. 202. When,

(1) A. I. R. 1925 Pat. 717=5 Pat. 33.

(2) [1910] 37 Cal. 412=6 I. C. 8=14 C. W. N. 512.

therefore, the petitioner filed his petition on 27th June impugning the police investigation, the Magistrate had already taken cognizance on complaint of the offence alleged against the petitioner, and, therefore, S. 195 (1) (b) could not possibly apply. On the other hand in the case of *Daroga Gope v. Emperor* (1) though the investigating Police Officer made his adverse report on 15th January he did not prefer a formal complaint to the Magistrate until 3rd February, whereas Daroga Gope filed a formal complaint before the Magistrate on 23rd January, that is to say, before the Magistrate had taken cognizance of the offence of Daroga Gope on the complaint of the Police Officer and indeed before the Magistrate had received the petition of complaint of the latter. The distinction is of importance: in the case cited magisterial cognizance was first taken on the complaint of accused whereas in the present instance, such cognizance had already been taken before the accused took any action which can, even by implication, be adjudged to be a complaint, and it is impossible to hold that when a Magistrate has taken cognizance of a complaint anything that can subsequently happen will suffice or anything in S. 195 (1) (b) can operate to deprive him of jurisdiction to proceed thereon in accordance with law. Clearly the Magistrate had jurisdiction to issue summons on the petitioner.

It is next urged that in any event the petitioner was not afforded adequate opportunity of showing cause against his prosecution. Assuming that under the superseded provisions of the Code he was entitled to such an opportunity, he is no more entitled to it under the procedure laid down in the amended Code than any other person against whom a complaint is made. It was open to the Magistrate to issue process without any notice to him if on reading the complaint he found sufficient ground for proceeding, or to proceed under S. 202 for the purpose of ascertaining the truth or falsity of the complaint. An inquiry or investigation under S. 202 is designed to afford the Magistrate an opportunity of either confirming or removing such hesitation as he may feel in respect of issuing process against the accused. The nature of the inquiry varies with the circumstances of each case, and it is

certainly not contemplated that it should always be exhaustive. Frequently all that is required is the elucidation of some minor point or the summary determination of the sufficiency of the available evidence, but least of all is the inquiry, a preliminary trial of the accused, at which he is entitled to adduce his evidence before process can issue upon him. The degree of formality of the proceedings and the width and depth of the inquiry is entirely in the discretion of the Magistrate (so long at least as he confines himself to the simple question of issue of process or dismissal of the complaint). The provision is enabling and not obligatory as soon as he has satisfied himself that process should issue, its object is fulfilled and it is certainly not incumbent upon him or ordinarily expedient that he should practically enter upon a trial of the case.

In the present instance the Magistrate was satisfied upon the material placed before him by the prosecution of the truth of the complaint in spite of the submissions and evidence adduced by the accused and was, therefore, warranted in issuing process, even though accused may have had further evidence which he could adduce. This Court moreover will not ordinarily interfere with the details of an inquiry or investigation under S. 202 and particularly will not do so on the ground that it was inadequate.

As to the argument that when the Magistrate had before him two competing complaints of which he had taken cognizance, he should have disposed of the complaint of the petitioner before issuing process upon the petitioner on the other though earlier complaint, it is based upon recollection of the decisions under the superseded provisions of the unamended Code. When there are competing complaints it is manifestly within the discretion of the Magistrate on a consideration of the circumstances of the particular case, to determine in which he should issue process first and not less so when he has made an inquiry under S. 202 in one of them which necessarily involves also a consideration of the other.

The application is without merit and accordingly this rule is discharged.

V.B./R.K.

Rule discharged.

1930 Cr. Cases 9

(Madras)

CURJINVEN, J.

Subbayya Pillai—Complainant—Petitioner.

V. Sesa Iyer and others—Accused—Respondents.

Criminal Revn. No. 140 of 1929, and Criminal Revn. Petn. No. 120 of 1929, Decided on 21st August 1929, against order of Town Sub-Magistrate, Trichinopoly, D/- 1st February 1929.

Criminal P. C., S. 239 (6) — Joint trial—Complaint against five accused the first being abettor—Abettor discharged being unidentified — Charge framed against others and prosecution witnesses cross-examined—Further inquiry against accused 1 directed on revision—Joint trial of abettor with others was not ordered—Criminal Trial.

A complaint was filed against five persons under S. 325, Penal Code, the 1st being included as an abettor. Accused 1 was discharged on the ground of not being identified and charge was framed against the other four accused. On revision further inquiry was directed which was to give further opportunity to the prosecution witness to identify accused 1. Meanwhile proceedings against the other four accused had proceeded and prosecution witnesses had been cross-examined after the charge.

Held: that though ordinarily the correct course is to try an abettor with the primary offender yet in this particular instance the proceedings had reached such a stage that a joint trial could not be ordered: *A. I. R. 1926 Mad. 638, Ref.* [P 9 C 1,2]

K. S. Jayarama Ayyar and S. Nagaraja Ayyar—for Petitioner.

K. N. Ganapathi—for the Crown.

T. R. Venkatarama Sastriar for *K. S. Sankara Ayyar* and *M. S. Vaidyanatha Ayyar*—for Respondents.

Order.—The petitioner is the complainant. He filed a complaint against five persons which was taken on file against accused 2 to 5 as voluntarily causing grievous hurt under S. 325, I.P.C., and against accused 1, who is a pleader, as abetment of that offence, under Ss. 325 and 114, I. P. C. The Town Sub-Magistrate of Trichinopoly who tried the case discharged accused 1 on the ground that he had not been identified, and framed a charge against the remaining accused of the offence stated. The complainant then applied to the Sessions Judge of Trichinopoly to revise the order discharging accused 1 and the application was granted, the learned Sessions Judge directing further inquiry which was to include affording several of the

prosecution witnesses an opportunity of identifying accused 1. In Criminal Revision Case No. 952 of 1928 Reilly, J., refused to interfere with this order.

Meanwhile, as I have said, a charge had been framed against the other accused and the first prosecution witness had been further cross-examined after charge. The question then arises as to the correct procedure to be adopted, whether, as the petitioner urges, the joint trial of all the accused could be resumed or whether the trial of accused 1 must be conducted separately. The parties appear to have been canvassing this question before the local courts, for I find an application by accused 1, disposed of by the Sub-Divisional Magistrate on 5th January 1929, in which it is said that there can be no question of a joint trial, and another application by the complainant to the Sub-Magistrate insisting that a joint trial is necessitated by the circumstances. The Sub-Magistrate is, however, of a contrary opinion. I think that the views taken by these Courts are correct.

No one disputes the general principle, to which Spencer, Offg. C.J., gave expression in *Sogaimuthu Padayachi v. Emperor* (1), that ordinarily the correct course is to try an abettor with the primary offender or offenders. Where no reason to the contrary appears, the enabling provisions of S. 239, Criminal P.C., should be availed of. In the present case, however, it is I think only necessary to consider what a joint trial would involve to be satisfied that it cannot now be had compatibly with observing the rules of procedure.

Suppose, then, that accused 1 is reinstated in the dock, along with the remaining accused. The proceedings against those accused, as I have said, have extended to the framing of a charge and to the further cross-examination of a witness after charge. One of two courses must then be pursued. Either that part of the proceedings against accused 2 to 5 which took place after the order discharging accused 1 was passed must be expunged, so as to restore them to that point in the inquiry which has been reached in the case of accused 1, or inquiry must be conducted solely into accused 1's case until it reaches the stage at which it stands against the other ac-

(1) *A. I. R. 1926 Mad. 638=50 Mad. 274.*

cused. For adopting the former alternative I can find no justification. It is not to be found in the order directing further inquiry against accused 1. Cancellation of the charge could only be justified on the ground that it had been improperly framed, and no such ground can be alleged. We are left then with the second alternative, and that presents even greater difficulties. Assuming that the inquiry is taken up against accused 1 at the point where it was dropped, the next step would be the examination of P. Ws. 6 to 9 touching their identification of accused 1, and their cross-examination upon this question. Their statements would be evidence against accused 1, but although what they said might bear upon the case against the others, it would not be evidence against them. The Court would have to distinguish in its mind between what was admissible against one of the accused and what was admissible against the others. It need scarcely be said that such a position would be at variance with the principles upon which a joint trial should be connected. It would in effect be no joint trial at all, because while the inquiry preceding charge was being conducted against accused 1, proceedings against the remainder would be at a standstill.

I conclude then that the Sub-Magistrate is taking the only practicable course in deciding to try accused 1 separately. Since the statements of the prosecution witnesses already recorded must be appropriated to one or other of the inquiries, and cannot, as to any part of them, be made to serve for both, this will involve a de novo inquiry into the case against accused 1. The Criminal Revision Petition is dismissed.

P.R.S./P.R.

Petition dismissed.

1930 Cr. Cases 13

(Calcutta)

B. B. GHOSE AND S. K. GHOSE, JJ.

Tiku Kahar—Appellant.

v.

Equitable Coal Co. Ltd.—Respondents.

Appeal No. 515 of 1928, Decided on 23rd August 1929, from order of Commr, Workmen's Compensation Bengal, D/- 5th October 1928.

(a) *Workmen's Compensation Act (8 of 1923), S. 3 (b) (ii)*—"Wilfully"—Meaning.

A man does a thing wilfully when he does it intentionally because he expects some benefit to himself, either some convenience or an easy way of doing a piece of work and so forth.

[P 11 C 1]

(b) *Workmen's Compensation Act (8 of 1923), S. 30*—Finding as to "wilful disobedience".

A finding as to wilful disobedience is a finding of fact which might be arrived at on evidence and hence it cannot be interfered with in appeal by the High Court.

[P 11 C 1]

Purna Chandra Chatterji—for Appellant.

Lalit Mohan Sanyal and Amarendra Narayan Bagchi—for Respondents.

B. B. Ghose, J.—The objection that has been taken in this case on behalf of the respondents is that there is no substantial question of law involved in the appeal and that being so no appeal lies to the High Court from the order of the Commissioner under S. 30, Proviso. (2), sub-S. 1, Workmen's Compensation Act, (8 of 1923). The learned Commissioner has found that the accident, which was a very unfortunate one by which the appellant lost his right arm was due to the wilful disobedience of the order expressly given to him as well as to the other workmen by the night-Sirdar of the Colliery.

The case of the defendants-respondents was that the Sirdar actually made a cross over an old hole and he told the applicant and the other men not to drill there. The applicant gave his own evidence in support of his case. His evidence was that he saw no cross mark. The Commissioner has found that the version on behalf of the employers was true so that it must be taken as a fact that there was a cross mark and the workmen were forbidden to drill at the place. The next finding of the Commissioner was that there was wilful disobedience. It may be that upon the evidence in the case the Commissioner might reasonably have come to the conclusion that the facts do not show wilful disobedience. The evidence is that it does not matter how many holes are drilled by a workman in the course of the day. They are not paid by piece work but the applicant among others received a daily pay. There was no inducement on his part to wilfully disobey an order that had been made. The evidence of Jaganath Mondal on behalf of the opposite

party is that a workman would get the same daily pay whether he drilled one hole or 20 holes even if the gallery had been cleared. Under such circumstances it might have been inferred quite reasonably that although the applicant drilled a hole at a place where there was a cross mark, it might have been due to forgetfulness or negligence or for any other reason but not as an act of wilful disobedience. A man does a thing wilfully when he does it intentionally because he expects some benefit to himself, either some convenience or an easy way of doing a piece of work and so forth. But it seems to me that the finding is one of fact which might be arrived at on the evidence. It is unfortunate that such a finding has been arrived at by the learned commissioner with which we cannot interfere in appeal having regard to the provisions of S. 30 of the Act. I hope, however, that the employers will find their way to make some compensation to the unfortunate workman, although he has failed in his appeal.

The appeal will stand dismissed but we make no order as to costs.

S. K. Ghose, J.—I agree.

V.B./R.K. *Appeal dismissed.*

1930 Cr. Cases 11

(Calcutta)

SUHRWARDY AND GRAHAM, JJ.

Sashi Bhushan Choudhury and others—
Party 1—Petitioners.

v.

Debendra Gati Roy and others—Opposite Parties.

Criminal Reqn. No. 987 of 1928, Decided on 7th February 1929.

Criminal P. C., S. 145—Dispute regarding complete and existing bund and not right to erect one falls under S. 145.

Where the subject matter of dispute is possession of a complete and existing bund and not a right to erect a bund, the case falls within S. 145 : 15 C. L. J. 267 and 4 C. W. N. 779, *Dist.* [P 12 C 1]

Girija Prasanna Sanyal and Sourendra Nath Ghose—for Petitioners.

Protodh Chandra Chatterji and Bireswar Bhagchi—for Opposite Parties.

Suhrawardy, J.—This rule has been issued on the ground that S. 145, Criminal P. C., does not apply in this case. The dispute is with regard to a complete bund on the south west of the Rainagar Bil measuring about 40 feet in

length with a top of about 4 cubits. Mr. Sanyal on behalf of the petitioners argues that the right claimed by his clients (the first party) is a right of easement or a right in the nature of an easement. The first party, he says, admits the land under the bund belongs to the second party but they claimed the right to put up a bund over the land of the second party to avoid overflow of water into their land. The case as it was tried before the Deputy Magistrate was not what it is now attempted to be. The subject matter of the dispute there was a complete bund then in existence.

The first party claimed that the bund was theirs and that they had the right to repair it from time immemorial. The second party's case was that the bund was recently erected on their land by the first party. The dispute between the parties therefore was in respect of the bund at the time of the proceedings as to whether the bund with the land underneath should be allowed to the first party or to the second party. The contention put forward before us on behalf of the first party loses sight of the difference between a bund and the right to erect a bund. Reference has been made in support of the contention of the first party to the case of *Dowlat Koer v. Siva Pershad* (1). There the dispute was with regard to the right of a party to flow water over the land of another and whether the other party had the right to put up a bund for obstructing the flow. There it was held that proceedings under S. 147, Criminal P. C., which were taken were properly started. That case is not relevant for our present purposes. Reference has also been made to the case of *Empress v. Ganpat Kulwar* (2). There the dispute was between landlord and tenant. The tenant claimed the right to put up a Gola on the land which he had leased from the landlord and the landlord claimed the right to prevent him from doing so. There the right claimed was an incorporeal and intangible right unconnected with the possession of land. In the present case the order passed by the trial Magistrate declaring the possession of the second party of the disputed place brings the case within S. 145, Criminal P. C. The

(1) [1912] 15 C. L. J. 267=10 I. C. 615=12 Cr. L. J. 819.

(2) [1900] 4 C. W. N. 779.

subject matter of the dispute was the bund and not the right to erect a bund and we think that the proceedings are quite regular. The rule is accordingly discharged.

Graham, J.—I agree. In my opinion the case comes within the purview of S. 145, Criminal P. C. I may also observe that the point which has been raised before us that the proper section is S. 147 of the Code and not S. 145, was not raised before the Magistrate at the time when the enquiry was made. That being so, I do not think that we ought to entertain it in revision.

V.B./R.K. *Rule discharged.*

* 1930 Cr. Cases 12 (1)

(Calcutta)

SUHRWARDY AND GRAHAM, JJ.

Kailashpati Upadhyaya and another—
Accused—Petitioners.

v.

Gopi Koeri—Complainant — Opposite Party.

Criminal Revn. No. 1276 of 1928, Decided on 8th March 1929, against order of Dist. Magistrate, Howrah.

* Criminal P. C., S. 403—Trial for offence under Act other than Penal Code—Sentence enhanced in view of offence under Penal Code for which no charge framed—Subsequent trial for that offence is barred.

If in a previous trial for offence under a different Act a person is convicted and the sentence enhanced in view of another offence under Penal Code for which no charge was framed, there cannot be subsequent trial for that offence inasmuch as the Court has taken account of the same previously though indirectly. [P 12 C 2]

Sashi Sekhar Basu and Tarapada Banerjee—for Petitioners.

Judgment.—This rule was issued to show cause why the order of the learned District Magistrate of Howrah rejecting the application made by the petitioners for the quashing of an order issuing processes against them under S. 323 should not be set aside. The main ground urged is that the petitioners had already previously been tried for an offence under the Railways Act and had been convicted and fined, and that being so, they ought not to be again placed in peril in respect of another offence arising out of the same facts for which they might have been tried and convicted at the former trial. The trying Magistrate relying upon S. 403 (2), Criminal P. C., held that the trial was competent and the

learned District Magistrate has endorsed that view. The point involved is not altogether free from doubt; but we do not think that we are called upon to decide it in this case inasmuch as it seems to be clear that while there was no charge of assault in the previous case, and which the accused were not on that occasion asked to plead in respect of that offence, the Court nevertheless took into account the fact that the accused had committed an assault upon the complainant, and in consideration thereof inflicted heavier fines upon them than upon the other two accused who had not committed any assault. That being so, we do not think that it would be just or proper that the petitioners having already been punished although indirectly on this account, should be again tried in respect of the same matter since that would involve punishment twice over for the same offence. In this view of the case we make the rule absolute and set aside the order complained of.

V.B./R.K. *Rule made absolute.*

1930 Cr. Cases 12 (2)

(Calcutta)

SUHRWARDY AND GRAHAM, JJ.

Dwarika Malo—Accused.

v.

Emperor—Opposite Party.

Criminal Ref. No. 19 of 1928 and Appeal No. 954 of 1928, Decided on 8th February 1929, against judgment of Addl. Sess. Judge, Dacca, D/- 8th December 1928.

Criminal P. C., S. 274—S. 274 not strictly enforced in murder case—Jury is deemed to be illegally constituted — Criminal P. C. S. 326.

In a murder case only fourteen jurors were summoned of whom eleven attended and seven were empanelled.

Held: that not less than eighteen jurors ought to have been summoned and hence the trial was vitiated because the jury was illegally constituted, there being a breach of the statutory provisions: A. I. R. 1928 Cal. 645, *Rel. on.* [P 13 C 1]

Surujit Chandra Lahiri — for Appellant.

Ashrafali—for the Crown.

Order.—This is a reference by the Additional Sessions Judge of Dacca under S. 374, Criminal P. C., submitting for confirmation the proceedings in a case under S. 302, I. P. C., in which sentence of death has been passed upon the accused. The accused Dwarika Malo has

also appealed against his conviction and sentence.

A preliminary point has been raised on behalf of the appellant that the jury, before which the case was tried was not properly or legally constituted, and that as a consequence the conviction and sentence are bad in law. We think that this contention is well founded and must prevail.

The sections of the Code which bear upon the point are Ss. 274 and 326 of the Code. S. 274 lays down that in trials before the Court of Sessions the Jury shall consist of such uneven number, not being less than five, or more than nine, as the Local Government, by order applicable to any particular district, or to any particular class of offences in that district, may direct; and the proviso to this section, which was added by Act 12 of 1923, states that where any accused person is charged with an offence punishable with death, the jury shall consist of not less than seven persons and, if practicable, of nine persons.

Section 326, which deals with the summoning of jurors and assessors, requires inter alia that the number to be summoned should be not less than double the number required for the trial.

Applying these provisions of the law to the present case it is clear that being a murder case not less than eighteen jurors should have been summoned. As a matter of fact only fourteen were summoned, and there was therefore to commence with a failure to comply with S. 326. It appears, however, that S. 274 could still have been complied with since eleven jurors are shown as having been in attendance. For some reason however, only seven of these were empanelled and the trial proceeded. In the circumstances stated it cannot be said that it was not practicable to empanel a jury of nine as required by S. 274 and, as there was a breach of this statutory provision, the jury must be held to have been illegally constituted. This view of the matter is supported by recent authority in this Court reported in *Serajul Islam v. Emperor* (1). In that case twelve persons were summoned and seven persons were selected as jurors out of eight who attended. It was held that the tribunal was illegally constituted, the proceedings were set aside, and the

case remitted for retrial. We regret that we have no alternative but to follow the same course in the present case. We accordingly allow the appeal, set aside the conviction and sentence and direct that the case be retried according to law.

We draw the attention of the Additional Sessions Judge to the importance of seeing that the sections of the Code to which reference has been made above are in future carefully complied with.

P.R./R.K.

Retrial ordered.

1930 Cr. Cases 13

(Calcutta)

SUHRAWARDY AND GRAHAM, JJ.

Debidas Karmakar and others—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1090 of 1928, Decided on 27th March 1929, from an order of Sess. Judge, Burdwan, D/- 29th September 1928.

(a) Criminal P. C., S. 437—Order of commitment by Sessions Judge who had previously rejected application for setting aside of order of discharge is not without jurisdiction.

An order of commitment made by a Sessions Judge under S. 437, when already he had at previous stage rejected an application for setting aside an order discharging the accused is not without jurisdiction: 26 *Mad.* 126 (F.B.); 28 *Cal.* 652 (F.B.) & 10 *Cal.* 1047, *Ref.* [P13 C 2]

(b) Criminal P. C., S. 369—Order of discharge under S. 209 or 203 is not judgment.

Order of discharge under S. 209 or 203 is not judgment within the meaning of S. 369.

[P 14 C 1, 2]

Probodh Chandra Chatterjee and Bireswar Chatterjee—for Petitioners.

Graham, J.—This rule was issued calling upon the District Magistrate of Burdwan to show cause why an order of the Sessions Judge of Burdwan directing that the petitioners should be committed for trial to the Court of Sessions on a charge of murder should not be set aside. The main ground upon which the order has been assailed is that inasmuch as the learned Sessions Judge had already at a previous stage rejected an application for setting aside an order discharging the petitioners under S. 409, Criminal P. C., he had exhausted his revisional power, and could not make the order now complained of under S. 437, Criminal P. C., the contention being that that order is, practically speaking, a review of his previous order, and therefore not sustainable in law. In my opinion there

(1) A. I. R. 1928 Cal. 645=55 Cal. 794.

is no substance in this contention. The facts are shortly these:

The two petitioners and a woman named Tarubala were sent up for inquiry before Mr. A. Hossain, Deputy Magistrate of Burdwan under Ss. 307 and 326, I. P. C. The petitioners were discharged under S. 209, Criminal P. C., the Magistrate being of opinion that the evidence against them was so meagre and wretched that no jury could possibly convict upon it. Before the commencement of the trial an application was made before the Sessions Judge by the father of the woman Tarubala praying that the order of discharge should be set aside and that the present petitioners should be ordered to be committed for trial also. That application was summarily rejected on 10th July 1925 apparently upon a perusal of the commitment order. At a later stage with all the evidence before him the learned Sessions Judge came to the conclusion that the present petitioners had been improperly discharged and recorded the order which forms the subject matter of this rule.

The question is whether he had jurisdiction to make the order. In my judgment the contention that he had no such jurisdiction, because he had made the previous order rejecting a similar application, is without substance. Jurisdiction to make an order of this description, is a continuing jurisdiction, and is not barred merely because an application may have been previously refused upon different materials. An order of this nature is not a final order but is open to reconsideration upon proper materials. The case is analogous to the case of an order of dismissal or discharge. Such orders do not take away the jurisdiction of the Magistrate. A Court is competent to take cognizance of a complaint which it has already dismissed under S. 203, Criminal P. C., without any order for further inquiry by a superior tribunal: *Emperor v. Chinna* (1) following *Dwarkanath v. Benimadhab* (2). The position is the same as regards an order of discharge, though there may be some doubt where such an order has been passed upon a consideration of the full materials. S. 369, Criminal P. C., which was apparently relied upon by the petitioners before the Sessions Judge certainly has

no application, since an order of this nature is not a judgment. It is also in my opinion, a material fact in the present case that the subsequent order directing commitment was made upon fresh materials when the entire evidence was before the Judge, whereas his first order was a summary one based merely on a perusal of the commitment order, which was all that was before him at that stage. If the Judge with these fresh materials before him was of opinion that there had been an improper discharge, it seems to me that it was his duty to make the order, and that if he failed to do so, a miscarriage of justice might result.

It was next argued that, whatever view may be taken as to the legality of the order, the learned Sessions Judge ought not to have made the order, since the case now made against the petitioners is not the case which was made out at the trial, and because there is not the remotest chance of a conviction being had. As to this the most material fact seems to be that the learned Judge with all the evidence before him was of opinion that there was a sufficient case to go to a jury. There is moreover another circumstance of importance, and it is this that at the trial, which has already taken place, the jury unanimously found the woman Tarubala guilty under Ss. 326 and 109, I. P. C. This in itself gives rise to the inference that the jury believed the story that the woman merely abetted the crime, and that the injuries were inflicted by some other person or persons, presumably the present petitioners. In short it furnishes a good reason for holding that the Judge was right in ordering the commitment of the petitioners. There was further the evidence of two witnesses who deposed to having seen the petitioners running away about the time of the occurrence with weapons in their hands. There may be reasons why that evidence should not be accepted. But it is evidence which ought to go before a jury.

For the reasons stated I am of opinion that the order was in accordance with law, and that it was in the circumstances a right and proper order. I would therefore discharge the Rule.

Suhrawardy, J.—I agree. The real controversy in this case turns upon the meaning of the words "on examining the

(1) [1903] 26 Mad. 126=16 M.L.J. 79 (F.B.).

(2) [1901] 28 Cal. 652=5 C. W. N. 457 (F.B.).

record of any case under S. 435 or otherwise." It is argued that the learned Sessions Judge having refused to interfere with the order of commitment on an application made by the father of the woman is precluded from considering the matter under S. 437, Criminal P. C. I do not think that this contention should prevail upon the facts of this case. The first application was made by the father of the woman invoking the Court's jurisdiction under S. 435 and inviting it to call the record of the case and to pass orders thereon. This the Court refused to do. This was not in my opinion an order under S. 435 which says that the Sessions Judge may call for and examine the record of any proceeding before any inferior criminal Court, etc., etc. It cannot therefore be said that on the previous occasion the Court exercised any power given to it under S. 437 which says that when on examining the record called up under S. 435 the Sessions Judge considers that such case is triable exclusively by the Court of Sessions, etc., etc. Then again with regard to meaning of the words "or otherwise," I am inclined to give them a wider meaning than confining them to the provisions of S. 435. In *Nabin Krishna Mookerji v. Rasik Lal Laha* (3) the words 'or otherwise' were considered and interpreted. The learned Judges held they must mean not "in another way whatsoever" but in any other way provided by the Code. In the present case the Sessions Judge on reading the judgment of the enquiring Magistrate refused to call up the record. Then subsequently in the course of the trial against the other accused he thought that it was a proper case for him to interfere under S. 437, Criminal P. C. This is exactly the procedure which was considered to be within the meaning of the words 'or otherwise' in *Nabin Krishna Mookerji's* case (3) where it was held that the Court may exercise the power under this section if it acts in an appellate Court under S. 423. If the Sessions Judge had called up the record and on perusing the same had refused to interfere, there might have been room for controversy that he had no power to revive or vary his order under S. 369.

The next ground upon which this rule was obtained is that the petitions were

(3) [1964] 10 Cal 1047.

deprived of the right of having their cases examined again before commitment. There does not seem to be any substance in this contention as the petitioners were tried by the Magistrate who thought that it was not a case for commitment, but the learned Sessions Judge is of a different opinion. S. 437 does not provide that there should be a fresh enquiry before commitment is ordered by the superior Court, under that section. I agree that the rule should be discharged.

V.B./R.K.

Rule discharged.

1930 Cr. Cases 15

(Calcutta)

PEARSON AND MALLIK, JJ.

Satya Charan De and another—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1322 of 1928, Decided on 26th April 1929, from order of Sub-Deputy Magistrate, Noakhali, D/- 17th August 1928.

(a) Criminal P. C., S. 145—Order under S. 145 is not confined to actual parties but may extend to others.

The binding character of an order passed under S. 145 is not under all circumstances to be confined to persons who were actually made parties to the proceedings but may under certain circumstances extend to persons other than the parties themselves: 11 Bom. L.R. 377, *Rel. on.* [P 16 C 2]

(b) Criminal P. C., S. 145—Person aware of proceedings under S. 145 and colluding with one party to deprive other of fruits of success—Person held bound by order under S. 145,—Penal Code, S. 188.

Where a person was not only aware of proceedings under S. 145 but has acted in collusion with one party in order to deprive the other party of the fruits of their success in S. 145 case.

Held: that the order under S. 145 was binding on such person and any resistance to execution of the order will justify conviction under S. 188. [P 16 C 2]

Suresh Chunder Taluqdar and Raj Coomar Chakravarty—for Petitioners.

Debendra Narain Bhattacharjee for Khondkar—for the Crown.

Mallik, J.—The facts which have given rise to the present rule are briefly these: There was a proceeding under S. 145, Criminal P. C., between one Mon Mohun Chakravarty and others, first party, and Naba Chandra Chakravarty and others, second party. This proceeding under S. 145, Criminal P. C. was on 16th January 1928, decided in favour of the first party and the first party were declared entitled to maintain possession

of the property in dispute and it was also ordered that there must not be any interference with their possession. When the Daroga went to the spot on 1st April 1928, he found the present petitioners in occupation of the property and, when he asked them to vacate it, the petitioners declined to do so. On these facts, the two petitioners were put on their trial under S. 188, I. P. C., and both of them were ultimately convicted and sentenced under that section. Against this order of conviction and sentence, the petitioners went up to the Sessions Judge but without any success. Thereafter, they came up to this Court and obtained the present rule on the District Magistrate to show cause why their conviction and sentence should not be set aside. The rule was issued on two grounds: (1) that the trial Court had acted illegally in rejecting the petition of the accused persons praying for time for issue of process upon their witnesses and (2) that the conviction and sentence of the petitioners under S. 188, I. P. C., was bad in law, inasmuch as neither of them had been a party to the proceedings under S. 145, Criminal P. C.

As regards the first ground, I do not think that there is much substance in it. It appears that, when the case for the prosecution was closed, the petitioners applied to the trying Magistrate for an adjournment of the case for 15 days in order to call defence witnesses. The learned Magistrate without adjourning the case for 15 days granted only a day's time and, when the case was taken upon the next day, namely, the 14th August 1928, seven witnesses for the accused were produced and all of them were examined. There is nothing to show that the petitioners wanted to examine any witnesses other than the seven who were produced in Court on 14th August and were, as a matter of fact, examined by the Magistrate. That being so, it cannot be contended that the petitioners were in any way prejudiced by the Magistrate's refusal to adjourn the case for 15 days.

The second ground on which this rule was issued was that the conviction of the petitioners was wrong in law, inasmuch as the petitioners had not been any party to the proceedings under S. 145, Criminal P. C., and it was contended that, as they were no parties to the pro-

ceedings under S. 145, Criminal P. C., the order passed by the Magistrate under that section was not binding on them. The question that arises for consideration in connexion with this point is whether the binding character of an order under S. 145, Criminal P. C. is under all circumstances to be confined to the persons who were actually parties to the proceeding. I am inclined to think that this question should be answered in the negative. Sub-S. (3), S. 145 lays down that at least one copy of the order passed under sub-S. (1) must be published by affixing it in some conspicuous place at or near the subject of dispute. This, to my mind, is an indication that the binding character of an order passed under S. 145 is not, under all circumstances, to be confined to the persons who were actually made parties to the proceeding but may, under certain circumstances, extend to persons other than the parties themselves. This view has been adopted by the Bombay High Court *In re, Nathubhai Brijlal* (1) where it has been held that an order under S. 145, Criminal P. C. is binding not only on the actual parties to the proceedings but also on persons who may have notice of the proceedings.

In the present case, the two petitioners were not only aware of the proceedings under S. 145 but they have been found to have acted in collusion with the second party in order to deprive the first party of the fruits of their success in the S. 145 case. Having regard, therefore, to the provisions of S. 145 (3), Criminal P. C., and the findings of fact arrived at by the Courts below, I am of opinion that the order under S. 145, Criminal P. C. was binding on the present petitioners as well. That being so, their conviction under S. 188, I. P. C. cannot be successfully challenged on the ground that they were not bound thereby.

The result, therefore, is that the Rule is discharged.

Pearson, J.—I agree.

V.B./R.K.

Rule discharged.

(1) [1903] 11 Bom. L. R. 377=2 L. C. 513=11 Cr. L. J. 64.

1930 Cr. Cases 17 (1)

(Madras)

CURGENVEN, J.

Subba Naicker and others—Petitioners.*Emperor*—Opposite Party.

Criminal Revn. Cases Nos. 214 and 513 of 1929 and Criminal Revn. Petns. Nos. 186 and 465 of 1929, Decided on 30th July 1929, against order of Sess. Judge, Tinnevely, in Cr. R. C. 44 of 1928.

Criminal P. C., S. 437—Accused charged under Penal Code Ss. 457 and 380—Trying Magistrate discharging them under Criminal P. C., S. 209—Sessions Judge cannot pass order under S. 437 but can order inquiry under S. 436.

Section 437 relates only to cases triable exclusively by the Court of Session. Where, therefore, the accused, charged under Penal Code, Ss. 457 and 380, have been discharged by the trying Magistrate under Criminal P. C., S. 209, the Sessions Judge, acting under S. 437, cannot pass an order against the accused directing that the order of discharge be set aside and that the trying Magistrate do commit the accused to take their trial at the Sessions. The correct procedure is to order further inquiry under Criminal P. C., S. 436: 15 M. L. J. 373, *Rel. on.* [P 17 C 1, 2]

M. C. Sridharan—for Accused.

K. Venkatakrishnavachariar—for the Crown.

Order.—The petitioners in this case were discharged under S. 209, Criminal P. C., by the Sub-Magistrate of Koilpatti, the complaint against them being one of house breaking by night and theft in a building under Ss. 457 and 380, I. P. C. The learned Sessions Judge of Tinnevely, taking the matter up suo motu, issued notice to the accused and passed an order on 14th January 1929, against which this petition is presented, directing that the order of discharge be set aside and that the Sub-Magistrate do commit the accused to take their trial at the Sessions. No section of the Criminal Procedure Code is quoted as authority for this order but I must take it that it purported to be passed under S. 437, Criminal P. C., because that is the only section under which a revising Court has power to order commitment. If that be so, the learned Sessions Judge appears to have overlooked the circumstance that the section relates only to cases triable exclusively by the Court of Sessions, and the offences of house breaking by night and theft in a building do not fall within that category. The same error was dealt with in a case *Tham-*

1930 Cr. C. 3 & 4

manna v. Emperor (1), referred for orders. The correct procedure was to order further inquiry under S. 436.

It has been pressed upon me that the Sub-Magistrate had valid grounds for his order of discharge, and that further proceedings should not be taken against the accused. After reading and considering the judgments, I think the best course is that I should make an order setting aside the order of the Sessions Judge directing commitment and restoring the case to his file for disposal according to law. Since there has been a change of officers, it will be open to the present Sessions Judge freshly to consider whether further enquiry into the complaint is justified. I order accordingly.

P.R.S./V.S. *Order accordingly.*

(1) [1905] 15 M. L. J. 373.

1930 Cr. Cases 17 (2)

(Madras)

CURGENVEN, J.

Kandasami Chetti and others—Petitioners—Accused.

v.

Emperor—Opposite Party.

Criminal Revn. No. 595 of 1929, and Criminal Revn. Petn. No. 542 of 1929, Decided on 9th August 1929, against judgment of Joint Magistrate, Dindigul, in Criminal Appeal No. 11 of 1929.

Madras Towns Nuisance Act (3 of 1889), S. 7—“Common gaming house” explained.

“Common gaming house” means a place of public resort where a number of persons are invited to congregate for the purpose of gaming: A. I. R. 1924 Mad. 729, *Rel. on.*; 15 Hals. 584, *Foll.* [P 17 C 2]

T. V. Ramanatha Ayyar and T. S. Venkatarama Ayyar—for Petitioners.

Order.—Petitioner 1 has been convicted under Ss. 6 and 7, Towns Nuisance Act, Madras Act 3 of 1889, of keeping a common gaming house and the remaining petitioners under S. 7 of gaming therein. The expression “common gaming house” has not been defined in the Act; and although a definition of the term occurs in S. 3, City Police Act, I think that following two decisions of this Court one unreported and the other reported as *Chinniah, In re* (1) the meaning to be attached is substantially that contained in 15 Hals. 584, namely a place of public resort where a number of persons are invited to congregate for the purpose of gaming. As regards the evi-

(1) A. I. R. 1924 Mad. 729=47 Mad. 426.

dence of the prosecution witness P. W. 3, upon whose information the Sub-Inspector took action, states with reference to the plate in question that he had seen the accused and others also always gaming with cards, betting money and gambling, that accused 1 was collecting Rangu Kusu (which is some kind of levy) for all such plays, that gaming went on there day and night and that whenever he passed by when going to work he saw the accused 1 and others gambling. Evidence to the same effect was given by P. W. 6, and the Sub-Inspector himself (P. W. 1) stated that he had information that accused 1 was keeping a common gaming house and that gambling was going on there. He made a raid with the result that all the accused were found inside the compound gambling with cards and money. As soon as they saw him they attempted to run away. I do not think that any other inference is possible on this evidence than that which has been drawn by the lower Courts, namely that accused 1 was keeping the gaming house and the remaining accused were actually caught when gambling there. In these circumstances I can find no reason to interfere with the conviction. I dismiss the petition.

P.R.S./P.R.

*Petition dismissed.***1930 Cr. Cases 18**

(Lahore)

FFORDE AND TEK CHAND, JJ.

Gehna Sardara—Convict—Appellant.
v.

Emperor—Opposite Party.

Criminal Appeal No. 661 of 1929.
Decided on 21st October 1929, against order of Sess. Judge, Lyallpur, D/- 25th June 1929.

Penal Code, S. 302—Mere youth of murderer is insufficient for not imposing capital sentence—Want of apparent motive does not justify inference of provoking cause.

A particularly cruel and cowardly murder was committed by a lad of about 19 or 20 without any apparent motive and the capital sentence was sought to be reduced.

Held: that the mere youth of the murderer was insufficient for not imposing the capital punishment and that the absence of an apparent motive could not be construed as indicating the existence of a provoking cause, which would amount to a mitigating circumstance. [P 19 C 2]

M. Sleem—for Appellant.*I. M. Mackay*—for the Crown.

Fforde, J.—The appellant has been convicted of having murdered his wife by cutting her throat with a knife and has been sentenced to death by the learned trial Judge.

The prosecution case has been presented in its essentials by three witnesses, namely, Sarishta (P. W. 2), Burhan (P. W. 3) and Rajada (P. W. 4). Sarishta has stated that on the morning of the occurrence, namely, the morning of 16th March 1929, he was coming out of the mosque after saying his morning prayers when he heard an outcry coming from the ihata of one Khan which is two or three ihatas distant from the mosque. As he was going in the direction of the outcry he saw the appellant running out of Khan's ihata followed by Rajada, P. W. 4. Rajada was shouting that the appellant had murdered his wife and was escaping. The appellant at that time was holding a knife in his hand which was covered with blood. The witness Sarishta seized hold of him and Burhan and Rajada immediately came on the scene and assisted the witness in securing the appellant, Rajada snatching the knife from his hand. When asked why he had committed the murder the appellant replied that his wife was unchaste and that is why he had killed her. The witness Sarishta left the appellant in the custody of Rajada and went into the house of the deceased and found her lying on a charpoy with her throat cut and breathing her last. He then proceeded to the police station and made his report of the affair.

Burhan, the next important witness, is the brother of Khan in whose ihata the appellant was living at the time of this crime. Burhan's ihata adjoins Khan's, only a low partition wall separating it. The witness was sleeping in his house on the morning of the occurrence and awoke on hearing an outcry from Rajada. He ran in the direction of the cry and met the accused running towards him followed by Rajada. This witness then corroborated the evidence of Sarishta as to the securing of the appellant and wresting of the knife from his hands, with only this discrepancy, that this witness says that the knife was wrested from the appellant by Sarishta while Sarishta said that it was Rajada who took the knife away.

The third important witness is Rajada who actually witnessed the murder. He has stated that on the morning in question he left his house for the purpose of going to his well and had to pass the front of Khan's house, while doing so he heard a scream coming from within. He immediately turned back into the ihata and saw the appellant kneeling on his wife's chest and cutting her throat with a knife. Directly the appellant noticed the witness he got up and took to his heels. The witness raised an outcry and pursued him. The witness was joined in the pursuit by Burhan and he noticed Sarishta coming from the opposite direction to their assistance. When they came up to the appellant they seized hold of him and this witness, Rajada, wrested a blood-stained knife from his hands. On the witness's asking the appellant why he had committed the crime the reply was that he had killed his wife because she was unchaste.

Upon this evidence given by witnesses in Court, against whom no possible motive for making a false case can be suggested, it is perfectly clear that the appellant did murder his wife by cutting her throat. When asked before the Committing Magistrate about the crime the appellant refused to say anything beyond a denial to every question asked him. He put in a written statement in which he declares that he did not commit this crime and that he was on the night in question sleeping by his cattle in order to keep a watch over them and it was only on the following morning that he learnt that his wife had been murdered. Four witnesses have been called for the defence whose testimony is mainly directed to showing that the evidence of Sarishta cannot be relied upon. This defence evidence is, in my judgment, of no value whatsoever and has been quite rightly rejected by the learned Sessions Judge with whose reasons for so rejecting it I am in complete accord.

Mr. Sleem has strongly urged that in the event of his client being found guilty of murder the lesser penalty which the law permits should be imposed and not the capital sentence. I can see no reason for acceding to this request. Although no adequate motive has been proved for this crime it is a murder of a particularly cruel and cowardly nature.

The mere youth of the appellant who is either 18 or 19 years of age is not a sufficient ground for not imposing the capital sentence. He has not put forward any extenuating circumstance himself, and we are asked to assume that because a brutal murder has been committed without any apparent motive we ought to assume that there has been some provoking cause which would amount to a mitigating circumstance. I am not able to accept this contention of counsel for the appellant, and in my judgment, the only appropriate sentence for a crime of this kind is the capital sentence. I would accordingly dismiss this appeal and confirm the sentence of death.

Tek Chand, J.—I concur.

P.R. R.K.

Appeal dismissed.

1930 Cr. Cases 19

(Lahore)

DALIP SINGH, J.

Allah Wadhaya—Convict—Appellant.
v.

Emperor—Opposite Party.

Criminal Appeal No. 686 of 1929, Decided on 18th October 1929, against order of First Class Magistrate, Dera Ghazi Khan, D/- 21st June 1929.

Penal Code, S. 235 — **Man possessing instruments for counterfeiting coin, should not be separately punished for possessing various parts of such instrument.**

The offence of counterfeiting coin is very serious and an exemplary sentence should be given. But when a man is being convicted for being in possession of instruments or materials for counterfeiting coin, it is hardly right to convict him separately for being in possession of various parts of such instruments, or materials. [P 20 C 1]

Niaz Muhammad—for Appellant.

Muhammad Monier—for the Crown.

Judgment.—These three connected appeals can be disposed of in one judgment. In my opinion the evidence in the first case clearly establishes that Laddha alias Allah Wadhaya appellant was found in possession of a wooden clip with which he was holding a mould for the purpose of counterfeiting coin. It is not very clear whether he was mending the said mould or boring holes in it by way of preparation, but in any case his offence would come within the purview of S. 235, I. P. C., under which he has been convicted.

In the connected case I see no reason to doubt the evidence of the prosecution

witnesses which proves that the appellant Ladha produced various instruments and material for the purpose of counterfeiting from his own house. The appellant has been sentenced in both cases to seven years' rigorous imprisonment and Rs. 1,000, fine, in default one year's further rigorous imprisonment. As a matter of fact it is clear that he was in possession of certain instruments in one case which were a part of his stock-in-trade, the rest of which were discovered by him from his own house. The offence of counterfeiting coin is no doubt very serious and an exemplary sentence should be given. At the same time, I consider that when a man is being convicted for being in possession of instruments or materials for counterfeiting coin, it is hardly right to convict him separately for being in possession of various parts of such instruments or materials. I, therefore, accept the appeals to the extent of ordering that the sentence in each case shall be reduced to five years rigorous imprisonment and Rs. 500 fine, in default, six months' further rigorous imprisonment in each case. The result will be that the appellant will be sentenced to a total of ten years' rigorous imprisonment and Rs. 1,000 fine, in default one year' further rigorous imprisonment. As regards Rasul Bakhsh, the evidence against him clearly establishes the offence and the sentence is by no means too severe. I, therefore, dismiss the appeal.

P.R./R.K.

Order accordingly.

1930 Cr. Cases 20

(Lahore)

JAI LAL, J.

Haidar Shah—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 674 of 1929, Decided on 18th October 1929, against order of First Class Magistrate, Gujrat, D/- 29th May 1929.

Penal Code, S. 366—Intention can be inferred from conduct of accused and circumstances of case.

In a case under S. 366, it is the duty of the prosecution to prove that the abduction took place with the intention mentioned in the section, but then the intention can also be inferred from the conduct of the accused and the circumstances of the case. Ordinarily it is not possible for the prosecution to establish the intention except by proving the conduct. A

girl of about 14 years' was forcibly abducted by the accused.

Held : that no inference except of the intention such as is mentioned in S. 366 is possible. [P 21 C 2 ; P 22 C 1]

B. S. Puri—for Appellant.

Mulk Raj—for the Crown.

Judgment.—Haidar Shah has been convicted in two different cases ; in the first he has been convicted under S. 366, I. P. C., and sentenced to five years' rigorous imprisonment ; in the second he has been convicted under S. 304-2 and sentenced to five years' rigorous imprisonment. He has further been convicted under S. 323 and sentenced to one year's rigorous imprisonment. The sentences in this last case have been ordered to run concurrently.

The facts alleged by the prosecution are these :—

Rang Shah, a collateral of Haidar Shah, had a daughter named Mt. Hayat Bibi. Rang Shah was a sonless proprietor and naturally his collaterals were anxious that the girl should be married in the family, so that the estate may not go out to a stranger. Haidar Shah was consequently a candidate for the hand of Mt. Hayat Bibi, but owing to his antecedents Rang Shah was not willing to give the girl to him. Instead he offered her to another cousin of Haidar Shah, but this proposal was not acceptable to Haidar Shah's family, because that cousin had already been betrothed to another girl. Mt. Hayat Bibi was ; therefore married to one Mohammad Shah. It is alleged that it was the intention of Rang Shah to make Mohammad Shah his khandamad. This caused offence to his reversioners and consequently, it is alleged, that on 17th September, 1928 when Mt. Hayat Bibi was sitting in her house with her stepmother, Mt. Jannat Bibi, in the absence of Rang Shah, Haidar Shah with several others came and abducted the girl. In doing so an injury was caused to Mt. Jannat Bibi and in spite of the outcries raised by her and the girl the culprits took the latter out of the village.

This abduction was witnessed by Mt. Jannat Bibi, P. W. Sardara, and P. W. Taja. After the girl had been abducted she was placed on horseback and was being carried away when P. W. Salehon, a friend of Rang Shah, having obtained information of the incident, pursued the culprits and was able to rescue the girl.

When he was bringing her back to the village he was accompanied by Shahna deceased and P. W. Khawaja. This party was again set upon by Haidar Shah and his companions, who were all armed with lathis, and subjected to a brutal assault. Salehon received 14 injuries, Shahna received four injuries and Khawaja received nine injuries. A large number of these injuries were on the head of each of the injured persons. The girl was again forcibly carried away and was not traced for a long time. This assault on Salehon, Shahna and Khawaja was witnessed by Maulu and Shera, who have both given evidence on behalf of the prosecution.

Rang Shah having received information of the incident reported the matter at the thana and the Sub-Inspector of Police arrived in the village and testified to having seen traces of the fight at the scene of the assault on Salehon, Shahna and Khawaja in the field pointed out by them. At that place also were found the dopatta and the loin cloth of Mt. Hayat Bibi, which, it is alleged were left behind during the struggle which attended her abduction.

Haidar Shah denies his guilt and states that he was absent from the scene of the occurrence altogether, and he has produced certain witnesses in support of this defence, but they have been rightly disbelieved by the learned Magistrate.

Mt. Hayat Bibi also was produced as a witness for the defence and she alleged that she was not abducted at all. On the other hand she says that she went voluntarily with Azam Shah whom she had married. It is to be noted that during the whole of the period which elapsed between the alleged abduction and her appearance in Court this girl had been in possession of the accused and it is easy to understand that after the death of her father Rang Shah she was won over by the accused. On 4th March 1929, i. e., about five months and a half after the alleged abduction, she presented an application to the Deputy Commissioner of Mianwalli in which she stated that she had gone with him voluntarily. The date of this application is significant in showing that it took the accused more than five months to bring the girl round to their view. I have, therefore, no hesitation in holding that Mt. Hayat Bibi did not give a true version of the

affair, but that she made her statement in Court under the influence of the accused.

The prosecution version with regard to the actual facts of abduction is supported by the testimony of Mt. Jannat Bibi, Sardara, Taja (who is the brother of Khawaja, one of the injured persons) Salehon, Khawaja, Maulu and Shera. The assault on Salehon, Shahna and Khawaja has been established by the evidence of Salehon, Khawaja, Maulu and Shera. No reasonable explanation has been offered by the defence about the presence of such a large number of injuries on the persons of the three men, who were injured on the day. The incident of the assault lends a very strong corroboration to the story of the prosecution with regard to abduction.

Having regard to the evidence produced in the case, I have no hesitation in agreeing with the conclusions of the learned Magistrate that the prosecution have given a true version of the affair and that Haidar Shah has been rightly convicted both under S. 366 and Ss. 304 and 323, I. P. C.

Counsel for the appellant alluded to certain discrepancies in the statements of the prosecution witnesses. They are not, however, of a serious nature and such discrepancies are generally to be found when a number of witnesses describe an incident that they had witnessed under the circumstances already mentioned.

A number of cases were cited before me in support of the proposition that in a case under S. 366, it is the duty of the prosecution to prove that the abduction took place with the intention mentioned in that section. I feel no difficulty in assenting to this abstract proposition of law, but then the intention can also be inferred from the conduct of the accused and the circumstances of the case, and ordinarily it is not possible for the prosecution to establish the intention except by proving the conduct of the accused.

In the present case a girl who according to the witnesses for the prosecution, is alleged to be between 13 and 14 years of age, but according to her own statement is 18 years (the Magistrate had believed the prosecution version on this point) is forcibly carried away by the accused. Under the circumstances mentioned above there can be no other infer-

ence except of the intention such as mentioned in S. 366, I. P. C.

Similarly with regard to S. 304. It was contended that the prosecution witnesses do not definitely state that Haidar Shah appellant caused any particular injury to any particular injured person or to Shahna deceased, but the testimony of the witnesses is that he and a number of culprits came armed with lathis and all set upon the three injured persons. In these circumstances Haidar Shah must by virtue of S. 34, I. P. C., or of S. 149 be held guilty of the offence that was caused during the assault, and there can be no manner of doubt that Shahna, who received four injuries, three of which were on his head and which caused his death the same day, was subjected to a brutal assault and therefore the conduct of the assailants is punishable under S. 304-2, I. P. C.

I do not consider the sentences to be excessive having regard to the high-handed manner in which the whole affair was conducted by the accused. I dismiss the appeals.

P.R./R.K.

Appeals dismissed.

1930 Cr. Cases 22 (1)

(Lahore)

TEK CHAND, J.

Sardar Khan—Convict—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 85 of 1929, Decided on 18th February 1929, against order of Sess. Judge, Lahore, D/- 5th December 1928.

Penal Code, S. 182—To constitute the offence the accused should know that there was no just or lawful ground for proceeding.

To constitute the offence punishable under S. 182, I. P. C., it is necessary that the information given should be which the accused person knows or believes to be false. It is not sufficient that he had reason to believe it to be false, or that he did not believe it to be true, there must have been positive knowledge or belief that it was false: 32 P. R. 1884 Cr. and 29 P. R. 1994 Cr., *Foll.* [P 22 C 2]

Hakumat Rai—for Petitioner.

Jamna Das—for the Crown.

Judgment.—As the learned Sessions Judge had not in his judgment discussed the evidence I have gone through the whole of the record and am of opinion that the evidence produced by the prosecution falls short of establishing all the neces-

sary ingredients of an offence under S. 182, I. P. C., against the petitioner.

There is no doubt that the petitioner was inimical towards Chaudhri Mohammad Aziz and it is quite likely that he made the complaint in bad faith but as pointed out by Plowden, J., in *Hinghan Khan v. Empress* (1) to constitute the offence punishable under S. 182, I. P. C., it is necessary that the information given should be information which the accused person knows or believes to be false. It is not sufficient that he had reason to believe it to be false, or that he did not believe it to be true; there must have been positive knowledge or belief that it was false: see also the remarks of the same learned Judge in *Murad v. Empress* (2) to the following effect:

"It is not enough to find that he has acted in bad faith, that is, without due care or enquiry, or that he has acted maliciously, or that he had no sufficient reason to believe or did not believe the charge to be true. The actual falsity of the charge, recklessness in acting upon information without testing it, or scrutinising its sources; actual malice towards the persons charged they are relevant evidence more or less cogent; but the ultimate conclusion must be, in order to satisfy the definition of the offence, that the accused knew that there was no just or lawful ground for proceeding. It may be difficult to prove this knowledge, but, however difficult it may be, it must be proved and unless it is proved the informer must be acquitted."

The lower Courts have not examined this aspect of the case. In my opinion the evidence produced and the circumstances disclosed on the record do not satisfy the above test.

I, therefore, accept the petition for revision, set aside the conviction of the petitioner and the sentence passed against him and direct that he be set at liberty forthwith.

P.R./R.M.

Conviction set aside.

(1) [1884] 32 P. R. 1884 Cr.

(2) [1894] 29 P. R. 1994 Cr.

1930 Cr. Cases 22 (2)

(Lahore)

JOHNSTONE, J.

Sandhi—Convict—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 830 of 1929, Decided on 16th September 1929, against order of Magistrate, First Class, Lyallpur, D/- 18th April 1929.

Punjab Northern India Canal and Drainage Act (8 of 1873), S. 70 (12)—General accusation of breach of rules made under S. 70 is inadequate.

Where the petitioner was never told what rule he had violated and where though violation about rules of taking turns of water was alleged yet no authorized warabundi was produced:

Held: that merely a general accusation of breach of rules made under S. 70 was wholly inadequate. [P 23 C 1]

Mohammad Iqbal—for Petitioner.

Judgment.—The petition was admitted on the question what rule made under the Act was violated. No appearance has been made against the petition. It was never explained to the petitioner what rule he had infringed, and a general accusation of breach of some rule made under S. 70 (12), Act 8 of 1873, was obviously inadequate. It is alleged, indeed that the petitioner infringed some rule about taking turns of water, but no authorized warabundi has been produced, and the conviction and sentence must be set aside on these grounds. I accept the petition accordingly and set aside the conviction and sentence. The fine, if paid, will be returned.

P.R./R.K. *Petition accepted.*

1930 Cr. Cases 23

(Lahore)

TAPP, J.

Jagat Singh—Accused—Appellant.
v.

Emperor—Opposite Party.

Criminal Appeal No. 761 of 1929, Decided on 25th October 1929 from order of Sess. Judge, Hoshiarpur, D/- 16th April 1929.

(a) Criminal P.C., S. 476—To issue notice and hold preliminary enquiry is discretionary.

Under S. 476, it is entirely discretionary and not obligatory with a Court to issue a notice and hold a preliminary enquiry.

[P 23 C 2, P 24 C 1]

(b) Criminal P.C., S. 195 (1) (b)—Before sanctioning prosecution of witness, Court should consider reasonable prospect of success and expediency of prosecution in interest of public justice.

A Court should, before sanctioning prosecution under S. 195 (1) (b), consider two essential factors namely, a reasonable prospect of success in the prosecution of a witness under Penal Code, S. 193 and the expediency of such prosecution in the interest of public justice.

[P 24 C 2]

Ram Lal Anand—for Appellant.

B. O'Conner—for the Crown.

Judgment.—Mt. Bhago, the wife of Umar Din, a Jat of Jamalpur, lodged a complaint under S. 376, I. P. C., against Harnam Singh, zaildar of Badala Mahi in the Hoshiarpur district. The Magistrate enquiring into the case for certain reasons committed the accused for trial. The learned Sessions Judge in agreement with the four assessors acquitted the accused Harnam Singh holding that the complaint of Mt. Bhago "was utterly false."

Harnam Singh thereupon moved the Sessions Judge for the prosecution of Mt. Bhago and certain witnesses including Jagat Singh the appellant before me under Ss. 211 and 193, I. P. C. The learned Sessions Judge without issuing any notice to the appellant directed his prosecution under S. 193, I. P. C.

Jagat Singh appellant was not a witness for the prosecution, but it appears that the defence alleged that he in concert with some other enemies of Harnam Singh, the accused, had instigated Mt. Bhago to bring the complaint and that Jagat Singh had identified himself with the matter by accompanying Mt. Bhago when she went to Dr. Sukh Dial, Assistant Surgeon, Hoshiarpur, for medical examination, paid the fee for this purpose and also a fee of Rs. 32 for the examination of stained garment by the Chemical Examiner.

Jagat Singh was, therefore, called as a Court witness by the Committing Magistrate and when examined on the above matters he denied having taken Mt. Bhago to Dr. Sukh Dial or having paid any fees. Jagat Singh was not examined as a witness at the trial being given up by the Public Prosecutor as his evidence was not considered necessary.

Mr. Ram Lal's contention that the learned Sessions Judge had no power to order the prosecution of Jagat Singh because he had not given evidence at the trial has no force in view of the clear provisions of Cl. (b), S. 195 (1), Criminal P. C., which permit such action to be taken by the Court before which the offence was committed or the Court to which such Court is subordinate.

His second contention that no notice was issued to Jagat Singh and no preliminary inquiry was held is also devoid of any force as S. 476, Criminal P. C., does not render this obligatory. It was

entirely discretionary with the learned Sessions Judge to issue a notice and hold a preliminary enquiry but I am inclined to agree with the learned counsel that the present case was one in which such discretion should have been exercised.

It will be seen from the order of the learned Sessions Judge that he relies on the evidence of Dr. Sukh Dial to prove the falsity of Jagat Singh's testimony that he did not accompany Mt. Bhago and pay the necessary fees. Jagat Singh's statement in this respect is clear and definite while that of the Assistant Surgeon is halting and vague. He only thinks and as far as he can recollect that Jagat Singh accompanied Mt. Bhago. He cannot say whether Jagat Singh paid the fee to him. One of his three compounders gave him the fee and only thinks this was Dev Raj.

Dr. Sukh Dial was also examined as a witness for the defence (D. W. 1) when he deposed that he had already stated that Mt. Bhago was accompanying Jagat Singh, but a reference to his evidence as a prosecution witness does not clearly show this.

Now it will be seen that the matter resolves itself into a question of one man's word against another. Mr. O'Connor states that there is other evidence to show the falsity of Jagat Singh's statement, but such evidence was not before the Court and hence the holding of a preliminary enquiry in which such evidence could have been considered would have been desirable and appropriate. The learned Sessions Judge with such evidence before him would have been in a better position to find that there was reason to believe that Jagat Singh had given false evidence.

In my judgment there are not sufficient grounds for such a belief and in the circumstances the prosecution of Jagat Singh is inadmissible. Another principle which finds a prominent place in the English Law relating to prosecution for perjury and calling for observation here is the material nature of the statement said to be false, that is, it must be of such a nature that it may directly or indirectly affect the decision. It will be obvious I think that the evidence of Jagat Singh could not have influenced the decision of the learned Sessions Judge one iota in view of the

fact that his evidence was considered unnecessary by the prosecution.

To sum up, two essential factors have, I consider, been lost sight of by the learned Sessions Judges:

(1) a reasonable prospect of success in the prosecution of Jagat Singh and (2) the expediency of such prosecution in the interests of public justice.

Neither of these is present and I, therefore, accept the appeal and setting aside the order of the Sessions Judge direct that any complaint, if filed, should be withdrawn.

V.S./R.K.

Order set aside.

1930 Cr. Cases 24

(Lahore)

SHADI LAL, C. J.

Karim Bakhsh—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1450 of 1928, Decided on 12th October 1928, reported by Dist. Magistrate, Dera Ghazi Khan, on 25th July 1928.

Criminal P. C., S. 562—Order under—Fine cannot be imposed.

The order of the Magistrate in awarding a sentence of fine when an order under S. 562, Criminal P. C., had been passed is illegal.

[P 25 C 1.]

Report.—Karim Bakhsh, accused, aged 17 years, was servant of the complainant Mt. Rasti for 10 or 11 years and thus knew well where she used to keep her ornaments. One month before the occurrence he left her service. On 2nd May 1928, when she was away from her house, he opened the lock and stole certain ornaments. When the woman returned home she found that the ornaments in her house had been stolen. She informed one Asa Ram, goldsmith, of Dajul in the presence of Dula Ram who is also a goldsmith of the same place. Four or five days after the occurrence the accused took the stolen ornaments to the said Dula Ram who suspected them to be stolen ones. He sent for the complainant and the latter identified the ornaments. Dula Ram reported the matter to Mukhi Narain Das, Zaildar, who sent for the accused. The latter admitted his guilt and produced one of the ornaments which he had still with him. The Zaildar took the parties together with the stolen property to the officer in charge of Police Station, Dajul. First information report No. 33/1-5 was re-

recorded and the accused was after necessary investigation challaned under S. 454, I. P. C., to the Court of Lala Parma Nand, Tahsildar and Magistrate, Second Class, Jampur. The witnesses produced on behalf of the prosecution corroborated the prosecution story and the accused too confessed before the Court and begged for pardon. He did not recall any of the prosecution witnesses for cross-examination and produced no defence.

The accused, on conviction by Lala Parma Nand, Tahsildar, Jampur, exercising the powers of a Magistrate of the second Class in the Dera Ghazi Khan District was sentenced by order, dated 29th May 1928 under S. 454, I. P. C. to pay a fine of Rs. 25 and also directed to furnish security under S. 562, Criminal P. C. The records have been examined under S. 435, Criminal P. C. and it is clear that the order of the Magistrate imposing fine on the accused when an order has been passed under S. 562, Criminal P. C., is illegal.

The proceedings are forwarded for revision on the following grounds :

The order of the Magistrate in awarding a sentence by fine when an order under S. 562, Criminal P. C. had been passed is illegal. It is liable to be set aside. It is recommended that the order imposing fine be reversed.

Order.—The accused Karim Bakhsh has been convicted under S. 454, I. P. C. but on account of his youth he has been released on probation under S. 562, Criminal P. C. The trial Magistrate has, at the same time, imposed upon the convict a fine of Rs. 25; but in view of the wording of S. 562, Criminal P. C., this sentence of fine is illegal. Accordingly I set aside the order inflicting the fine. The fine if realised, shall be refunded to the accused.

R.K.

Revision accepted.

1930 Cr. Cases 25

(Lahore)

JOHNSTONE, J.

Mangal Sen—Convict—Appellant

v. .

Emperor—Opposite Party.

Criminal Appeal No. 112 of 1929, Decided on 6th May 1929, against order of Magistrate, First Class, Lahore, D/- 1st December 1928.

(a) Criminal P., S. 403 (2)—Directors of a company convicted under S. 91-B, Companies Act—Subsequent prosecution under S. 409, Penal Code—Alternate charge in proceedings under S. 91-B was not possible and S. 403 (2), Criminal P. C., held applicable.

Two persons, who were the directors of a Bank, were prosecuted, tried for and convicted under S. 91-B, Companies Act. They were further prosecuted for criminal breach of trust. It was contended that under S. 403 a person could not be charged on the same facts for any other offence for which a different charge from the one made against him might have been made under S. 286, or for which he might have been convicted under S. 287.

Held : that the offence under S. 91-B, Companies Act had nothing to do with the alleged offence of criminal breach of trust of the Bank's funds. No alternative charge was possible in the proceedings under S. 91-B, Companies Act and that the case was governed by S. 403 (2), Criminal P. C. : 5 S. L. R. 16, *Foll* and 23 Cal. 174, *Appr.*; A. I. R. 1926 *Lah.* 639; 45 Cal. 727; 29 P. L. R. 52; A. I. R. 1927 *Bom.* 629 and A. I. R. 1928 *Lah.* 332, *Ref.*

[P 26 C 2; P 27 C 1]

(b) Penal Code, S. 409—Entries in cash book though mere paper entries—Conversion effected as no cash passed—Entries constitute offence of criminal breach of trust.

A loan of Rs. three lacs was made to one of the accused who was a director of a Bank. The professed object of the accused was to bolster up the affairs of the closely allied concern known as the Hindustan Assurance and Mutual Benefit Society, which would otherwise have been obliged, under Cl. 179 of its Articles of Association to go into liquidation. What he did in effect was that with one of the three lacs of rupees he converted a debt owed by the Society into a credit balance; with another lac he created a fixed deposit for the Society with the Bank with the third lac he converted his own debt into a credit balance and also created a fixed deposit of Rs. 30,000 in his wife's favour. He sent intimation to the Society regarding their credits. At the time when he made these changes in the Bank's financial position, he had no authority except his own and his subsequent transactions do not show that he had an honest intention.

Held : that although the changes made were mere paper entries, the conversions were no less conversions because no cash passed and that an offence under S. 409 had been committed : A. I. R. 1926 *Lah.* 385, *Ref.*

[P 26 C 1; P 27 C 2]

Bhagat Ram Puri and *Mul Chand*—for Appellant.

Raj Krishna and *Hem Raj*—for the Crown.

Judgment.—This judgment disposes of Criminal Appeals Nos. 1478 of 1921 and Nos. 112 and 114 of 1929.

The facts necessary for a comprehension of these appeals are set out in my judgment in *Mangal Sen v. Emperor* (1).

(1) A. I. R. 1929 *Lah.* 840 (2)=1929 Cr. C. 568 (2).

Diwan Mangal Sen had been sentenced, under S. 409, I. P. C., to seven years' rigorous imprisonment and a fine of Rs. 5,000 while Dr. Jagan Nath Luthera and Goutam Dev have been sentenced each to one day's imprisonment and fines of Rs. 2,000 under S. 409 I. P. C., read with S. 109, I. P. C.

The three appellants were, amongst others directors of the Punjab Industrial Bank, which is now in liquidation. One 16th September 1922, as the books of the Bank show, a loan of Rs. three lakhs was made to Mangal Sen. His professed object was to bolster up the affairs of the closely allied concern known as the Hindustan Assurance and Mutual Benefit Society, which would otherwise have been obliged, under Cl. 179 of its Articles of Association, to go into liquidation. For the purposes of the Society according to the scheme alleged to have been agreed on, only Rs. two lacs were needed, in order that five out of the six directors of that Society might each take up shares worth Rs. 40,000. The loan was adjusted thus. Rs. one lac were placed in fixed deposit to the credit of the Society; Rs. one lac were credited to the Society's floating account, thus altering its debit balance to a credit balance; of the remaining Rs. one lakh (a) Rs. 70,000 were credited to Mangal Sen's floating account, thus converting his debit balance to a credit balance and (b) Rs. 30,000 were placed in fixed deposit in the name of Srimati Lajwanti, wife of Mangal Sen. Subsequently a loan of Rs. 50,000 was taken on the security of this fixed deposit of Rs. 30,000.

On 17th September 1922, a resolution was passed (No. 335) sanctioning to Mangal Sen a loan of Rs. three lacs under certain conditions. It is curious that the resolution should have followed and not preceded, the making of the entries in the books. It appears that the original voucher showed the loan to "Diwan Mangal Sen and others," while the later voucher, prepared on 21st September and dated both 16th and 21st September, contained the words "Diwan Mangal Sen and other directors of the Hindustan and Mutual Benefit Society, Limited. Similar alterations were made in the Day Book and Floating Ledger, and Diwan Mangal Sen informed him- self, as managing director of the Society

that Rs. 2 lacs had been credited to the Society. These facts are all proved.

The learned counsel for Mangal Sen opened his arguments by attacking the charge on two grounds. He contended in the first place, that the word "unlawfully" was wrongly used because the directors had authority to sanction a loan. Secondly he urged that when the resolution was passed, the loan had already been entered in the books of the Bank. It is quite clear, however, that the charge is composed of two parts, which explain the contents of the alleged offence and no fault can reasonably be found with it. The suggestion that the Magistrate was bound to insert the word "dishonestly" was not seriously pressed. Counsel's main argument was a legal one, namely, that there could not have been criminal breach of trust of property in this case, because, at the time when the loan was entered up in the books and afterwards sanctioned, the cash balance in the Bank varied between Rs. 1,700 and Rs. 992. I shall deal with this point later. Meanwhile it will be convenient here to dispose of another legal argument raised by the learned counsel for Dr. Jagan Nath. It appears that Dr. Jagan Nath and Goutam Dev were prosecuted under S. 91-B, Companies Act, for voting on an arrangement in which they, as directors, were directly or indirectly concerned. Reliance was placed on the principle of *autrefois convict* as laid down in S. 403, Criminal P. C., the words stressed being :

"nor on the same facts for any other offence for which a different charge from the one made against him might have been convicted under S. 237."

Counsel also cited authorities, e. g., *Fateh Mahomed v. Emperor* (2), *Manhari Chowdhurani v. Emperor* (3), *Waryam Singh v. Emperor* (4) and *Kallasami v. Emperor* (5), *Sobhumal v. Emperor* (6). I have examined these rulings and find nothing in them to help the appellants. A more apposite authority is to be found in *Queen Empress v. Croft* (7). The principle to be followed in

(2) A. I. R. 1920 Lah. 639=8 Lah. 52.

(3) [1918] 45 Cal. 727=27 C. L. J. 434=43 I. C. 614=22 C. W. N. 199.

(4) [1927] 29 P. L. R. 52.

(5) A. I. R. 1927 Bom. 629.

(6) A. I. R. 1928 Lah. 332.

(7) [1896] 28 Cal. 174.

such cases is laid down in *Ganesh Krishna v. Emperor* (8), and as a matter of fact the wording in Ss. 236 and 237 of the Code is sufficiently clear. In the former section there must be a doubt as to what offence has been committed, and the illustration to that section is explanatory. On the other hand S. 235 is an enabling section whereby sanction is given to the charging of, and trying, an accused person at one trial for more offences than one. In the case under examination, the two appellants concerned were merely tried for, and convicted of, the offence of voting in certain circumstances. That matter had nothing to do with the alleged criminal breach of trust of the Bank's funds. No alternative charge was possible in the proceedings under S. 91-B, Companies Act. The case is, in fact, governed by sub-S. (2), S. 403, Criminal P. C., and the preliminary contention raised by the learned counsel cannot succeed.

The appeal of Dr. Jagan Nath was argued at length by Mr. Ram Chand Manchanda and his arguments were adopted by Gautam Dev, the other appellant, who addressed the Court in person. It was pointed out in the first place that Mangal Sen, early in the life of the Bank, started on his scheme of acquiring and controlling position. As a first step the original managing agents were ignominiously removed and Mangal Sen was appointed the sole managing director. Thereafter he did practically everything, wrote all the minutes, made countless entries in the different books of the Bank, had the meetings of the Board held at his own house, refused to let even his co-directors have access to the books, and so forth. There is documentary evidence on all these matters, and although counsel's eulogy of Mangal Sen as a veritable Napoleon of finance is throughout on a note of exaggeration, there can be no doubt that Mangal Sen was to all intents and purposes the Bank and the Bank was Mangal Sen. His appointments as managing director of both concerns placed him in a commanding position.

Stress has been laid on these facts, because it is sought to show that Dr. Jagan Nath and Gautam Dev were pawns in the game. These two

and the other directors left everything to Mangal Sen. After considering the evidence regarding the meeting of the Board on 17th December, I am of opinion that there is reasonable doubt as to whether Dr. Jagan Nath was present at all at that meeting. It is certain that there was no quorum at the meeting and the resolution was ultra vires. The expunged names of Gopal Lal and Bheri Ram, when considered in the light of the evidence on the record, establish that proposition beyond doubt.

It is unnecessary for my purpose to set forth all the transactions which flowed from the original loan of Rs. three lacs or to explain the significance of the different entries in the account books. It seems to me that the short question in the case the facts being proved is whether or not criminal breach of trust was committed. Now, what Mangal Sen did was, in effect, as follows: With one of the three lacs of rupees he converted a debt owed by the Society into a credit balance; with another lac he credited a fixed deposit for the Society with the Bank; with the third lac he converted his own debt into a credit balance and also created a fixed deposit of Rs. 30,000 in his wife's favour. He sent intimation to the Society regarding their credits. At the time when he made these changes in the Bank's financial position, he had no authority except his own, and his subsequent transactions do not show that he had an honest intention. It is, in my opinion, an untenable argument that the changes were mere "paper" changes. The conversions were no less conversions because no cash passed. In this connexion the final paragraph in *Ram Chand Gurwala v. Emperor*, A. I. R. 1926 Lah. 385, at p. 392, is a clear authority, and reference was also made to Ferrero's case in Chancery Appeals, Vol. 9 for 1873-1874 at p. 355.

I am satisfied, therefore, that Mangal Sen is guilty of an offence under S. 409, I. P. C. As to the abetment of that offence by the other two appellants I am doubtful. As I have said, the offence was committed on 16th September 1922, and on that day no resolution was passed. It is, indeed, indicated by the evidence that the other two appellants had discussed the affair with Mangal Sen before 17th September, but the resolution was

(8) [1911] 5 S. L. R. 16=10 I. C. 168=12 Cr. L. J. 224.

passed on the 17th and their action in passing the resolution (if we suppose that they were both present), would not constitute an abetment of criminal breach of trust: vide *M. L. Pritchard v. Emperor* (A. I. R. 1928 Lah. p. 382, at p. 390). I am satisfied, too, that the other two appellants did not know what was really being done, and that they had no dishonest intention in anything that they did. The only point against them is, I think, that they got shares but these they disposed of afterwards to Mangal Sen and they never got any advantage out of the transaction. For these reasons I accept their appeal, set aside their convictions and sentences and direct that the fines, if paid by them, be refunded.

As to Mangal Sen, there is no question as to his guilt and his conviction is maintained.

These concluding paragraphs of this judgment are common to all the judgments in all five appeals of Mangal Sen. The statement of convictions and sentences is summarised thus "rigorous imprisonment" being read after the term of years in each sentence:

(1) *Appeal No. 111 of 1929*:—S. 477-A, I.P.C. Sentence 7 years and a fine of Rs. 5000, in default, one year. (Not concurrent with any other sentence).

(2) *Appeal No. 112 of 1929*:—S. 409, I. P. C. Sentence 7 years and a fine of Rs. 5,000 in default, one year. (Not concurrent with any other sentence).

(3) *Appeal No. 113 of 1929*:—(a) S. 409, I. P. C., Sentence one year. (b) S. 477-A, I. P. C. Sentence five years and a fine of Rs. 5,000 in default one year. (a) and (b) both concurrent with No. 2 above.

(4) *Appeal No. 232 of 1929*:—(a) S. 409, I. P. C. Sentence two years and a fine of Rs. 2,000 in default six months. (b) S. 477-A, I. P. C. Sentence two years. (a) and (b) concurrent.

(5) *Appeal No. 233 of 1929*:—(a) S. 409, I. P. C. Sentence two years and a fine of Rs. 2,000, in default, six months. (b) S. 477-A, I. P. C. Sentence two years. (a) and (b) concurrent."

Now, it appears from the summary above that Mangal Sen has been sentenced to rigorous imprisonment for terms amounting to 18 years and fines amounting to Rs. 19,000, and that defaults in payments will render him liable to four more years of imprisonment. Serious though the offences are, it cannot be reasonably contended that the sentences are not too severe. The appellant is over 50 years of age and he is at present doomed to spend the remain-

der of his ordinary span of life in prison. That is not desirable from any point of view. On the other hand it is desirable that he should be made to pay. I accordingly, while maintaining all these sentences, direct that those mentioned in the four appeals from (2) to (5), both inclusive, shall run concurrently with the sentence mentioned in appeal (1). Thus the substantive term of imprisonment will be seven years. The fines are confirmed, and thus, if the appellant pays the Rs. 19,000, he will serve seven years only. The total "default" terms amount to four years and he can reduce those terms in proportion to the amount which he pays.

Before closing the judgment, I wish to add a word of commendation for the Magistrate (Mr. Isar) who took great trouble with the trials, kept neat record and wrote clear and well arranged judgments. I was also much impressed by the care with the learned counsel for the Crown, Mr. Raj Krishna, had worked up the cases and stored innumerable details accurately in his memory. The appeals were well argued by Mr. Mool Chand.

Finally, a prayer was made that Mangal Sen should be treated as a special class prisoner. I merely note the fact here, since there is another and more proper course open to the prisoner.

K.N./R.K. *Appeals partly allowed.*

1930 Cr. Cases 28

(Lahore)

ZAFAR ALI AND ADDISON, JJ.

Chadgi—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 708 of 1929, Decided on 14th October 1929, from order of Sess. Judge, Karnal, D/- 22nd June 1929.

(a) Evidence Act, S. 32 (1)—Statement by deceased before Third Class Magistrate not competent to record statement under Criminal P. C., S. 164—Statement is yet relevant under S. 32 (1).

The deceased made a full statement, about an assault which resulted in his death, before a Third Class Magistrate. This statement was not taken into consideration by the Sessions Judge on the ground that the Third Class Magistrate was not competent to record the statement of a witness under Criminal P. C. S. 164.

Held: that the statement was relevant under the provisions S. 32 (1). [P 29 C 2]

(b) Penal Code, S. 302—Panchayat convened to consider act of stealing by accused—

One of the panchas insisting the matter to be reported to police—Accused striking heavy blow at him and thereby causing death—Accused held guilty of murder,

K seized the accused in the act of stealing; but the accused escaped from him. *K* convened a panchayat consisting of several members of whom *J* was one. The accused admitted his offence and asked for pardon as it was a trivial offence. *J*, however, insisted that the matter must be reported to the police. On hearing this the accused suddenly struck *J* a heavy blow with a chopper which he had carried with him. *J* died of the heavy blow.

Held: that the accused either intended to cause *J*'s death, or that he intended causing bodily injury to *J* and the bodily injury which he intended to be inflicted was sufficient in the ordinary course of nature to cause death.

[P 30 C 1]

J. R. Agnihotri—for Appellant.

D. R. Sawhney—for the Crown.

Addison, J.—Chadgi, a Jat of Badli village in the Rohtak District has been sentenced to death, subject to confirmation by this Court, under the provisions of S. 302, I. P. C., for murdering Jot Ram, Sufedposh of his village, by striking him on the forehead with a heavy chopper. He has appealed and the record has been forwarded to this Court for confirmation of the death sentence.

The deceased Jot Ram had reported verbally on 18th February 1929, to the police that the appellant was a bad character. On 21st February Khushia a distant collateral of the appellant, seized the appellant while he was plucking his barley crops. He had noticed that this had been going on for some time and lay in wait for the culprit. Chadgi appellant escaped from him but left a leather charsa he had with him. Khushia took this charsa home and convened a panchayat outside his house the same evening. Jot Ram Sufedposh who was killed, Khushi Ram Lambardar, Risal Singh Zaildar and others attended. After some time Chadgi was induced to present himself before the Panchayat. He came to it wrapped in a chadar. The evidence establishes that he admitted his offence and asked for pardon as it was a trivial one. He also admitted the charsa to be his own. Khushia did not wish to proceed further and tried to take away the charsa as it might implicate the appellant. Jot Ram prevented his and had it handed over to Mazir Beg, the jamadar of chaukidars, for safe custody. Jot Ram also said that the matter must be reported to the police.

At this stage the appellant suddenly took out a chopper from underneath his chadar and struck Jot Ram a heavy blow with it on the forehead. This chopper is called a gandasa by the witnesses, but the sketch shows that it is a chopper and not an axe. The wound bled profusely. Sudhan, one of the prosecution witnesses, tried to stop Chadgi when he ran away and received slight injuries in doing so. He was helped by lambardar Khushi Ram, another witness, who snatched chopper from the appellant's hand. The appellant, however, succeeded in escaping, though in doing so he left his shoes behind. The matter was reported at the police station by Khushia. These facts are amply established by the evidence of numerous reliable witnesses.

The learned Sessions Judge has also relied upon the dying declaration made by Jot Ram on 6th March 1929, to a First Class Magistrate Pandit Lakshmi Datta. At that time, however, Jot Ram was in a semi-conscious state and was only able to say that the one-eyed Chadgi had struck him. We do not attach much importance to this statement. But the deceased made a full statement before a Third Class Magistrate on 25th February 1929. This has not been taken into consideration by the learned Sessions Judge on the ground that the Third Class Magistrate was not competent to record the statement of a witness under S. 164, Criminal P. C. The statement, however, was obviously relevant under the provisions of S. 32 (1) Evidence Act. That statement supports the prosecution story and is evidence against the appellant.

Chadgi denied committing the offence and stated that he had no enmity with Jot Ram. He added that the prosecution witnesses were inimical to him and had induced Jot Ram to name him. He produced no evidence in defence.

There is no question that the appellant struck Jot Ram in the manner described above. Jot Ram was immediately attended to by the Sub-Assistant Surgeon of Badli who removed six pieces of bone from inside the injury without extending the wound. Jot Ram's condition, however, continued to get worse and he was removed to the Civil Hospital on the 3rd March 1929. An operation was performed without avail. On 6th March he became semi-conscious. After

that unconsciousness developed and he died on 9th March 1921.

Three of the assessors were of opinion that the appellant was guilty of murder. The fourth also held it proved that the culprit was Chadgi, and that the prosecution evidence was true and reliable. He thought, however, that Chadgi struck under provocation without any intention of killing, though he must have known that his act was so imminently dangerous that it would result in death.

It is clear that Chadgi resented Jot Ram's action in insisting that the matter should be reported at a police station. He came unwilling to the panchayat and when he came he was wearing a chadar under which he had concealed the heavy chopper. Immediately after the dispute about the charsa he drew out this heavy chopper and struck Jot Ram a severe blow on the forehead. In the natural course of events a severe blow with such a weapon on the forehead must result in death as it did in the present case. It is clear that the appellant either intended to cause Jot Ram's death, or that he intended causing bodily injury to Jot Ram and the bodily injury which he intended to be inflicted, was sufficient in the ordinary course of nature to cause death. The facts that Jot Ram lingered for some time does not affect this question. He was given every possible attention but his life could not be saved. The weapon used and the place where the blow was struck both indicate the intention of the appellant. In these circumstances we hold that Chadgi was properly found guilty of the murder of Jot Ram under S. 302, I. P. C., and we see no reason to reduce the sentence. We therefore, dismiss the appeal and confirm the sentence of death.

V.S./R.K.

Sentence confirmed.

1930 Cr. Cases 30 (1)

(Lahore)

ZAFAR ALI, J.

Mt. Allah Rakhi -- Accused -- Petitioner.

Emperor--Opposite Party.

Criminal Revn. Petn. No. 2100 of 1928, Decided, on 1st March 1929, from an order of Sess. Judge, Multan, D/- 12th September 1928.

Punjab Municipal Act (3 of 1911), S. 152 (c)—Notice ought to be served upon the prostitute personally—There should be no summary trial.

The notice required by S. 152 (c) prohibiting the residence of the prostitute in a certain quarter ought to be served upon her personally. Where therefore the Municipal Committee promulgated a general notice, it is ineffective to bind a particular person and in such cases regular trial is preferable to summary trial.

[P 30 Q 2]

Mohamad Alam --for Petitioner.

Judgment.--The petitioner has been fined for disobeying a notice issued to her under S. 152, Municipal Act (3 of 1911). The trial was summary and there is no record of the evidence against her. The relevant portion of S. 152, runs thus:

"The Committee may, by notice in writing prohibit in any specified part of the Municipality.

(a)

(b) the residence of a public prostitute "

It is contended in this Court that no notice in writing was served on the petitioner. It appears from the order of the Magistrate that the Municipal Committee concerned promulgated a general notice but, in order to bind the petitioner it was necessary to serve a notice upon her personally. As this was not done, she could not have been found guilty of having disobeyed the notice.

I, therefore, set aside the order of the Magistrate and direct that the fine, if already realized, should be refunded. It may further be observed that it is desirable to try cases of this kind in a regular manner and not summarily.

P.B./R.K.

Order set aside

1930 Cr. Cases 30 (2)

(Lahore)

JOHNSTONE, J.

Suraj Bhan--Petitioner.

v.

Emperor--Opposite Party.

Criminal Revn. No. 1480 of 1929, Decided on 16th October 1929, reported by the Sess. Judge, Karnal, D/- 30th September 1929.

Practice -- Jurisdiction--Matter agitated and decided in civil Court -- Same matter cannot be agitated in criminal Court again.

A criminal Court should not, except for very exceptional and cogent reasons, go behind the finding of a civil Court which has been arrived at on merits. [P 31 C 2]

Where the civil Court grants a decree on the basis of a bond which is alleged to have been executed under duress, and the plea of wrong-

ful confinement, extortion and duress raised by the complainant in the civil suit is decided against him, the complainant shall not be permitted to agitate the same plea in a criminal Court: 33 P. R. 1910 (Cr.), *Foll.*; 4 P. W. R. 1916 and 9 P. W. R. 1916, *Ref.* [P 31 C 2]

Facts.—Towards the end of October 1928, Khannu, Gujar of Allahabad, came to Pundari village where he purchased 8 she-buffaloes. Vasdeo Lal Mahajan of Pundari, was interested in the realization of the price of these buffaloes. Khannu got the buffaloes booked for Delhi on 27th October. Vasdeo Lal thought that he would not be able to realize the price if the buffaloes and Khannu got out of his reach. Vasdeo Lal lodged a report against Khannu under S. 420, I. P. C. at Police Station, Karnal. The investigations were made by Head Constable Abdul Aziz. Khannu and the buffaloes were brought back to Karnal by the Police and Khannu was put in the lock-up. While there, he arranged to make up with Vasdeo Lal by raising money on a bond from Suraj Bhan, Mahajan of Karnal. The bond for Rs. 474 in favour of Suraj Bhan was executed on 31st October 1928 and the money raised on this bond was passed to Vasdeo Lal. On 2nd November, Suraj Bhan instituted a civil suit for recovery of the bond debt in the Court of the Subordinate Judge at Karnal. On 3rd November 1928, Khannu instituted a complaint against Head Constable Abdul Aziz, Vasdeo Lal and Suraj Bhan, alleging that these people had put him under wrongful confinement and had extorted a bond from him. In the civil suit brought by Suraj Bhan against him, Khannu raised the plea that he was not liable for the bond debt because the bond had been obtained from him under duress. This plea was duly put in issue and was disallowed by the civil Court which granted a decree on 26th February 1929 for a sum of Rs. 474 in favour of Suraj Bhan against Khannu. Khannu's complaint, which is a reiteration of the plea taken by him in the civil Court, has not yet been disposed of. It was made over for enquiry and decision to Khan Sabib Chaudhri Miran Bakhsh, Magistrate, with direction for speedy disposal. But this officer took five months in recording prosecution evidence and framed charges on 5th July 1929 under Ss. 342 and 384, I. P. C., against Abdul Aziz, Vasdeo Lal and

Suraj Bhan. All these three men have put in petition of revision praying that the case may be referred to the High Court for quashing of the charges which should not have been framed.

The proceedings are forwarded for revision on the following grounds:

It is argued by the learned counsel for the petitioners that the trial Magistrate was not justified in ignoring the finding of the civil Court on the only points which were in dispute between the parties both in the civil Court as well as in the criminal Court. In support of this argument reliance is placed on the case, *Emperor v. Bishan Das* (1). It was held in that case that save for very exceptional reasons, a criminal Court should not go behind the finding of a civil Court and should not convict of cheating and fraud a person who upon the very same facts has succeeded in satisfying the civil Court upon the merits of the case of the justice of his claim. It was also pointed out in that case by the learned Judges of the Chief Court that it is a very sound general principle and one to be observed by all Magistrates that parties should not be encouraged to resort to the criminal Courts in cases in which the point at issue between them is one which can appropriately be decided by a civil Court. The same view was expressed in the rulings cited as *Pars Ram v. Jalal Din* (2) and *Nur Din v. Emperor* (3). No exception can be taken to the sound principle of law enunciated in these rulings that a criminal Court should not, except for very exceptional and cogent reasons, go behind the finding of a civil Court which has been arrived at on merits. In the present case the civil Court has granted a decree on the basis of the bond which was alleged to have been executed under duress. The plea of wrongful confinement, extortion and duress raised by the defendant in the civil suit, was decided against the defendant who should not now be permitted to agitate the same plea in a criminal Court.

(1) [1910] 33 P. R. 1910 Cr.=8 I. C. 1161=57 P. L. R. 1911.

(2) [1916] 4 P. W. R. Cr. 1916=82 I. C. 135 =17 Cr. L. J. 7.

(3) [1916] 8 P. W. R. Cr. 1916=34 I. C. 317 =17 Cr. L. J. 205.

In my opinion, the contention raised by the learned counsel for the appellants is sound and correct. Both the complainant and the Crown were given an opportunity to attend the Court to oppose the petitions if they so cared. Complainant put in an appearance through his counsel but Crown representation was not deemed necessary. Mr. Gurdial Singh, counsel for complainant, cannot show how the criminal proceedings are justified in face of the finding of the civil Court on the same point.

The petitions of revision should, in my opinion, be accepted. I accordingly refer the case under S. 438, Criminal P. C. to the High Court with a recommendation that the charges framed against the petitioners by the Magistrate may be quashed.

Order.—I agree with the recommendation of the learned Sessions Judge of Karnal, and for the reasons given by him I quash the charges framed against the three accused persons.

V.S./R.K.

Charges quashed.

1930 Cr. Cases 32

(Lahore)

ZAFAR ALI, J.

Emperor

v.

Gunga—Accused—Respondent.

Criminal Case No. 538 of 1929, Decided on 3rd May 1929, reported by Dist. Magistrate, Multan, on 12th March 1929.

Criminal P. C. S. 341—Finding that accused had sufficient intelligence to understand criminal character of act done by him and nature of judicial proceedings against him must be recorded.

In a case under S. 341 it is essential for the Magistrate before convicting the accused to record a finding to the effect that he had sufficient intelligence to understand the criminal character of his act and nature of the judicial proceeding taken against him. Where no such finding is recorded by the Magistrate the accused cannot be convicted: 40 Bom. 598, *Rel. on: Rat. Un. Cr. C. 696, Rej.* [P 32-C 2]

Judgment.—This a reference under S. 341, Criminal P. C. The accused is a deaf and dumb lad of 14 or 15 years of age and he has been convicted of theft under S. 381, I. P. C.

The facts found by the Magistrate are that the accused was engaged as a servant by one Gobind Ram on 14th December 1928, but the same day during

the temporary absence of Gobind Ram from his shop the lad stole Rs. 26-1-0 and disappeared. Later on the boy was arrested and the money was found on his person.

The Magistrate has recorded no finding as to whether the accused was capable of realizing the criminal character of the act done by him, or could understand the purpose or nature of the judicial proceedings that were taken against him.

In *Queen-Empress v. Renbin Samuel* (1) it was pointed out that in submitting a case to the High Court under S. 341, Criminal P. C., the Presidency Magistrate must state his view of the conduct of the accused and must take some evidence regarding the previous history and habits of the accused. In the present case no information could be obtained about the previous history of the accused. The general proposition of law as stated in *Emperor v. A. Deaf and Dumb* (2) is that if it be shown that such person had sufficient intelligence to understand the character of his criminal act he is liable to punishment. It is, therefore, essential for the Magistrate to record a finding before convicting such person to the effect that he had sufficient intelligence to understand the criminal character of his act. The Magistrate in the present case having not recorded any finding on this point could not have convicted him. Further there is nothing to indicate that the accused understood that he had been engaged by the complainant as his servant or that he could form a conception of the relation between master and servant.

In view of what has been stated above it is not possible to maintain the conviction and I accordingly set it aside.

R.M./R.K.

Conviction set aside.

(1) Rat. Un. Cr. C. 696.

(2) [1916] 40 Bom. 598=37 I. C. 495=18 Bom. L. R. 553.

1930 Cr. Cases 33*(Aizahabad)***BOYS AND YOUNG, JJ.***Goli—Applicant.*

v.

Emperor—Opposite Party.

Criminal Appeal No. 373 of 1929, Decided on 24th June 1929, from an order of Sess. Judge, Gorakhpur., D/- 20th February 1929.

(a) Criminal Trial—Court's duty—Opportunity should be afforded to accused to explain evidence against him.

Neither a Magistrate nor a Judge is entitled to cross-examine an accused person but it is their bounden duty to question him generally on the case and give him an opportunity of explaining any point in the evidence against him.

[P 33 C 2]

(b) Criminal Trial—Court's duty—Greater care should be given to cases under S. 75 of Penal Code—Previous convictions should not prejudice Court—Penal Code S. 75.

In cases where S. 75, Penal Code is to be applied a great deal more care should be given to the inquiry and trial than is usually given to them. An accused person though he has several convictions behind him is entitled to have his case treated as if it was not a foregone conclusion that he is guilty. [P 35 C 1]

M. Waliullah—for the Crown.

Judgment.—Goli appeals from his conviction under S. 477 read with S. 75, I. P. C. and a sentence of transportation for life. The charge under S. 75, I. P. C. referred to no less than 5 previous convictions of theft and house-breaking with sentences beginning with three months and ending with three years. The accused pleaded guilty to all these convictions, with the exception of one, which he said had been set aside in appeal. But the learned Judge says that he has seen the record of that case and finds that the appeal was dismissed. It is a regrettable feature of these cases, where a man has already had a number of convictions, that everything seems to be assumed against him and that care is not devoted to the enquiry as to whether the present charge is well founded or not. The record of the evidence is very small, but we have had to give the case considerable time, because it was obviously neither desirable that a man who was of a bad character should escape punishment, if he were really guilty, nor that he should suffer further punishment unjustly merely because he had already committed several offences. The accused was arrested in Nautanwa Bazar of Bhundi, which is evidently close to Nautanwa Bazar, the place of

his arrest being variously described. These places are close upon the Nepal border. The home or birth place of the accused is in Nepal, but the place where he lives is a village in Purandarpur in the district of Gorakhpur. Purandarpur is about 20 miles south-west from Nautanwa Bazar. Nautanwa Bazar is in the police circle of Naikot and at Nautanwa Bazar or Bhundi there is only a police outpost. The story for the prosecution is that the complainant, Kahabir Thapa, was half asleep in the middle of the night when he noticed somebody moving about in his house. According to the first information report, he jumped up and seized the person and had a struggle with him. The thief escaped from him and he chased him a distance of 30 or 40 yards and seized him with a stolen brass vessel in his hand. Upon the outcry of the complainant three persons came up and helped him to secure the thief. Two of these three alleged witnesses have been produced to give evidence. They are Gorey Thapa, and Jas Bahadur Thapa. The accused was taken to the police outpost, and in the morning to the police station at Naikot, where the first information report was recorded, and he was later sent up for trial.

The accused's story is that he had only been released from jail in Gorakhpur a few days previously and having gone part of the way by train, he went to his own home. Finding his wife not there he made enquiries and eventually set off for Nepal to fetch his wife. He does not say whether he found his wife there or whether he did not, and neither the Magistrate nor the learned Judge thought it worth while questioning him on this point. It is hardly necessary to repeat that neither a Magistrate nor a Judge is entitled to cross-examine an accused person, but it is their bounden duty to question him generally on the case and give him an opportunity of explaining any point in the evidence against him. In cases of the description of the one before us we fear that a conviction is generally regarded as more or less a foregone conclusion and very little trouble is taken to enquire into the facts. This man had made a statement about having gone in search of his wife and being, on his way back to his village, found at Nautanwa

Bazar where he was arrested. There is nothing improbable *prima facie* in that story. That is one mention of the wife. Again the Judge's attention was specifically drawn to the fact that the accused really had a wife, because the defence witness mentioned her as being the person at whose instance she (the witness) was giving evidence. This fact the Judge has used to discredit the defence witness, but it did not suggest the desirability, as it should have, of making any enquiry as to where the wife was at the time of the offence.

The accused talking continues that he was asked by the police where he was, going to spend the night and told them that he was sleeping in a hut in Nautanwa Bazar, when the police on their rounds paid him no less than three visits, on the first occasion asking him who he was and on the second occasion assuring themselves that he was still sleeping in the hut. He says that on the third occasion at 5 O'clock in the morning he was aroused and arrested and this false charge brought against him. Taking the prosecution evidence first, we find that in the first information report a mention, very brief it is true, but still a clear mention of a struggle between the complainant and the accused finds place. On the other hand, there is also mention of the fact that in the complainant's own house were sleeping at the time three visitors, Pahari pensioners. It is manifest that if a struggle did take place and if three Pahari pensioners were, as admittedly they were, sleeping in the house at the time, they must have known a great deal more about it than anybody who merely saw from outside what happened at a later stage. None of these three men have been produced and no explanation is offered as to why. It may be that they left the place, as they were apparently only birds of passage. On the other hand, they were pensioners and they must have been known to the complainant, for he gave them shelter in his house and *prima facie* there could have been no difficulty in tracing them. It is noteworthy that all mention of the struggle in the house is dropped in the complainant's deposition. We were disposed ourselves to feel doubts about the correctness of this conviction in view of the points that we have already

mentioned. There is a third point, that the accused is alleged to have been actually arrested with a brass vessel worth only Rs. 2 in his hand. It is a small point, but it does strike us as improbable that a thief, being pursued and seeing himself about to be caught, would be actually so foolish as to keep a brass vessel that he had just stolen in his possession. No doubt he could not have concealed the fact that he had it, but his first instinct would be to throw it away.

We did feel, however, that there was one point which might strongly be urged in favour of the truth of the story told by the police. The accused was arrested at Nautanwa Bazar and the learned Judge has made a great point against him as to what could he be doing in this village 20 miles away from his own home so soon after he had been released. We have already referred to the accused's story as giving a not unreasonable explanation of his presence in Nautanwa Bazar, but the very fact of the distance of Nautanwa Bazar suggests another consideration in favour of the prosecution and that is, how did the police know anything about this man? If it were suggested that the case was a false one brought by them merely in order to get into jail again the well known offender, how did they know that he was a previous convict? The accused alleged that they had paid him no less than three visits on the night in question. This fact alone should have raised the Magistrate's and the Judge's suspicion and, at any rate, led to some enquiry on the point. We felt that as the case stood we were unable to feel satisfied as to the correctness of the conviction. Having arrived at that view, we decided to look into the police diary to see whether there was anything further that ought to have been brought on the record of the case. If the learned Judge had done that, as he should have done, not with a view to using it as evidence, but with a view to seeing whether further evidence was available, he would have found that the accused was perfectly well known to the police of Naikot and the police of Nautanwa Bazar. It appears that of the previous sentences which the accused had served, at least two or three of them were in respect of offences which had been committed at Nautanwa and the police at Naikot not

only knew the man well as a previous convict, but even knew that his home was at Gol Sugra. This being so, it is very natural indeed that when they found him again at Nautanwa Bazar they would recognise him and pay him several visits in order to see whether he was still sleeping in the hut. In this we find much corroboration of the story told by the accused and it further removes the main difficulty that we had, which was to answer the question, why should the local police 20 miles away from Gol Sugra and perhaps three times that distance from Gorakhpur, have had what is commonly described as a down upon this particular man? This only increases the doubts, which had already formed in our minds. We feel that the conviction cannot stand. In conclusion, we would suggest to the Magistrate and to the Judge that in these cases, where S. 75, I. P. C. is to be applied, a great deal more care should be given to the enquiry and trial than is usually given to them, and was given in this particular case. An accused person, though he has several convictions behind him, is entitled to have his case treated as if it was not a foregone conclusion that he is guilty. We set aside the conviction and sentence and direct that the accused be forthwith released. Let copies of the judgment be sent to the Judge and the Committing Magistrate.

R.M./R.K. *Conviction set aside.*

1930 Cr. Cases 35 (1)

(Allahabad)

YOUNG AND SEN, JJ.

Emperor

v.

Timman and others—Opposite Parties.

Criminal Revn. No. 387 of 1929, Decided on 9th September 1929, from order of First Class Magistrate, Meerut, D/- 27th February 1929.

Criminal P. C., S. 562 — Scope—Section should not be applied to case of people in possession of dangerous drugs in defiance of law.

Section 562, dealing with first offenders, should not be applied to the case of people discovered with cocaine and other dangerous drugs upon them in defiance of the Excise Act, it being almost certain in all these cases the occasion on which they have been discovered in possession of the drug is not really the first time they have been in such possession. [P 35 C 2]

U. S. Bajpai—for the Crown.

S. Majid Ali—for Opposite Parties.

Judgment.—In this case Timman, Azmat and Summan were charged before Mr. Thomas, Magistrate of the First Class, Meerut, under S. 60 (v), Excise Act, for being in possession of cocaine. It appears that the police, having obtained a warrant for the search of a gaming house, carried out the search and these three accused were there discovered, and on being searched packets of cocaine were found upon them. It has not been disputed by the accused that the cocaine was found upon them, and indeed it would have been impossible for them to dispute this fact. The learned Magistrate sentenced each of them to a fine of Rs. 75. The Local Government filed an application in revision asking for the enhancement of the sentence.

It is pressed on behalf of the opposite party that this is a case of first offence with regard to all three. We are of opinion that the section of the Criminal Procedure Code dealing with first offenders should not be applied to the case of people discovered with cocaine and other dangerous drugs upon them in defiance of the Excise Act, it being almost certain that in all these cases the occasion on which they have been discovered in possession of cocaine is not really the first time they have been in such possession.

We are satisfied that the sentence is totally inadequate, and we enhance it to one of six months' rigorous imprisonment each. The fine already imposed is to stand.

R.M./R.K. *Order accordingly.*

1930 Cr. Cases 35 (2)

(Allahabad)

YOUNG AND SEN, JJ.

Sultan and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 493 of 1929, Decided on 30th August 1929, from order of Addl. Sess-Judge, Meerut, D/- 10th May 1929.

Penal Code, S. 366—Scope — Underlying policy is to throw protection over minor girls — Consent of girl does not exonerate seducer.

Section 366 is an aggravated form of S. 363. The consent of the girl does not exonerate the seducer. The underlying policy of the section is to uphold the lawful authority of parents or guardians over their minor wards, to throw a ring of protection over the girls themselves.

and to penalise sexual commerce on the part of persons who corrupt or attempt to corrupt the morals of minor girls by taking improper advantage of their youth and inexperience.

[P 37 C 1]

K. O. Carleton—for Appellants.

U. S. Bajpai—for the Crown.

Judgment.—Sultan, Mohammad Baksh, Allah Baksh, Ismail, and Kala were committed to take their trial before the learned Sessions Judge of Muzaffarnagar under S. 366, I. P. C. Bundu was committed under S. 368 of the said Code. The learned Sessions Judge has convicted all of them and sentenced them to four years' rigorous imprisonment each.

The first five accused persons were charged with the offence of kidnapping, Mt. Jamila, a girl, alleged to be under 16 years of age from the lawful guardianship of her father Mohammad Qazim with intent that she might be seduced to illicit intercourse. The offence is said to have been committed in mauza Khudda in the district of Muzaffarnagar on or about 5th May 1928.

Bundu was charged with the offence of wrongfully concealing Mt. Jamila in his house at village Dadheru for nearly two months from 5th May 1928 with the knowledge that Mt. Jamila was a kidnapped girl.

There was considerable social disparity between Mohammad Qazim and the accused, the former being a Sheikhzada and the latter being Garhas by caste.

The case for the prosecution was that Mt. Jamila was an unmarried girl below 16 years of age, that she had twice eloped with Sultan during the temporary absence of her father from home; that the final elopement took place on 5th May 1928 with Sultan and that the four other accused excepting Bundu were associated with Sultan in kidnapping the girl.

Sultan is the nephew of Mohammad Baksh, Allah Baksh and Mohammad Baksh's sisters are married in the same family. Bundu's uncle's daughter is married to Siddiq, the own brother of Sultan. Ismail alias Billi and Allah Baksh are close friends.

Qazim's household consisted of himself, his daughter Jamila and a step-daughter Mt. Mahfuzan, aged 10 or 11 years, who was given in marriage to Qazim's son Nawab. Qazim appears to have been a man with a religious turn of

mind whose time was mostly spent in prayers and meditations and who did not take much interest in mundane affairs. The result was that there was no discipline in his household and Mt. Jamila was practically left free to sport as she pleased.

Sultan is a young man aged about 21 years. He lived in a house with an enclosure, next door to Qazim's. He had access to Qazim's house without any let or hindrance. No parda was observed with him. Mt. Jamila and Sultan came to know each other about a year or six months before the alleged occurrence. They fell in love and their love grew into an infatuation.

One of the neighbours told Qazim about Sultan's visits. Qazim said: "It does not matter." The voice of scandal was not silent but:

"Qazim did not care for the talk in the village."

While Qazim was away at Saharanpur, Sultan took away Mt. Jamila with him to Meerut and returned after three days. Mt. Jamila was dressed in male attire. The next day, Ghasita, brother-in-law of Qazim attempted to take Mt. Jamila to his house in Chhappar. He put her into a bullock cart but Sultan and Kala arrived on the scene. Kala caught hold of Ghasita and Sultan dragged Mt. Jamila away. She returned, however, at about 8 p. m. When this matter was brought to the notice of Qazim, he abused Mt. Jamila and took her to task. He also threatened to get her seducer and his confederates condignly punished.

It is remarkable, however, that Qazim lodged no report to the police nor instituted any complaint about either of these two incidents.

The last elopement took place the same day, namely 5th May 1928, after Qazim had left his house to say his Isha prayers. This infuriated Qazim. It is true that he did not make any report at the police station but a formal complaint was instituted in the Court of a Magistrate against the first five accused persons under S. 366, I. P. C., on 12th May 1928. Qazim backed his complaint by his deposition, which was recorded on 14th May 1928.

Qazim died under very tragic circumstances on 7th July 1928 and the question as to how he met his death is the

subject of enquiry in the connected appeal.

The defence was that Mt. Jamila had been given in marriage to Sultan by Qazim himself, that she was over 16 years of age on 5th May 1928 and that the offence of kidnapping under S. 366, I. P. C., had not been committed. Bundu denied having concealed Mt. Jamila in his house.

Mt. Jamila was examined in the case as a witness for the defence on 4th April 1929. She says she is the lawful wife of Sultan and that her age is between 17 and 18 years.

The judgment of the Court below is a document of portentous length, teeming with repetitions, irrelevant matters and with many deductions, which are either illogical or are non sequitor. Now and again, ingenious attempts have been made either to explain away or to water down points which tell against the prosecution. This was absolutely unjustified and this minimises the value of a judgment which is otherwise a monument of industry. What appears to have happened is that upon a consideration of certain features of the case, the learned Judge was morally convinced of the guilt of the accused; and this moral conviction warped his judicial vision to such an extent that he failed to view the evidence in its true perspective.

The learned Sessions Judge found that Mt. Jamila was not the wedded wife of Sultan, that she was below 16 years of age on 5th May 1928, and that all the accused persons were guilty of the offence of which they stood charged.

It may be observed here that S. 366, I. P. C., is an aggravated form of S. 363, I. P. C. The consent of the girl does not exonerate the seducer. The underlying policy of the section is (1) to uphold the lawful authority of parents or guardians over their minor wards; (2) to throw a ring of protection round the girls themselves and (3) to penalise sexual commerce on the part of persons, who corrupt, or attempt to corrupt, the morals of the minor girls by taking improper advantage of their youth and inexperience.

The learned Sessions Judge has given excellent reasons for holding that Mt. Jamila was not married to Sultan. This finding is supported by the evidence of witnesses, who were in a position to

know; and also by the probabilities of the case.

Mohammad Qazim, belonging as he did to the old school of thought, could never have dreamt to give his daughter in marriage to a Garha. It is difficult to conceive the idea of his officiating as Qazi on the occasion of his daughter's marriage.

Certain Qazi's registers have been produced, but they contain no entry in support of this marriage. Defendants' witnesses have told a farrago of lies and have been rightly disbelieved by the Court below. We endorse the finding of the trial Court on this point and hold that there was no marriage.

There is no direct evidence on the record that Sultan or any of his four associates kidnapped Mt. Jamila. At the time of the alleged kidnapping, Qazim was away from home. Mt. Mahfuzan, the only other inmate of the house was in another part of the house easing herself. Mt. Mahfuzan heard certain whispers. We do not know what these whispers were about. We do not know whose whispers they were. When she came inside the house, she discovered that Mt. Jamila was gone.

That Mt. Jamila eloped with Sultan is a settled fact. It is not unlikely that Mt. Jamila, in response to her own passion for Sultan singed her wings. It is equally probable that Sultan allured her with his seducer's voice. What part the other accused persons played cannot be predicated with certainty, the evidence on the point being vague and cloudy. It has been suggested that all these persons had conspired with Sultan. It is said that on a particular date as Qazim and his party were returning from the Court of the Magistrate in Muzaffarnagar, Qazim demanded the restitution of his daughter to him. He held out the threat that if the daughter was not restored, the case against the accused persons "will be prosecuted to the bitter end." Ismail is said to have retorted that he did not care, as he would wipe Qazim out and install Mt. Jamila and Sultan in Qazim's house. Sometimes before Mt. Jamila's elopement, Nawab son of Qazim had run away with one Mt. Khatoon, daughter of Lala Garha. Ismail and Allah Bakhsh are said to have remarked at the village panchayat, which was held over Mt. Jamila's elope-

ment that Mt. Jamila had been kidnapped by the Garhas by way of retributive justice.

The story seems plausible but it is unsafe to accept the statement of Ghulam Muhammad Mukhia who has told a string of lies and is not a disinterested witness. (After considering the evidence and holding that the other four accused were not proved to have joined Sultan in kidnapping Mt. Jamila and that Mt. Jamila was not proved to have been below 16 years on 5th May 1928, their Lordships proceeded.) The charge, therefore, fails against all the accused persons including Bundu. The evidence discloses that Mt. Jamila lived in the house of Bundu without the least attempt to conceal the fact. Mt. Jamila being over 16 years of age, there could be no offence of kidnapping with reference to her. The lease under S. 368, I.P.C., against Bundu therefore fails.

In the result we allow the appeal, set aside the convictions and sentences and direct that Kala be immediately released and the other five accused persons be released unless they are wanted in some other case.

R.M. R.K.

Appeal allowed.

1930 Cr. Cases 38

(Patna)

MACPHERSON, J.

Bechu Singh and others—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 277 of 1929, Decided on 10th June 1929, from order of Asst. Magistrate, Gaya, D/- 16th March 1929.

Criminal P. C., S. 423 (1) (b)—Setting aside conviction on one charge while affirmation on others—Non-reduction of sentence does not amount to enhancement.

It does not follow that if the conviction on one of the several charges in a trial is set aside while one or more others are affirmed there must necessarily be a reduction of sentence. It depends upon the particular circumstances of the case whether the retention of the sentence awarded by the trial Court constitutes an enhancement of the sentence. [P 39 C 1]

S. M. Gupta—for Petitioners.

N. K. Prasad II—for the Crown.

Judgment.—This application is directed against the order of the District Magistrate of Gaya who in appeal upheld the conviction of the petitioner under S. 323, Penal Code, and maintained the

sentence of imprisonment for three weeks and fine of Rs. 25 upon each of them which the trial Court had passed under S. 147, I. P. C. The trial Court had convicted them under Ss. 147 and 323 but passed sentence under S. 147 only and expressly did not pass any separate sentence under S. 323.

In support of the rule it is contended, first, that the sentence passed in appeal is illegal as it is an enhancement of sentence; and, secondly, that the conviction ought not to be maintained because practically all the evidence went to show that not only the three petitioners but also five other persons who were also convicted along with them under S. 147 and fined Rs. 25 by the trial Court were participants in the offence of rioting of which the appellate Court acquitted all the accused.

As to the second plea, it cannot prevail. It is clear that the appellate Court laying special stress on certain facts, such as the sancha recorded at the thana from the chaukidar after the latter had talked with Sheobalak, the injured man, and the unreliability of the civil Court pcon, entertained doubts as to whether the minor accused assisted or accompanied the present petitioners when, as the Court found, the latter assaulted Sheobalak, that is to say, the learned District Magistrate held that the charge of rioting could not be sustained because as many as five persons were not found to be concerned. He did not distrust the prosecution story fundamentally but only in a detail. The conviction under S. 323 is sound.

As to the first point, an appellate Court is under S. 423 (1) (b), Criminal P. C. empowered to alter the finding maintaining the sentence. For the Crown it is contended that that is what has been done in the present case. On behalf of the petitioners Mr. Gupta urges that in reality the District Magistrate has effected an enhancement of sentence such as only the High Court can make. He relies upon the decisions in *Ramzan Kuwra v. Ramkhelawan Chowbe* (1) and *Queen Empress v. Hanma* (2). The question really is whether an apparent maintenance of the sentence is a real enhancement of it. Manifestly it does not follow that if the conviction on one of

(1) [1897] 24 Cal. 316.

(2) [1896] 22 Bom. 760.

several charges in a trial is set aside while one or more others are affirmed, there must necessarily be a reduction of sentence. It depends on the circumstances of the particular case whether the retention of the sentence awarded by the trial Court constitutes an enhancement of sentence. The present case presents no difficulty. Here eight persons including the petitioners were found guilty of rioting with the common object of rescuing attached cattle and the petitioners with the further offence of voluntarily causing hurt to the decree-holder's servant. The fact that for the same offence under S. 147, the petitioners were sentenced to imprisonment and fine whereas their co-accused were sentenced to fine only though there was no differentiation in degree of guilt, shows that the Magistrate whilst stating that he did not pass a separate sentence under S. 323 actually passed under S. 147 a combined sentence for the two offences. It is also clear that in this combination the sentence of fine represents the guilt under S. 147. Accordingly the apparent maintenance of the sentence upon the alteration of the finding was in reality an enhancement and was ultra vires.

This Court will now pass the sentence which the lower Court ought to have passed, that is to say, the sentence of fine is set aside. The rule is thus made absolute in part. The petitioners must surrender to undergo the unexpired portion of their sentences.

The attention of the District Judge is drawn to the misconduct of the civil Court peon Nur Muhammad in respect of the evidence he gave.

V.B./R.K. • Rule made absolute.

1930 Cr. Cases 39

(Allahabad)

SEN, J.

Alayar Khan—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 470 of 1929, Decided on 27th August 1929, from an order of Sess. Judge, Jhansi, D/- 23rd May 1929.

(a) Criminal P. C. S. 439—Consideration of evidence is not question of law—Practice—Evidence.

Where both the parties have tendered evidence the question of weight is not a question of law. [P 4 C 1]

(b) Criminal P. C., S. 110—Section is in-

tended to put curb on persons dangerous to society.

S. 110 is intended to put a curb upon the activities of persons who set the ball of discord in motion and try to create or foment dissensions between man and man or between one community and another in matters which result in or have a tendency to result in breach of peace. [P 40 C 1,2]

Zahur Ahmad—for Applicant.

M. Waliullah—for the Crown.

Judgment.—On 18th March 1929, Mr. Browne, the learned District Magistrate of Jalaun, directed that Alayar Khan, the applicant, should under S. 110, Criminal P. C. execute a bond for Rs. 2,000 with two sureties in Rs. 2,000 each to be of good behaviour for a term of one year. He appealed to the learned Sessions Judge who set aside the finding of the trial Court so far as it related to the charge under S. 110 (d) but maintained the findings in other respects. The learned Sessions Judge observed that in view of the dangerous activities of the appellant in communal matters, he was not prepared to reduce the security. Alayar Khan has applied for revision to this Court.

Alayar Khan is a man of considerable influence at Konch and is a member of the Municipal Board. The township of Konch is torn by factions. The necessary consequence is political differences and communal dissensions.

Notice was issued to him to show cause as to why he should not be bound over inasmuch as :

(1) he habitually cheats, commits extortion and counterfeits coins and currency notes;

(2) he habitually commits and abets the commission of offences involving a breach of the peace;

(3) he is so desperate and dangerous as to render his being at large without security hazardous to the community.

Forty-eight witnesses were examined before the trial Court to prove these allegations. The applicant appears to have been convicted under Ss. 147, 149 and 325, I. P. C. on 26th August 1915 and sentenced to term of imprisonment which was reduced in appeal by the High Court. He was also bound over under S. 107, Criminal P. C. On 9th March 1928, he was bound over for one year under S. 107, Criminal P. C. The trial Court in an elaborate judgment, consisting of 70 type-written pages arrived at

the conclusion that Alayar Khan habitually commits cheating and extortion; habitually commits and attempts to commit, and abets the commission of offences involving a breach of the peace specially in connexion with religious riots and is so desperate and dangerous that his being at large without security is hazardous to the community. The learned Sessions Judge on appeal held that the evidence of general reputation was not sufficient to establish the charge relating to cheating and extortion as no specific acts had been proved. He maintained the finding and the order of the Court below on the other counts.

The learned Sessions Judge observes as follows :

"My opinion, after carefully examining the evidence on the record, is that the evidence of general reputation given by the witnesses for the prosecution, taken in combination with the specific instances proved, establishes that Alayar Khan is a fomentor of communal discord and that he likes to excite trouble and create bad blood. The fomenting of communal trouble amounts to an abetment of offences calculated to involve a breach of the peace. My impression from the evidence is that Alayar Khan is a firebrand of a dangerous type. A man who stirs up communal enmity and who does and says things which must inevitably create such enmity is clearly an instigator and thus an abettor of offences involving a breach of the peace. A man of this character is a danger to society and should undoubtedly be made to give security."

This Court has considerable hesitation in going into the merits of a case under S. 110, Criminal P. C., unless the Court below in dealing with the evidence has made a material departure from legal principles. I have been referred to the evidence on the record and have considered the criticisms of the learned counsel for the applicant. I do not think that the Court below has erred in admitting evidence which ought to have been excluded or in ignoring evidence which might have told in favour of the accused. Where both the parties have tendered evidence, the question of weight is not a question of law.

The applicant has been carrying on his game amongst people whose passions and prejudices are easily roused and who are driven to lawlessness by his sinister influence. He is a menace to the community to which he belongs and to the social order generally.

Section 110, Criminal P. C., is intended to put a curb upon the activities of persons

who set the ball of discord in motion and try to create or foment dissensions between man and man or between one community and another in matters which result in or have a tendency to result in breach of the peace. Alayar Khan deserved to be dealt with a strong hand. Accepting the finding of the Court below, I hold that the order passed against the applicant was fully justified. I reject the application.

R.M./R.K.

Application rejected.

1930 Cr. Cases 40

(Allahabad)

YOUNG AND SEN, JJ.

Emperor

v.

Mohammad Israil—Accused.

Criminal Appeal No. 416 of 1929, decided on 22nd August 1929, from order of Sess. and Sub-Judge, Allahabad, D/- 15th February 1929.

(a) Criminal P. C., S. 297—Charge to jury—Judge is bound to explain law with clearness and distinctness.

A Judge is bound to explain the law to the jury with clearness and distinctness and failure to do so prejudices the trial. Where the Judge withholds from the jury the legal assistance, the assistance in points of law, which the case demands, he fails in his duty. So also the Judge ought not to omit to state in his charge that if the jury entertains a reasonable doubt as to the guilt of the accused they are bound to return the verdict that the accused is not guilty. [P 41 C 2]

(b) Criminal P. C., S. 418—Misdirection or nondirection is matter of law.

Where there has been a trial by jury the appeal has to be confined within the restricted limits prescribed by the legislature. Misdirection or non-direction is a matter of law. If the verdict of the jury has been influenced by evidence which was inadmissible or proceeds upon no evidence at all, this is a matter of law. If this defect has affected the Crown or the accused prejudicially the order passed by the Court below ought to be set aside. [P 42 C 1]

U. S. Bajpai—for the Crown.

Mohammad Hussain—for Accused.

Judgment.—Mohammad Israil was committed to the Court of Sessions to take his trial under Ss. 380 and 467, I. P. C. The trial was held with the aid of a jury. The verdict of the jury was that Mohammad Israil was not guilty of theft under S. 380, I. P. C., but that he was guilty of forgery under S. 467, I. P. C. The Sessions Judge accepted the verdict of the jury in its entirety. In the result, he acquitted Mohammad Israil of the offence of theft but convicted him under S. 467, I. P. C., and

sentenced him to one year's rigorous imprisonment and a fine of Rs. 1,000 or in default to undergo six months' rigorous imprisonment.

The order of the Sessions Judge has been challenged by the Local Government, which has preferred an appeal to this Court against the acquittal of Mohammad Israil on the charge of theft and by Mohammad Israil against his conviction under S. 467, I.P.C.

There is a firm of the name of Mohammad Sami Abdul Hakim at Allahabad, which held two hundis in due course one of which was for Rs. 500 and the other for Rs. 365. These hundies were endorsed in favour of Jawaharmal Lachmi Narain, their Bombay agents for collection; but the hundis never reached the latter firm.

The case set up by the Crown was that the hundis were put inside an envelope with a view to being posted to Bombay, that the envelope mysteriously disappeared, either from the office of Mohammad Sami Abdul Hakim or somewhere in the course of transit and that it never reached the firm of Jawaharmal Lachmi Narain. It was a later discovery that the hundies had come into the possession of Mohammad Israil, who negotiated them and collected the money.

The case for the prosecution was that the accused had obtained possession of the hundis by dishonest means and that he was guilty of theft.

The charge of forgery was founded upon the fact that the accused had obliterated or effaced the original endorsement in favour of Jawaharmal Lachmi Narain and had entered the name of Abdul Hamid Mohammad Sami there being no firm of that name.

The charge framed by Mr. A. B. Hardie, the committing Magistrate was not happily worded. It embraced two distinct offences under the second count:

(1) Forging the signature of Abdul Hamid on the hundi Ex. 2, and (2) selling the said hundi to one Lala Parsotam Das.

The accused admits that he was in possession of the hundis and that he negotiated them but he contended that Abdul Hakim son of Mohammad Sami was indebted to him for Rs. 900 and that in satisfaction of this debt, he had transferred the two hundis to him.

The charge to the jury by the Sessions

and Subordinate Judge, Mr. Rup Kishun Agha has been adversely criticized by the counsel, appearing for the Crown and also by the counsel for Mohammad Israil. The common ground is that the charge is vitiated by misdirections and non-directions, which misled the jury and resulted in a miscarriage of justice.

The heads of the criticism need not be noticed in detail. The learned Judge has not only travelled outside the record but has confounded the identity of one of the witnesses Shamsuddin examined in Court with another of the same name, who was not before the Court and was never examined. But this is not all. The learned Judge has not explained to the jury the necessary ingredients of the offences under Ss. 380 and 467, I. P. C. The constituent elements of the two offences were essentially different. The learned Judge was bound to explain the law with clearness and distinctness and his failure to do so has seriously prejudiced the trial. The result of the omission has produced a hopeless confusion in the minds of the jury. The charges of theft and of forgery, in view of the peculiar features of the case, were interdependent in certain respects and inextricably mixed up in other respects. The learned Judge failed in his duties by withholding from the jury the legal assistance, the assistance in points of law, which the case demanded. The consequence of this omission was almost inevitable. We are faced with an astonishing verdict that Mohammad Israil is not guilty of theft, as Abdul Hakim had delivered the hundis to him and with the further verdict that he is guilty of the offence under S. 467, I. P. C. It is another astonishing feature that the learned Judge did not apply his mind to the nature and effect of the findings by the jury and accepted them without any discrimination or hesitation.

The Sessions Judge ought not to have omitted to state in his charge that if the jury entertained a reasonable doubt as to the guilt of the accused, they were bound to return a verdict that the accused was not guilty. This principle ought to have been clearly placed before the jury and, in fact, emphasised.

This appears to be the second case, in the course of the week in which, to our extreme regret, this omission has been conspicuously noticed in Mr. Rup Kishun

Agha's charge to the jury. We hope that our observation will be kept in view and this defect from the charge avoided in future.

We do not think that this is a proper case in which the guilt or innocence of the accused should be determined by this Court on the merits. Under S. 418, Criminal P. C.

"An appeal may lie on a matter of fact as well as a matter of law except where the trial was by jury in which case the appeal shall lie on a matter of law only."

Where there has been a trial by jury; the appeal has to be confined within the restricted limits, prescribed by the legislature. Misdirection or non-direction is a matter of law. If the verdict of the jury has been influenced by evidence, which was inadmissible or proceeds upon no evidence at all, this is a matter of law. If this defect has affected the Crown or the accused prejudicially, the order passed by the Court below ought to be set aside.

We are convinced that in the present case, there has been no proper trial and we are of opinion that this case should go back for a fresh trial before a Judge other than Mr. Rup Kishun Agha and that the case should be tried with the aid of a fresh jury. We direct accordingly.

The learned Sessions Judge of Allahabad may either try the case himself or send the case to a competent tribunal for trial.

R.M./R.K.

Case remanded.

1930 Cr. Cases 42

.. (Allahabad)

SEN, J.

Gauri Shankar—Accused.

v.

Emperor—Opposite Party.

Criminal Ref. No. 591 of 1929, Decided on 2nd September 1929, made by Sess. Judge, Allahabad, D/- 23rd July 1929.

(a) **Jurisdiction—Civil Court—Civil Court is the only forum for determining suit relating to property between Municipal Board and private individual—U. P. Municipalities Act, S. 265.**

Where there is a clash between Municipal Board on one side and a private individual on the other with reference to some property the matter has got to be adjudicated by the civil Court which is the only forum for determining the title. The straightforward course in such a case is the institution of a suit in the civil Court. The remedy provided by S. 265 may be cheap, swift and within a certain range effec-

tive. S. 265, however, is not intended to arm a Municipal Board with powers to disturb the possession of any person, who asserts a lawful title to the property in controversy.

[P 42 C 2, P 43 C 1]

(b) **Evidence Act, Ss. 35—Document neither shown to be prepared by public servant nor shown as forming the act or record of public officer is inadmissible—Evidence Act S. 74.**

Where a record plan has not been shown to be prepared by a public servant in the discharge of his official duty or by any other person in pursuance of his duty specially enjoined by the law of the country, nor has it been established by evidence that the said document formed the act or record of the act of public officers within the meaning of S. 74, the record plan cannot be admitted in evidence either under S. 35 or S. 74 in the absence of proper evidence and of necessary particulars.

[P 43 C 1]

(c) **U. P. Municipalities Act, S. 265—Crown has to prove that disputed site forms part of public street.**

The onus of proving that the site in dispute is a public street or part of a public street lies upon the Crown.

[P 43 C 1]

(d) **Evidence Act, S. 36—Site-plan prepared for a case has very little probative value on question of title.**

A site plan prepared for the purposes of a case can have a very little probative value on the question of title. Entries in such documents in support of title of a Municipal Board are no more than admission in favour of the Board and are not relevant.

[P 43 C 2]

(e) **U. P. Municipalities Act—Fact of Municipal Board demolishing Chabutra does not amount to assertion of title.**

The fact that a Municipal Board has on several occasions demolished a chabutra constructed by a party on the disputed land and realised the cost does not amount even to an assertion of title on the part of the Municipal Board and is absolutely inconclusive.

[P 43 C 2]

Judgment.—This is a reference by Mr. Rup Kishan Agha, Officiating Sessions Judge of Allahabad, recommending that the conviction of one Gauri Shankar Singh under S. 265, Municipalities Act, be set aside.

This case is a typical example of aggressiveness on the part of a Municipal Board with a view to establish a claim to property, the title to which is in dispute. S. 265, Municipalities Act, has its use; but not unoften the powers conferred by the section are abused. This is to be strongly deprecated. Where there is a clash between a Municipal Board on the one side and a private individual on the other with reference to some property, the matter has got to be adjudicated by the civil Court which is the only forum for determining the title. The straightforward course in such a case is the institution of a suit in the civil Court. The remedy provided

by S. 265, Municipalities Act, may be cheap, swift and within a certain range effective. The section, however, was never intended to arm a Municipal Board with powers to disturb the possession of any person who asserts a lawful title to the property in controversy.

Gauri Shankar Singh was convicted by a Bench of Honorary Magistrates on 12th December 1928, under S. 265, Municipalities Act, and sentenced to a fine of Rs. 2. The head and front of his offence is that he tied his cow on a piece of land which is in the immediate vicinity of his house but which the Municipal Board claims as part of a public lane. The title to this piece of land is disputed. Gauri Shankar Singh denied that it was part of a public lane, asserted his own title to the same and alleged that the land belonged to him and was his sahan darvaza. The trial Court describes the property as a blind lane through which other persons pass. The appellate Court agrees with the trial Court that it is a blind lane which is used by the occupants of two other houses bearing the Municipal Nos. 272 and 273. The learned Sessions Judge has very clearly described the position and boundary of the disputed site.

"It abuts on a public street on the west and there is a short narrow lane at the south east corner giving access to another open land bounded by houses Nos. 272 on the south, 273 on the east and 274, applicant's house, on the north."

The onus of proving that the site in question was a public street or part of a public street lay upon the Crown. The trial Court held in substance that the site formed part of a public lane. Reliance was placed upon the record plan filed on behalf of the municipality. It has not been shown that this document was prepared by a public servant in the discharge of his official duty or by any other person in pursuance of his duty pecially enjoined by the law of the country, nor has it been established by evidence that the said document formed the act or record of the act of public officers within the meaning of S. 74, Evidence Act. In the absence of proper evidence and of necessary particulars, the record plan could not be admitted in evidence either under S. 35 or under S. 74, Evidence Act.

The site plan prepared for the purposes of the case can have a very little

probative value on the question of title. The entries in the aforesaid documents, in support of the title of the Municipal Board, are no more than admissions in favour of the Board and are not relevant.

The fact that the Municipal Board has on certain occasion in the past demolished a chabutra constructed by Gauri Shankar Singh upon this land and realised the cost, does not amount even to an assertion of title on the part of the Municipal Board and is absolutely inconclusive.

There was no justification for the finding by the trial Court upon the evidence indicated above that the property was a public lane. The finding is further vitiated by the fact that an important title deed filed by Gauri Shankar Singh was completely ignored by the trial Court. This was a document more than 30 years old and produced from proper custody. The genuineness of this document does not appear to have been challenged either before the trial Court or before the Court of appeal. The latter Court refers to the document; but lays it aside with the observation that:

"measurements are not given therein and it is difficult to say how far it covers the land in dispute, supposing it was a genuine transaction."

The judgment of the appellate Court is open to a further criticism that it fails to see the distinction between ownership and a mere right of easement. The appellate Court treats the owners or the occupants of the two houses Nos. 272 and 273 as "a portion of the public." From the fact that these occupants had a right to pass along the land in dispute it concludes that the land is a public street. The learned Magistrate fails to see that a right of easement may have been acquired by the occupants of these two houses but the said right is reconcilable with the right of ownership claimed by Gauri Shankar Singh.

I accept the reference and set aside the order dated 7th March 1929, affirming the order passed by a Bench of Honorary Magistrate on 12th December 1928. The fine, if paid, should be refunded.

R.M./R.K.

Order accordingly.

1930 Cr. Cases 44

(Allahabad)

YOUNG, J.

Jagmohan Singh and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 622 of 1929, Decided on 20th August 1929, from order of Sess. Judge, Allahabad, D/- 13th June 1929.

(a) Criminal P. C., S. 297—Where evidence is equally balanced Judge ought to give usual direction that benefit of doubt should be given to accused.

Where prima facie the evidence is more or less equally balanced to the ordinary jury the Judge ought to give the usual direction to the jury that if they have any reasonable doubt in their minds as to the guilt of the accused they should give the accused the benefit of it. In such a case it is almost impossible to say that the omission of this very important portion of the charge to the jury might not affect the minds of the jury. [P 45 C 1]

(b) Criminal P. C., S. 297 — For miscarriage of justice by misdirection there should be reasonable ground that misdirection affected jury's verdict.

Miscarriage of justice through misconsideration means that there must be a reasonable ground for apprehending that the misdirection may have affected the jury's verdict. Where it is possible that the omission of a charge under the particular circumstances might have affected the minds of the jury, it is a proper case for retrial by another jury : *A. I. R. 1926 All. 429, Rel. on.* [P 45 C 1]

(c) Criminal P. C., S. 297—Judge should reduce charge to writing as soon as possible after charging jury.

If a Judge does not write his charge before delivery which whenever practical is the better course, he should reduce the charge to writing as soon as possible after charging the jury so that what he said is fresh in his mind. A delay makes it impossible for an appellate Court to know whether the written charge was really the charge which was given to the jury. [P 45 C 2]

Iqbal Ahmad, Peari Lal Banerji, Durga Charan Singh, Krishna Bahadur and Aditya Narain—for Appellants.

Sankar Saran—for the Crown.

Judgment.—This is an appeal by four persons against a conviction by the learned Officiating Sessions Judge of Allahabad and a jury under Ss. 330/34 and 384/34, I. P. C.

The appellants were found guilty for voluntarily causing hurt to extort a confession and money, and for house trespass. As this was a jury case, the appellants can only succeed if they can show that there has been any misdirection by the learned Judge to the jury

which has in fact occasioned a miscarriage of justice. The prosecution story was that four Koals were seized by the accused, who were officials of the Manda estate, and that they were put to torture and beaten in order to make them confess that they had cut the barley produce of one Ram Partab. The defence evidence was that the whole story of the prosecution was mythical, and the defence called several witnesses to say that they had been present all the day in question with the accused and that no such thing took place.

The points made by Mr. Iqbal Ahmad, the counsel for the appellants in this case, are that there was misdirection in that, firstly, the learned Judge summed up in too summary a manner the evidence for the prosecution. I do not like to criticise the summing up of an experienced Judge such as the learned Officiating Sessions Judge of Allahabad; but I must say I think the evidence for the prosecution might have been dealt with at greater length.

If the criticism of the charge to the jury had been confined to this point alone, I would not have interfered. The next portion of the charge which has been criticized is that part where the learned Officiating Sessions Judge deals with the evidence which he himself called under S. 540. He says in his charge to the jury:

"Abdul Sattar was questioned upon the same point and had made a statement to the effect that no enquiry had been made by the Manda estate."

I have been referred to the evidence on this point, and it is not quite correct to say that this witness said this. What he did say was that it was not within his knowledge that an enquiry had been made, which is quite a different matter. The Judge himself deals rather severely with the defence evidence upon this point, and it is quite possible that this misdirection might have had some effect upon the minds of the jury.

The third and last point is that the learned Officiating Sessions Judge failed altogether to give the usual direction to the jury, that if they had any reasonable doubt in their minds as to the guilt of the accused, they should give the accused the benefit of it. It is conceivable that in some cases such an omission might not neces-

sarily be vital. If, for instance, the evidence for the prosecution was overwhelming, so that no reasonable jury could possibly have any doubt, or where it would be unlikely that a jury would have any doubt on the matter, in such cases I think it is clear that the mere omission of this ordinary direction would not amount to such a misdirection that it might be said that there had been a miscarriage of justice. In this case, however, I am influenced by a statement of the learned Judge himself where he says:

"Turning next to the evidence for the defence, it is apparently as strong as the evidence on the other side."

This means that prima facie to the ordinary jury the evidence was more or less equally balanced. In such a case, it is almost impossible to say that the omission of this very important portion of the charge to the jury might not have affected the minds of the jury. I have to consider in this case whether the misdirection was such as actually did occasion a miscarriage of justice. As to the definition of what a miscarriage of justice would be, I am in agreement with the judgment of Daniels, J. in the case of *Chiraji v. Akasi* (1), at p. 510 he says:

"It means that there must be a reasonable ground for apprehending that the misdirection may have affected the jury's verdict."

I think it is possible to say in this case that the omission of this charge may, under the circumstances of this particular case, have affected the minds of the jury. Each case must be considered on this point on its own facts. It is impossible to lay down any direction of law which will be binding in every case. Coming as I do to the conclusion that the jury may possibly have been affected by the omission to which I have just alluded, and also by the other points to which criticism has been directed by the appellants, I hold that the verdict of the jury cannot stand.

It has been urged by the Government Pleader, that, as I have found that the verdict of the jury is vitiated, it is within the power of the appellate Court to go through the evidence and decide the case as if it were an ordinary appeal and not an appeal from the verdict of the jury. I am very doubtful if there is any warrant for this contention in Ss. 418 and 423, Criminal P. C. In any case I do

(1) A.I.R. 1926 A.F. 422.

not need to decide this point as I am satisfied that this is a proper case for retrial by another jury. I think, under all the circumstances of the case, and without making the smallest reflection upon the learned Officiating Sessions Judge who tried the case, that the retrial should be conducted by some other Judge. This case will, therefore, be sent back to the Sessions Judge of Allahabad to be tried by him or by any Judge to whom the Sessions Judge of Allahabad may send the case for trial. In the meantime the appellants will be admitted to bail to the satisfaction of the District Magistrate.

In this case I have not examined the evidence, and express no opinion, as to the weight of evidence either for the prosecution or the defence. Nothing that I have said must weigh with the Court trying the case.

In this case there was a delay of nine days after the learned Judge charged the jury until he reduced the charge to writing. If a Judge does not write his charge before delivery which, whenever practical, is the better course, he should reduce the charge to writing as soon as possible after charging the jury so that what he said is fresh in his mind. A delay of this character makes it impossible for an appellate Court to know whether the written charge was really the charge which was given to the jury.

R.M./R.K.

Case remanded.

1930 Cr. Cases 45

(Allahabad)

YOUNG AND SEN, JJ.

Mt. Khuban—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 550 of 1929, Decided on 5th September 1929, from an order of the Sess. Judge, Etah, D/- 28th May 1929.

(a) Evidence Act, S. 24—Confession—Definition—Confession is admission made by accused.

A confession is an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed the crime. [P 48 C 2]

(b) Evidence Act, S. 30—Self-implication is guarantee for truth of accusation against co-accused.

When the statement is self-incriminatory and also implicates a co-accused, the self-implication is the guarantee for the truth of the accusation against the co-accused and may be

taken to be a substitute for the sanction of oath. [P 48 C 2]

(c) Evidence Act, S. 114, Illus. (b)—Evidence of accomplice should be accepted when corroborated in material particulars by cogent evidence.

The statement made by an accomplice should be accepted when it is strongly corroborated in material particulars by clear and cogent evidence for authenticity of which is not open to doubt. [P 48 C 2]

(d) Evidence Act, S. 24—Retracted confession—Person making confession may be convicted when Court thinks that it is voluntary and true.

There is nothing in law to prevent a Court from convicting a person upon a confession which has been subsequently retracted, provided that the Court is convinced that the statement is voluntary and true. If there be anything from the barest suspicion to positive evidence that the confession has been obtained by threat, persuasion, etc., such confession has of course to be discarded. But where a confession is made by a person who is sui juris before a Magistrate in an atmosphere untainted by the influence of the police or by any other influence and there are no suspicious features about it there is no reason why the statement should not be accepted. [P 48 C 2, P 49 C 1]

A. M. Khawaja—for Appellant.

U. S. Bajpai—for the Crown.

Judgment. -- Mt. Khuban, Chand, Buddha and Bhanta alias Bhagwanta were committed to the Court of Sessions at Etah to take their trial under S. 302, I. P. C.

Mr. Iftikhar Hussain, Additional Sessions Judge who heard the case, acquitted Buddha, Chand and Bhanta. He convicted Mt. Khuban and sentenced her to death.

Mt. Khuban has appealed to this Court and the record has been submitted by the Sessions for confirmation of sentence.

The Local Government has appealed from the judgment acquitting Bhagwanta alias Bhanta. No appeal has been preferred against the order of acquittal regarding Chand and Buddha.

On the night between 14th and 15th January 1929, one Mt. Jawwa and her two infant daughters aged seven years and five months respectively were murdered. It is clear that the murder was effected by more than one person. It was a cold-blooded murder, a murder premeditated, organized and executed with fiendish malignity.

Syed Mohammad Mohsin Jaffery, Sub-Inspector posted at the Etah Kotwali received information through Ishtiaq Ali, constable, on 15th January, 1929 that the corpses of a woman and two girls had been recovered from a well. The

well was beyond the houses of Mt. Khuban and Mt. Jawwa deceased and beyond the octroi post.

There is nothing on the record to indicate the distance between the well and the house of Mt. Khuban.

The bodies were sent in usual course to the Civil Surgeon of Etah for a post-mortem examination. The post-mortem examination was held on 16th January 1929. The Civil Surgeon was of opinion that the death of the two small girls was caused "possibly" by strangulation. In the case of Mt. Jawwa, he was of opinion that cause of death was "probably" a deep wound on the neck of Mt. Jawwa.

Mt. Jawwa had no less than seven incised wounds. One of these was a large gaping incised wound 8" long from ear to ear cutting the neck above the larynx, cutting the upper part of oesophagus and deep vessels of the neck on either side notching the spine behind. It is not impossible that this wound was caused by a butcher's knife used with tremendous force. The four incised wounds on the fingers indicate that there may have been a struggle.

The age of Mt. Jawwa was about 35 years. Her first husband was Azim Ullah. Upon the latter's death, she married one Chand, who was a different person from Chand the accused. Upon the death of the second husband, she had some connexion with Chand the accused. She left Chand and then she either had nikah with or passed into the keeping of Akbar, butcher, husband of Mt. Khuban.

Akbar with his wife Mt. Khuban lived in one house. Mt. Jawwa with her children, one of whom was a grown up lad called Mahboob, lived in a different house.

When Mt. Jawwa left Chand the accused, the latter could not be expected to treat the matter with philosophical equanimity. He might well have conceived a grievance against Mr. Jawwa on that account.

Mt. Khuban appears to have conceived an intense hatred towards Mt. Jawwa, who was her rival in the affection of her husband.

This case is illustrative of the limits of brutal savagery to which a woman may be driven whose passions have been roused by jealousy.

On the night between 14th and 15th January 1929, there was a wedding, a butchers' wedding in Barla in the district of Aligarh. Most of the butchers of Etah had gone to this wedding and Akbar, the husband of Mt. Khuban had also joined the throng. The time was opportune. The coast was clear. Mt. Khuban went to Mt. Jawwa's house and entreated her to come to her house and sleep for the night, as she was alone. The instinct of Mt. Jawwa warned her and she at first refused; but she was prevailed upon by the entreaties of Mt. Khuban and went to Mt. Khuban's house with her two daughters; on this fateful night Mt. Jawwa and her two daughters did not emerge from that house alive.

The evidence of Mahboob is of some importance. He times the first visit of Mt. Khuban to Mt. Jawwa's house at about 10 p. m. He gives the details of the conversation between Mt. Khuban and Mt. Jawwa and how the latter was prevailed upon to go to Mt. Khuban's house. He is positive that his mother and two sisters accompanied Mt. Khuban to her house and did not come back in the morning. He saw Mt. Khuban standing on the chabutra of one Fakirey. Mt. Khuban asked him where his mother was. He replied that she might have gone somewhere. Mt. Khuban said that Mt. Jawwa might have been taken by some orderly peon to cook food at the house of some officer.

Mr. Jaffery, the investigating officer had examined the house of Mt. Jawwa and he found nothing in the house to indicate that any murder with violence had been committed there. He next visited the house of Mt. Khuban. He found that the ground of a kotah and the thatch in front of it had been recently plastered. He found blood stains on the wall of the kotah and blood marks on a corner of a doorleaf of the room on the inside. He also noticed blood marks on the patti and band of a cot in the kotah. He also recovered a knife having faint marks of blood. He took the earth of the wall and cut a specimen out of the doorleaf. These were sent to the Chemical Examiner and the Imperial Serologist in due course. Upon analysis, it was discovered that the stains were those of human blood.

The above evidence is sufficient to

bring home the guilt to Mt. Khuban. She had motive for the offence. Her house was searched shortly after the recovery of the corpses. The recent plastering of certain portions of the room and the finding of stains of human blood on the wall and the doorleaf of the said room and also on the cot are unexplained. It is proved that the stains were of human blood and not of goat's blood which one might expect to find in the house of a butcher. It is further proved that Mt. Khuban had decoyed Mt. Jawwa to her house and that Mt. Jawwa and her two infant children were not seen returning from the house alive.

On 19th January 1929, the statement of Mt. Khuban was recorded by a Magistrate of the First Class under S. 164, Criminal P. C. This statement is full of circumstantial details. The Magistrate, who took down the statement, certifies that the statement is voluntary. There is nothing on the record to suggest that this statement was extorted by the police by threat or ill treatment or procured by persuasion.

On the same day, the aforesaid Magistrate recorded the statement of Bhagwanta alias Bhanta. There is nothing on the record to indicate that this statement was not voluntary.

The statements of Mt. Khuban and Bhanta agree on all material points. There are certain variations in the two statements which are indicative of the fact that the statements were not the result either of preconcert or tutoring.

Mt. Khuban states that about two or three years before the murder, there was liaison between Chand accused and Mt. Jawwa. Mt. Jawwa gave up Chand and contracted an intimacy with her husband Akbar. She became pregnant by him and Akbar married her. For this reason, Chand began to cherish ill-will. When her husband was away from home, Chand sent Bhanta Ahir to her. Bhanta instigated Mt. Khuban to go and to bring Mt. Jawwa to her place to sleep for the night. Bhanta and Mt. Khuban went to take Mt. Jawwa. During her absence from home Chand was sitting on the roof of her house in the company of another Ahir. When Mt. Jawwa was coming to the house of Mt. Khuban, Bhanta was at the head of the party. On reaching Mt. Khuban's house Mt. Khuban took one charpai and Mt. Jaw-

was with her two daughters went to sleep on the other charpai in the same room. Bhanta, Chand and another Ahir, unnamed, killed Mt. Jawwa. Mt. Akbari woke up and wept. Mt. Khubān called the girl to her but Chand caught hold of the girl, sent for a rope through Bhanta Ahir and throttled Akbari. Chand also killed Anwari by throttling her. Chand tied the dead body of Mt. Jawwa into a bundle and made Mt. Khubān to hold the knots of the bundle. The three dead bodies were carried out of the house in two bundles. When they were carrying the bundles, Chand told her that she should whitewash the house so that there be no trace of blood in the house. Chand also told her that she should bury the knife with which the murder had been committed. She whitewashed the house but did not bury the knife. She washed the knife and kept it. She admits having shown marks of blood to the Sub-Inspector. She admits having pointed out the charpai on which the murder was committed. She also admits that she made over the knife to the Sub-Inspector.

The aforesaid confession is corroborated in material particulars. The corpses were found in two bundles. The house was found by the Sub-Inspector newly whitewashed and plastered. A blood stained knife was found in the house and this was given by Mt. Khubān to the Sub-Inspector. The statement of Mt. Khubān is self-incriminating. She admits having decoyed Mt. Jawwa to her house; she knew that Mt. Jawwa was going to be murdered. She helped in the tying up of the bundles. She was present when Chand knifed Mt. Jawwa and throttled the two daughters. The chain of evidence against her is complete.

If ever there was a case which deserved capital punishment this was one. We dismiss Mt. Khubān's appeal, affirm the conviction and sentence and direct that the same be carried out according to law.

We are clearly of opinion that Bhagwanta alias Bhanta has been improperly acquitted by the Court below. The learned Sessions Judge was wrong in holding that the statement of Mt. Khubān under S. 164, Criminal P. C., was not a confession. We accept the defini-

tion of confession as given by Stephen and which has been quoted in the judgment of the trial Court :

"A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed the crime."

We have quoted the major portion of the statement of Mt. Khubān and it would appear from the same that the statement fits in with the definition of "confession" as given by Stephen. The statement is self-incriminatory and it also implicates Bhanta. The self-implication is the guarantee for the truth of the accusation against the co-accused and may be taken to be a substitute for the sanction of oath. Under S. 30, Evidence Act :

"When more persons than one are being jointly tried for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such a person as well as against the person who makes such confession."

The confession of Mt. Khubān was affecting herself and also affecting Bhanta. This confession is, therefore, admissible in evidence against Bhanta.

Illustration (b), S. 114, Evidence Act, is an authority for the proposition that an accomplice is unworthy of credit unless he is corroborated in material particulars.

We have already shown above that the statement of Mt. Khubān is strongly corroborated in material particulars by clear and cogent evidence, the authenticity of which is not open to doubt.

The statement of Mt. Khubān chimes in with all the important particulars narrated by Bhanta in his confession before the Magistrate. It is true that both these confessions were subsequently retracted. It was observed by a Full Bench of this Court in *re, Raggha v. Emperor* (1) at (p. 833 of 23 A. L. J.) that a confession in its normal state is an entirely suspicious article and that a retracted confession is worse.

There is nothing in law to prevent a Court from convicting a person upon a confession which has been subsequently retracted provided that the Court is convinced that the statement is voluntary and true. If there be anything from the barest suspicion to positive evidence that the confession had been

obtained by threat, persuasion, etc., such confession has, of course, to be discarded. But where the confession is made by a person who is *sui juris* before a Magistrate, in an atmosphere, untainted by the influence of the police or by any other influence and there are no suspicious features about it, there does not seem to be any reason why the statement should not be accepted. Where two such confessions are made by two different persons and both of them are self-incriminatory and each of them affects the other co-accused, this is an important circumstance, which may be and ought to be taken into consideration at the trial.

Bhagwanta states that in the month of Asarh, Akbar butcher's wife told him that she had a co-wife and asked him to do such a thing that is, to kill the co-wife and promised to pay him some money. Bhagwanta said that it was beyond his power to commit such a deed. She said that she had a man in hand and asked Bhagwanta to take one man in addition. Bhagwanta refused. On the day when the murder was committed, Akbar Ali, the husband, had gone out. His wife met Bhagwanta at noon and told him:

"Now is the chance to do such a thing my husband is not at home. Kill my co-wife now."

At 10 or 11 O'clock at night, he found there Chand and Buddha. She concealed the three men in the house and went to call her co-wife. The co-wife with her two daughters came. Akbar's wife lay down on one charpai. The co-wife with her two daughters lay down on the other charpai and fell asleep. Chand had kept a knife under the charpai of Akbar's wife. Akbar's wife came and informed these people that her co-wife had gone to sleep. "Kill her now." Chand took up the knife, pressed the throat of the co-wife and plunged the knife into her person. Akbar's wife throttled the two daughters. The corpses were tied into two bundles:

"Akbar's wife, Chand and I tied the dead body into two bundles one of which was made of a printed sheet and the other of a red sheet of quilt."

Buddha, Chand and Bhagwanta went away taking the bundles with them.

The statements of Bhagwanta and Mt. Khuban agree in important particulars but there are variations. Al-

though each of the accused persons assigns to himself or herself a less prominent part, the statements are clear acknowledgments of participation in the murder of Mt. Jawwa and her two daughters.

The confession of Bhagwanta is corroborated by certain particulars:

(1) There is the medical evidence that Mt. Jawwa was killed with a knife and her two daughters died of strangulation.

(2) Corpses in two bundles were recovered from a well.

(3) A knife was recovered from the house of Mt. Khuban, which bore stains of human blood.

(4) The murder had taken place inside Mt. Khuban's house as was proved to a demonstration by the condition of the room, the recent plastering and whitewashing and from the things recovered in the room.

Mt. Khuban was actuated by jealousy, a frailty common to women. Bhanta was a hired assassin. He got Rs. 10 from Mt. Khuban as blood money—Rs. 10 for three human lives.

It may be incidentally mentioned that Mt. Khuban had made a clean breast of the whole affair to Gulzari and had admitted that Rs. 10 had been agreed to be given to Bhanta as the price of murder.

We have no reasonable doubt that Bhanta alias Bhagwanta took part in the murder and is guilty of an offence under S. 302, I. P. C.

We allow the Government Appeal No. 724 of 1929, set aside the order of the Additional Sessions Judge, dated 28th May 1929, acquitting Bhagwanta. We convict Bhagwanta alias Bhanta under S. 302, I. P. C., and sentence him to death and direct that the said sentence be carried out according to law.

R.M./R.K.

Order accordingly.

1930 Cr. Cases 49

(Allahabad)

YOUNG AND SEN, JJ.

Emperor

v.

Latoor—Opposite Party.

Criminal Ref. No. 503 of 1929, Decided on 12th Sep. 1929, made by Addl. Sess. Judge, Moradabad, D/- 18th July 1929.

Penal Code, S. 212—Accused not knowing that person staying with him is offender—Conviction under S. 212 cannot be sustain-

ed—Offender means person contravening provision of and punishable under criminal law.

A person can be supposed to "know" where there is a direct appeal to his senses. Person "has reason to believe" under S. 26 if he has sufficient cause to believe the thing but not otherwise. The word "offender" used under S. 212 means a person who has contravened the provisions of any criminal law, which is punishable either with death, transportation, imprisonment or fine. Where there is neither affirmative nor any circumstantial evidence to bring home to the door of the accused that he knew or had reason to believe that the person he was harbouring was an offender within the meaning of S. 212, his conviction under S. 212 cannot be sustained. [P 50-C 1 2]

M. Waliullah—for the Crown.

L. M. Roy—for Opposite Party.

Judgment.—This is a reference by the learned Sessions Judge of Bijnor recommending the enhancement of sentence in the case of one Latoor who was convicted by a Magistrate of the First Class under S. 212, I. P. C. and, sentenced to a fine of Rs. 25.

If the conviction was justified, there can be no doubt that the sentence passed by the learned Magistrate was grossly inadequate and the reference made by the learned Sessions Judge was thoroughly justified and proper.

The reference is opposed by Latoor, who is represented by counsel. Mr. Roy challenges the propriety and legality of the conviction of Latoor under S. 212, I. P. C.

The charge preferred against Latoor was that on or about 30th January 1929, he was found concealing and harbouring one Baldewa an absconded "offender" under Ss. 396 and 366, I. P. C. knowing or having reason to believe that the said person was an offender and absconder. We have been taken through the evidence on the record and we do not find that there are any sufficient materials on the record to show that Baldewa had committed an offence under S. 396 or S. 366, I. P. C. We have been referred to the statement of Mt. Bharto who says that she was kidnapped by Baldewa. Baldewa has not yet been tried and the solitary statement of Mt. Bharto as to her being kidnapped by Baldewa does not commend itself to us.

The prosecution is confronted with another difficulty. There is neither affirmative nor any circumstantial evidence to bring home to the door of Latoor that he knew or had reason to

believe that Baldewa was an offender within the meaning of S. 212, I. P. C. A person can be supposed to "know" where there is a direct appeal to his senses. A person "has reason to believe" under S. 26, I. P. C. if he has sufficient cause to believe the thing but not otherwise.

It may be that proclamations were issued broadcast against Baldewa. It is possible that his property may have been attached but it does not follow therefrom that Baldewa was an offender. The word "offender" used under S. 212, I. P. C. means a person who has contravened the provision of any criminal law, which is punishable either with death transportation, imprisonment or fine. Upon the evidence on the record, it is impossible for us to come to the conclusion that Baldewa was an "offender" under S. 212, I. P. C.

The result is that we reject the reference. We set aside the order of the Magistrate, convicting Latoor under S. 212, I. P. C. and direct that the fine if paid should be refunded to him.

R.M./R.K.

Reference rejected.

1930 Cr. Cases 50

(Allahabad)

SEN, J.

P. C. Chaudhri—Accused.

v.

Emperor—Opposite Party.

Criminal Ref. No. 592 of 1929, Decided on 2nd September 1929, made by Sess. Judge, Allahabad, D/- 10th August 1929.

Motor Vehicles Act, S. 16—U. P. Motor Vehicles Rules, R. 11—R. 11 is not applicable to cars registered outside United Provinces.

There is nothing in the wordings of these rules to show that R. 11 applies to cars registered outside the United Provinces. It is clear from the definition of "Registering Authority" in R. 3 that this expression, as used in R. 11, means the authority who had registered the car under the rules in force in the United Provinces. Where therefore the applicant's car is not registered in the United Provinces, but brought there for a short period, R. 11 has no application to his case. [P 51 C 1]

Judgment.—This is a reference by Mr. Kisch, the learned Sessions Judge of Allahabad with the recommendation that the order passed by a Magistrate, First Class of Allahabad convicting one Mr. P. C. Chaudhri under S. 16, Motor Vehicles Act, 1914, be set aside.

The learned Sessions Judge has given excellent reasons in support of his reference. The conviction is clearly illegal and must be set aside.

Mr. P. C. Chaudhri, resident of No. 4 Bankshall Street, Calcutta, came to Allahabad on a short visit. He brought with him his motor car bearing No. 23,047. On 14th April 1929, a constable on traffic duty demanded the production of the registration certificate. The Line Inspector who acts under the orders of the Superintendent of Police also made a similar demand. The certificate of registration was not produced. The result was that he was prosecuted for having contravened the provisions of R. 11 of the United Provinces Motor Vehicles rules and fined Rs. 5.

Rule 11 of the United Provinces Motor Vehicles rules provides as follows:

"Form of certificates and card; their production on demand. Certificates of registration and registration cards shall be in the forms provided in Schs. B and C, and shall be signed by the registering authority or by a person duly authorized by him in this behalf, and the owner of the vehicle in respect of which a certificate of registration has been issued shall be bound to produce the certificate when required so to do by the registering authority."

The "registering authority" referred to has been defined in the rules as meaning the Superintendent of Police, or an Assistant or Deputy Superintendent or Inspector of Police authorized by the Superintendent of Police to perform the duties of the "registering authority" under these rules. It is to be observed that there is nothing in the rules in force in the Presidency of Bengal corresponding to R. 11 of the United Provinces rules. The case lies within a very narrow compass. Do the United Provinces rules apply to a car registered in Calcutta and which has been brought to the United Provinces for a short duration? The learned Sessions Judge observes as follows:

"There is nothing in the wording of these rules to show that R. 11 applies to cars registered outside the United Provinces. It is clear from the definition of "registering authority" in R. 3 that this expression, as used in S. 11, means the authority who had registered the car under the rules in force in the United Provinces and as the applicant's car was not registered in the United Provinces, in my view, R. 11 has no application to his case."

I am in complete agreement with this view. I therefore accept the reference upon the ground set out in the referring order of the learned Sessions Judge

dated 10th August 1929, set aside the conviction and sentence under S. 16, Motor Vehicles Act coupled with R. 11, of the United Provinces Motor Vehicles rules and direct that the fine, if paid be refunded.

R.M./R.K. Conviction set aside.

1930 Cr. Cases 51

(Allahabad)

SEN, J.

Lala Bansi Dhar—Applicant.

v.

Brij Basi Lal—Opposite Party.

Criminal Ref. No. 482 of 1929, Decided on 14th August 1929, made by Sess. Judge, Mainpuri, D/- 13th June 1929.

Criminal P. C., S. 517 — Where house is not property in respect of which offence is committed no order under S. 517 can be made.

A house was in the occupation of A. It was alleged that one B was the owner of the house and C was in possession of the house on B's behalf. Later on B applied to the police to be put in possession of the house as C had disappeared. The police put B in possession. B sold the house to D. Thereupon A's son E instituted a complaint against D and others charging them with offences under Ss. 143, 380 and 448, Penal Code. Before filing complaint the police took possession of the house. The accused were acquitted. But during pendency of the case the key of the house was by order of a Magistrate delivered to E. D presented an application for an order directing E to hand over the key to him.

Held: that E's complaint being dismissed and the accused being acquitted it could not be said simply by reason of the fact that one of the charges was under S. 448, Penal Code, the house was a property in respect of which an offence was committed. The house therefore was not a property regarding which an offence was committed within the meaning of S. 517. The order as to the key was passed by a competent Court and E's possession of the key was not unlawful. Moreover when the Court was moved for an order directing E to hand over the key to D neither the house nor the key was in the custody of the Court. The Court therefore had no power to make an order under S. 517 in favour of D. [P 52 C 2]

Nehal Chand—for Applicant.

K. D. Malaviya—for Opposite Party.

Judgment.—This is a reference by the learned Sessions Judge of Mainpuri recommending that an order passed by Babu Ganga Prasad, Magistrate, First Class, on 15th January 1929, be vacated and that the said Magistrate be directed under S. 517, Criminal P. C., to recover a key from the possession of Brij Basi Lal and make over the same to Lala Bansi Dhar.

There is a house at Shikohabad which was in the occupation of Mr. Radha Kishun, pleader. Radha Kishun died in 1908.

It is alleged that one Govind Prasad was the owner of this house and that he had let out the same to one Mulua. It is further alleged that Mulua had continued in possession of this house on behalf of Govind Prasad between the years 1908 and 1920.

Trouble began in 1924 when Govind Prasad applied to the Mainpuri police to be put into possession of this house, inasmuch as the tenant Mulua had disappeared from the scene and had locked up the house. The police appeared to have put Govind Prasad into possession of this house.

On 20th September 1927, Govind Prasad sold the house to Bansidhar. On 26th September 1927, Brij Basi Lal, son of Radha Kishun, instituted a complaint in the Court of Mr. Jwala Prasad, Magistrate First Class, against Bansidhar and 17 others charging them with offences punishable under Ss. 143, 380 and 448, I. P. C. Before the filing of the complaint the police appear to have taken possession of the house and to have locked the house.

The Magistrate, upon the receipt of the police report, dismissed the complaint under S. 203, Criminal P. C., on 28th March 1928. The key of the house, however, continued to remain in the possession of the police. Upon an application for revision filed by Brij Basi Lal, the learned Sessions Judge of Mainpuri set aside the order dismissing the complaint and directed further enquiry. Bansidhar's application to the High Court against the order of the Sessions Judge was rejected. Under the orders of the District Magistrate of Mainpuri, the case was transferred for trial from the file of Babu Jwala Prasad to that of Mr. Kali Charan, a Tahsildar Magistrate. During the pendency of the case before Mr. Kali Charan, the key of the house was by the orders of Mr. Kali Charan delivered to Brij Basi Lal. The case was eventually transferred to Mr. Ganga Prasad, a Magistrate of the First Class, who on 29th December 1928 acquitted the accused.

An application was presented by Lala Bansidhar in the Court of Mr. Ganga Prasad for an order directing Brij

Basi Lal to hand over the key to him, which had remained in his possession since the order of Mr. Kali Charan, the Tahsildar Magistrate. This application was refused by Mr. Ganga Prasad, mainly upon the ground that the key having been put into the possession of Brij Basi Lal by a competent authority, he had no jurisdiction either to revise or to over-set the said order. On an application for revision filed by Lala Bansidhar the learned Sessions Judge of Mainpuri has referred the case to this Court under S. 438, Criminal P. C.

The title to the property is by no means clear. The complaint of Lala Brij Basi Lal dated 26th September 1927, having been dismissed and the accused acquitted, it cannot be said that simply by reason of the fact that one of the charges preferred was under S. 448, I. P. C., the house was a property in respect of which an offence had been committed. The allegation of the complainant that the accused persons had by use or by show of criminal force taken possession of the house did not find favour with the trial Court and was discredited.

The house was not a property regarding which an offence was committed within the meaning of S. 517, Criminal P. C. The house was at one stage, in custodia legis, the police being the agents of the Court. The possession of the key may under certain circumstances be evidence of symbolical possession of the house itself.

Mr. Kali Charan, the Tahsildar Magistrate, at one time had the seisin of the entire case by reason of the order passed by the District Magistrate of Mainpuri. It was within his competence to transfer the possession of the house to such person as he considered to be desirable and fit. He having directed that the key of the house should be transferred to Brij Basi Lal, it could not be said that Brij Basi Lal's possession of the key was unlawful and was open to challenge either on the ground of illegality or for want of any jurisdiction in Mr. Kali Charan, the Tahsildar Magistrate. The fact, however, remains that on 15th January 1929 or thereabout, when Mr. Ganga Prasad was moved for an order directing Brij Basi Lal to hand over the key to Bansidhar neither the house nor the key was in the custody of the Court. The Court therefore had no power to make an order

under S. 517, Criminal P. C., in favour of Bansidhar.

Mr. Nehal Chand in support of the reference has called my attention to S. 516 (a), Criminal P. C. That section has no application to the facts of the present case because neither the house nor the key is:

"property regarding which any offence appears to have been committed or which appears to have been used for the commission of an offence."

The key moreover was not produced before the criminal Court at any stage of the enquiry or trial.

My attention has also been drawn to S. 561 (a), Criminal P. C. and it has been argued that to allow Brij Basi Lal to retain possession of the key amounts to an abuse of the process of the Court and the ends of justice are likely to be met by restoring the status quo ante.

It is difficult, in view of the facts of this case, to say as to whether justice lies on the side of Lala Bansidhar. The title to the property cannot be effectively determined by the criminal Court. Any party aggrieved by the order of Mr. Ganga Prasad, dated 15th January 1929, is entitled to seek his proper remedy before the right forum. I refuse to entertain the reference. Let the papers be returned.

R.M./R.K.

Reference dismissed.

1930 Cr. Cases 53

(Allahabad)

YOUNG AND SEN, JJ.

Emperor

v.

Kudua Bari — Accused — Opposite Party.

Criminal Revn. No. 369 of 1929, Decided on 6th September 1929, from order of Sess. Judge, Mainpuri, D/- 21st February 1929.

Criminal P. C., S. 110 — Object of S. 110 is to offer protection to public — Evidence on question of repute should be tested in light of tangible facts.

The object of S. 110 is to offer protection to the members of the public and is not intended to be an engine of oppression. The Courts below have got, in all cases coming up either under Ss. 108, 109 or 110, to pay strict regard to the question whether the evidence produced is legal evidence in the case on the question of repute. Nothing is more easy than to put forward a general charge against a certain person that he is a burglar and thief. The said statement has got to be tested in the light of tangible facts and particulars if there are any such

facts to support the story. If there are no such facts, the evidence loses its value.

[P 53 C 2; P 54 C.1]

U. S. Bajpai—for the Crown.

Jaikishan Lal—for Opposite Party.

Judgment.—Proceedings have been instituted against Kudua Bari under S. 110, Criminal P. C., on the allegation that he was a habitual burglar and thief and that his character was so desperate and dangerous that it was a menace to the community at large to allow him to remain without being bound over. Mr. Budh Sen, Magistrate, First Class of Mainpuri, under his order dated 22nd January 1929, held that the accused was a habitual thief and burglar but there was no evidence that he was so desperate and dangerous as to justify his being bound over on the second ground. The learned Magistrate ordered the accused to execute a personal bond for Rs. 200 with two sureties each in the same amount to be of good behaviour for a term of three years. The accused was not in a position to furnish security and the matter was placed before the learned Sessions Judge under S. 123 (2), Criminal P. C.

The judgment of the trial Court is an excellent model of what a judgment should not be. It is summary sketch and most unconvincing. Without caring to weigh the value of the evidence and without trying to consider whether the evidence produced before him was legal evidence of repute or otherwise, he has pronounced judgment in this case.

The learned Sessions Judge has taken considerable pains in analysing and dissecting the evidence and in testing their value. The whole evidence in this case may be placed under two groups: (1) evidence which cannot be treated as evidence of repute and is no evidence at all, and (2) evidence which is legally admissible but is not sufficient or reliable. The learned Sessions Judge has sifted this evidence very carefully and we have not the slightest doubt as to the correctness of his conclusion.

The object of S. 110, Criminal P. C., is to offer protection to the members of the public and is not intended to be an engine of oppression. The Courts below have got, in all cases coming up either under Ss. 108, 109 or 110, Criminal P. C., to pay strict regard to the question whether the evidence produced is legal evidence in the case on the question of re-

putes. Nothing is more easy than to put forward a general charge against a certain person, that he is a burglar and thief. The said statement has got to be tested in the light of tangible facts and particulars if there are any such facts to support the story. If there are no such facts, the evidence loses its value.

The maintenance of a history-sheet may have its uses and a history-sheet may in some cases form good evidence against the accused. The difficulty which we experience in case after case is that it turns out that the history-sheet is no more than an ex parte proceeding and that the accused does not know upon what ground the history-sheet has been opened against him, nor does he know what facts it contains.

We are in entire agreement with the view of the learned Sessions Judge and are clearly of opinion that the present application for revision ought not to have been made. The learned Government Advocate as usual with him has placed the case for the Crown in its true and correct perspective. We dismiss this application.

R.M./R.K. *Application dismissed.*

1930 Cr. Cases 54

(Allahabad)

YOUNG AND SEN, JJ.

Emperor

v.

Narbada Prasad and another — Respondents.

Criminal Appeal No. 304 of 1929, Decided on 10th September 1929, against order of Magistrate, First Class, Allahabad, D/- 28th January 1929.

(a) District Boards Act, S. 34 — "Interest in contract" means financial interest with profit.

The expression "interest in a contract" means a financial interest with profit or hope of profit from the contract as the object of the person interested. This must be inferred from the facts in evidence in each case. [P 54 C 2]

(b) Criminal Trial—Evidence—Crown can rely on incriminatory evidence found in house search of accused.

The Crown is entitled to rely upon any material evidence of an incriminatory character found in the house of an accused person as the result of house search. [P 57 C 2]

(c) Evidence Act (1872), S. 34 — Necessity of formal proof that books are kept in course of business has been dispensed with.

Under the old Evidence Act of 1855 books to be admissible had to be "proved to have been regularly kept in course of business. In the later Act I of 1872 the words "proved to

have been" have dropped. This amounts to material alteration in the law. The legislature has dispensed with the necessity of any formal proof that the books were kept up in the regular course of business. It is a matter of intrinsic evidence as to whether the books in question were books of account and regularly kept in the regular course of business. The only limitation imposed by the statute is that the statement contained in the account books "shall not alone be sufficient to charge any one with liability." The value of the entries is corroborative and cannot be used as independent evidence to charge any person with liability: 18 All. 92, Rel. on; 27 Cal. 118, Ref; 4 Bom. 576, Dist. [P 57 C 2, P 58 C 1]

(d) Evidence Act, S. 68—Account book is not document required by law to be attested.

An account book is not a document which is required by law to be attested and S. 68 can have no application to a case in which such account book is produced in evidence. [P 58 C 1]

(e) Criminal Trial—False allegation in defence against respectable person of conspiracy to bring false charges, aggravates original offence.

False allegation against innocent and respectable persons of criminal conspiracy to bring false charges, when used as defence aggravate greatly the original offence. This type of defence is much too common in India and it ought to be recognized that where a defence of this character is obviously false, that fact ought to be taken into consideration in awarding punishment. [P 61 C 1, 2]

U. S. Bajpai—for the Crown.

K. N. Katju and A. P. Pandey and Gaya Prasad—for Respondents.

Judgment.—Pandit Narbada Prasad and Jagannath Prasad alias Kunnoo were charged before Mr. S. W. Bobb, First Class Magistrate of, Allahabad, under S. 168, I. P. C., and Ss. 168, I. P. C., and 168/109, I. P. C., for contravention of S. 34, District Boards Act of 1922. The Magistrate acquitted both the accused.

Section 34, District Boards Act reads as follows:

"(1) A member of the Board who otherwise than with the permission in writing of the Commissioner, knowingly acquires or continues to have directly, or indirectly by himself or his partner, any share or interest in any contract or employment with, by or on behalf of the Board, shall be deemed to have committed an offence under S. 168, I. P. C."

An "interest in a contract" we hold to mean a financial interest with profit or hope of profit from the contract as the object of the person interested. This must be inferred from the facts in evidence in each case.

In the month of January 1928, the District Board of Banda was suspended by order of the Government. It ap-

appears to us, after reading of the activities of this Board in this case, that the Banda District Board might have been suspended earlier with great advantage to the citizens of Banda. The administration of the District Board was placed in the hands of the District Magistrate, who appointed Mr. Chakarvarti as Official Chairman of the Board. Mr. Chakarvarti, on investigation into the affairs of the District Board, thought it proper to request Rai Bahadur Thakur Jaswant Singh, a Special Magistrate of Banda, to investigate the connexion of Narbada Prasad, who had been Chairman of the Mau Sub-Committee of the District Board, with a contract for metalling one mile of a road in the Mau Sub-Division which had been given to the second accused, Jagannath Prasad. It is to be noted that the investigation was started officially and not at the instigation of Thakur Jaswant Singh. On 24th March 1928, Thakur Jaswant Singh had finished his investigation and made his report in this matter to Mr. Chakarvarti. The police then took the matter in hand and as a result the Government sanctioned the prosecution of Narbada Prasad on 7th July 1928. In view of the nature of the defence in this case to which we will allude hereafter these dates are important. Mr. Vishnu Sahai, a First Class Magistrate of Allahabad, originally commenced the hearing, but, on an application for transfer being made to the High Court, the case was ordered to be transferred to Mr. S. W. Bobb.

The evidence produced by the prosecution consisted of :

(a) The circumstances surrounding the grant of the contract to Jagannath and the treatment accorded to Messrs. Mohammad Sharif and Gulab Chand, who had in January 1927 originally tendered for the contract and had their tender accepted by the Engineer, subject to the sanction of the Board which was never granted.

(b) The evidence of 13 labourers, who were engaged in the construction of the road or in collecting kankar who gave evidence to the effect that they had been engaged by Narbada Prasad and paid by him either on the road or at his house.

(c) The evidence of 5 cart-men, who said that Narbada Prasad had hired

their carts and paid them the agreed sums.

(d) The evidence of 3 boatmen, who carried the kankar used on the road, that their boats were engaged by Narbada Prasad and that they were paid by Narbada Prasad at his house.

(e) The evidence of Ram Kumar, the ferry contractor of Rajpur Ghat, who said that Narbada Prasad's kankar was conveyed by the boatmen, and who gave evidence that Narbada Prasad's servant used to look after the work, and that Narbada Prasad himself used to come as well, and that he used to see the workmen at the house of Narbada Prasad. He also said that Narbada Prasad himself had told him that he had taken the contract.

(f) The evidence of Munni Lal, whose house was on the actual portion of road being remetalled, who said that Narbada had told him that he was going to take the contract for the road, and that Jagannath had told him he had been given a four anna share in it. He also saw the labourers at Narbada Prasad's house. He deposed that Jagannath was a man who could not possibly undertake the contract, as his financial means were very limited, and that previously to this contract Jagannath had been engaged by his brother-in-law at Rs. 15 a month.

(g) The evidence of the karpardaz of Mohammad Sharif and Gulab Chand, who had originally tendered for the said contract. He says that, after the obstacles which had been put in the way of Mohammad Sharif and Gulab Chand, and at the time when it appeared fairly obvious that the delay which they were subjected to was deliberate, Narbada Prasad one day told him on the road that :

"he wanted to take this theka in the name of Jagannath. How have you butted in? You give up this or I will cause trouble and you will lose."

(h) The formal evidence as to the proof of the documents of the District Board.

(i) Police and search witnesses.

(j) And, lastly, the very important documentary evidence which was discovered in the search of the houses of Narbada Prasad and Jagannath. These documents consisted of muster rolls, in which names of the labourers

on the contract appear with the amounts which were paid to them, a cash book consisting of entries from 18th February 1927 down to 17th July 1927, setting out the payments made by Narbada Prasad for the purposes of the contract, and also debiting to the account in favour of Narbada Prasad a sum of Rs. 1,800, to which we will allude later. This cash book is of most vital importance and, in our view, it is impossible for any one having this evidence before him to come to any other conclusion but that Narbada Prasad was interested in the contract within the meaning of S. 34, District Boards Act. There was also a ledger account, which extracted from the cash book all the payments made by Narbada Prasad from February to July, amounting in all to Rs. 2,960-12-6, on account of this contract. (The contract price to be paid to Jagannath was Rs. 4,995). The cash book, ledger and muster roll were discovered at Jagannath's house. Jagannath admits that the writings in Muris and the cash book and ledger are his. At the house of Narbada Prasad was discovered a diary in the handwriting of Narbada Prasad himself, in which there were entries which showed conclusively that Mahadeo Pandit and Sain who were employed on the contract, were his servants and that he was in the habit of paying small amounts to Jagannath himself. It was admitted that Mahadeo and Sain were the servants of Narbada Prasad, and it was proved that Mahadeo wrote a large part of the accounts. A receipt for the sum of Rs. 100, which was the deposit made on Jagannath Prasad's tender for this contract, was discovered in the pocket of Narbada Prasad.

With regard to the proceedings of the District Board previous to the giving of the contract in question to Jagannath in May 1928, it is unnecessary for us to set the evidence out in detail, as this is all given in the record; but there can be no doubt that every difficulty was put in the way of Mohammad Sharif and Gulab Chand, whose tender in January was lower than that of Jagannath. Orders were given to them by the Engineer to start work in expectation of the sanction of the Board in that month. An agreement for the contract was executed by these contractors in which they agreed to finish the road by the end of March

1927. They could not, however, get definite orders from the Board sanctioning the contract. Application after application was made by them to the Board for clear orders: see letter from Wazir Beg, dated 14th April 1927; but no definite reply could be obtained by them. Eventually, through disgust, and because the date by which they had agreed to finish the road had long since expired, these contractors wrote to the Board giving up the contract. With regard to this, an important letter was written by their agent Shahid Husain on 27th June 1927, one year before this prosecution was commenced to the Engineer of the District Board, in which he sets out their complaint and made the definite allegation that:

"Pandit Narbada Prasad, Chairman, Sub-Committee, Mau having taken the contract in the name of his man, took possession of the entire material belonging to us."

The Engineer sent on this letter to the Chairman of the District Board with a note which dealt only with the amount of kankar in Mohammad Sharif's and Gulab Chand's bill and made no observation upon the very important allegation against Narbada Prasad and Jagannath. It is further to be noted that, although this letter was placed before the Chairman of the Board, no reply was received by these contractors, and no denial was made of the serious allegations contained in the letter. It appears to us that the only explanation of this can be that both the District Engineer and the Chairman knew the position very well and did not trouble to make a reply. On 10th May, Mohammad Sharif retired from the contract, and it is not unimportant to note that, although from January to May the sanction of the Board could not be obtained for Mohammad Sharif and Gulab Chand, in 24 hours the contract for Jagannath was sanctioned. It is also to be noted that, although security for completion of the contract had been taken from Mohammad Sharif, none was taken from Jagannath. We are satisfied that influences behind the scene were being used to prevent Mohammad Sharif and Gulab Chand doing the work, and to obtain the contract for Jagannath.

As to the evidence of the labourers on the road, their evidence was clear and was not shaken in cross-examination. It is to be noted that in one of two cases,

where these witnesses gave particularly strong evidence the Magistrate put a note at the bottom of the evidence of "unsatisfactory demeanour." The only suggestion in cross examination against these witnesses was that they were either the tenants of Thakur Jaswant Singh, or of Sheo Kunwar, against whom it was alleged by the defence that the prosecution was entirely due to their enmity. It is important to note as regards this allegation that Thakur Jaswant Singh and Sheo Kunwar are the big zamindars in the neighbourhood and it would be only natural that the majority of the labourers employed should be their tenants. The Magistrate dismisses this class of evidence on the ground that "they are men of absolutely no status," a wholly unsatisfactory and unjudicial reason.

As regards the cartmen, their evidence too was unshaken. The learned Magistrate dismisses this evidence on the ground that on the muster roll found in the house of Jagannath their names do not appear, and that they were "evidently tutored witnesses." As the muster roll apparently deals solely with the labourers engaged in the contract, one would hardly expect that independent carters would appear on this roll.

There is no reason to disbelieve the evidence of the boatmen.

As regards the evidence of Ram Kumar, the learned Magistrate rejects it on the ground that in some case, in which this man had given evidence, the Magistrate who heard the case, and whose judgment is exhibited in the record, commented adversely upon him as a man:

"who haunts the Court of the Special Magistrate (Thakur Jaswant Singh) and lives by either standing security to or by giving evidence for the parties in that Court."

It is to be noted that the Magistrate who made this comment does not give any clue in his judgment to the evidence on which he so found. Mr. Bobb dismissed this witness with the remark:

"He is evidently another hanger on in the Court of the Special Magistrate (Thakur Jaswant Singh)."

We will deal with the allegations against Thakur Jaswant Singh hereafter.

The evidence of Munni Lal appears to us to be important and reliable, and yet his evidence is discarded on the ground that "he is Thakur Jaswant Singh's man."

We are satisfied that the oral evidence alone is sufficient to bring home the charge to the accused.

With regard to the documentary evidence a preliminary objection has been taken by Dr. Katju that the account books Exs. G-18 and G-20 are not admissible in evidence for want of formal proof. It cannot be questioned that the Crown is entitled to rely upon any material evidence of an incriminatory character found in the house of an accused person as the result of house search. If Exs. G-18 and G-20 directly or indirectly connect Jagannath Prasad with the offence charged, the fact that those documents were found in the house of Jagannath is itself a circumstance which, if unexplained, may seriously tell against Jagannath Prasad. It has not been suggested in the case that any entries in these documents have been interpolated or fabricated.

Section 43, Act 2 of 1855, provided that:

"Books proved to have been regularly kept in the course of business shall be admissible as corroborative but not as independent proof of the facts stated therein."

Act. 2 of 1855 was repealed and was replaced by the Evidence Act (Act. 1 of 1872). S. 34 of this Act runs as follows:

"Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to enquire, but such statements shall not alone be sufficient to charge any person with liability."

From a comparison of the two sections referred to above, it is manifest that there is a material difference between the two and the change of expression in the later Act, is not a mere variant but amounts to a substantial alteration in the law. Under the former Act, books to be admissible had to be "proved to have been regularly kept in the course of business." In the later Act, the words "proved to have been" have dropped out. The legislature dispensed with the necessity of any formal proof that the books were kept up in the regular course of business. It was a matter of intrinsic evidence as to whether the books in question were books of account and regularly kept in the course of business. It was held by West, J., *In re, Munchershe Begonji v. New Dhurmsey Spinning & Weaving Co.* (1), that only

such books as are entered up as transactions take place that can be considered as books regularly kept in the course of business within the meaning of S. 34, Evidence Act. Their Lordships of the Privy Council did not approve of this ruling and held that it gave a much too limited meaning to the section: *Deputy Commissioner of Bara Banki v. Ram Prasad* (2).

"The only limitation imposed by the statute is that the statement contained in the account books "shall not alone be sufficient to charge any one with liability." If the entries stood by alone, without any independent evidence such as has been produced in this case, the entries could not be treated as sufficient evidence to convict either Jagannath Prasad or Narbada Prasad.

Whether or not the books have been regularly kept in the course of business is a question of fact and this question may be solved by a reference to the entries in the books. We have examined these books of accounts. There are two columns on each page relating to the debits and credits. The entries are duly dated. The cash book begins on each date with the closing balance of the previous date. The entries on each side are totalled at the close of the day and the debits and the credits tally. There is a reference in the cash book to the corresponding entry in the ledger. The entries in the ledger on the debit and credit side agree with the entries in the cash book.

It is clear therefore that these documents are account books regularly kept in the course of business.

The value of the entries is corroborative and cannot be used as independent evidence to charge any person with liability. It was so held in *Dwarka Das v. Sant Bakhsh* (3).

An account book is not a document which is required by law to be attested and S. 68, Evidence Act, has no application. The prosecution do not allege that the documents have been wholly written or have been written in part by any particular person except as to the entry which has been marked as Ex. G. The prosecution have established that the said entry is in the handwriting of Nar-

bada Prasad. As to the rest of the entries in the account books, S. 67, Evidence Act, does not apply.

We hold that the documents in question are admissible in evidence against Jagannath Prasad and Narbada Prasad without any formal proof.

It is to be noted that the documentary evidence completely upsets the evidence that the interest of Narbada Prasad in the contract was merely that of a financier in that he had merely lent money to Jagannath and had no interest in the contract itself. Mr. Bobb says that in this matter Narbada Prasad acted as a banker. No one looking at these accounts could honestly come to this conclusion. The cash book shows that not only did Narbada Prasad pay substantial amounts to Jagannath himself for payment of bills, but that he paid small amounts from one rupee upwards to various individuals on account of this contract, and, when he made these small payments, they were credited to him in the cash book. This cannot possibly be taken to be the action of a man who is simply lending money to the real contractor. It is important to note that Narbada Prasad does not produce any promissory note or other document which he would in all probability have if the transaction was one of an ordinary loan. It is alleged that the loans were merely oral, and that no document was required. This might be so if the sums advanced were one or two sums of, say, Rs. 1,000 or Rs. 2,000. It is an impossible suggestion where money was advanced daily in sums of one rupee upwards. Narbada Prasad must at least have kept some account himself to record the amount if he was only lending the money, and the account found was Jagannath's only. Narbada produces no such record. These accounts corroborate the statement of the workers that they were paid by Narbada Prasad. There is one other curious item in the cash book. On 30th July 1927, the District Council passed a resolution agreeing to pay Rs. 1,800 to Jagannath on account of the contract. This appears, according to the record, to have been paid by cheque on 1st August. There is an exact similarity between the amount paid by the District Board and the amount appearing in the cash book on 17th July. It has been contended by the prosecution, and de-

(2) [1900] 27 Cal. 118=26 I. A. 254=7 Sar. 586 (P.C.).

(3) [1896] 18 All. 92=(1896) A. W. N. 283.

nied by the defence, that this sum of Rs. 1,800 is the amount which was paid by the Board. It certainly was brought into the contract account, and although the dates, as we have set out above, do not coincide, it is probable, in view of the way in which the District Board carried on business, that this amount was indeed the sum received from the District Board. It may be that this amount was paid earlier than the documents show, and that subsequently the matter was put right. It is curious, as regards this sum, that it appears in two amounts Rs. 1,788 debited to Narbada Prasad as against the amounts that he had paid, and Rs. 12, which appears under the heading "Jagannath went to Banda for bringing money." If this really was merely a repayment to Narbada Prasad of a sum lent by him (he having no other connexion with the contract), it is a peculiar thing that a sum of Rs. 12 should be deducted by Jagannath for his expenses in getting the money.

As regards the ledger account, it was contended by Dr. Katju on behalf of Narbada Prasad that as a large proportion of the amount was paid or expended by Narbada Prasad from February to May, and that Jagannath did not obtain the contract until 13th May, therefore, the payments previous to May could not possibly have been on account of Jagannath's contract. It is to be noted that Jagannath had previously held one or two contracts from the Board. There are two observations which we have to make upon this contention of Dr. Katju. Firstly, that if, as we think, appears to be clear from the account, the payments from February to May were made on behalf of this contract, it conclusively proves that Narbada Prasad knew months before Jagannath obtained the contract that he was going to get it. Alternatively, if the earlier payments were not made on behalf of this contract, they were made on behalf of other contracts which Jagannath had from the Board, and therefore would show that Jagannath's previous contracts were also really the contracts of Narbada Prasad. There must have been later accounts kept by Jagannath relating to this contract showing how the final payments by the Board were dealt with. Such accounts would have been of great assistance to the defence if there was only a

loan by Narbada. No later accounts were produced. The inference is obvious.

The receipt for the deposit on the tender of Jagannath was, as already stated, found upon Narbada Prasad, and it is important to note that when Jagannath made his statement before the Magistrate on 15th September 1928, he was asked this question:

"Had you deposited Rs. 100, the earnest money, along with tender, Ex. A-5?"

The reply was:

"As regards this, at this time I do not want to say anything."

Narbada Prasad admitted, in answer to a question before the Magistrate, that this receipt was found on his person; and, when asked if he wanted to state anything more, said, "No. I shall file a written statement." The answer of Jagannath to this question makes us think that he did not, in fact, pay the money and that it was paid by Narbada Prasad and that, therefore, he kept the receipt himself. We have no confidence in the defence evidence as regards this receipt. As regards the financial position of Jagannath, we are satisfied that he was not a man who could undertake a contract of this character. He himself, in a letter to the District Board, calls himself a poor man. There is the evidence of Muni Lal which describes his financial position and to which there was no cross-examination. Neither was Jagannath's brother-in-law called by the defence to deny Muni Lal's statement as to the pay given by him to Jagannath. There is not only the evidence of Narbada's diary of very small payments of one rupee and two rupees being made to Jagannath, but also that of a defence witness who says that he lent Jagannath money in small amounts.

The defence in this case consisted of the evidence of several servants of the District Board and one or two others, the gist of which was that, as far as they knew, there was no connexion between Narbada Prasad and Jagannath in the matter of this contract. It is clear that negative evidence of this sort cannot displace the positive evidence of the mass of witnesses who gave affirmative evidence conclusively proving the connexion between the two accused with regard to this contract.

The main defence was an allegation of enmity against R. B. Thakur Jaswant

Singh, a Special and Honorary Magistrate in Banda and a large zamindar, the ground of enmity being that some 13 years ago Narbada Prasad joined in a memorial to the Local Government praying that Thakur Jaswant Singh should not be appointed an Honorary Magistrate. As to this, we have the evidence of a defence witness, Mr. Pearey Lal, in which he says that shortly before the contract in this case Thakur Jaswant Singh told him that Narbada Prasad was a "good man." There is no evidence that Thakur Jaswant Singh took the slightest notice of this memorial, so long ago, to the Local Government, or had the slightest enmity against Narbada. The reason of the memorial is clear from the evidence of another defence witness, who says that Thakur Jaswant Singh was a strict Magistrate. In a district like Banda, which produced such a District Board, it is not to be wondered that a Magistrate who did his duty would be unpopular with certain persons. It is admitted by Dr. Katju on behalf of Narbada Prasad that there is no evidence on the record of enmity or conspiracy on the part of Thakur Jaswant Singh on which he can rely. We agree entirely with Dr. Katju.

The other branch of the defence was that Thakur Jaswant Singh, together with one Sheo Kunwar, conspired to bring the charge in this case out of enmity. The reason of the enmity as regards Sheo Kunwar was alleged to be that Narbada Prasad was the reversioner of Sheo Kunwar, that Sheo Kunwar adopted the son of one Sheo Balak in order to defeat the claim of Narbada Prasad, and that from that date these conspirators were determined to do something to put Narbada Prasad out of the way. That this is an unfounded accusation is clear from the record itself. The defence evidence shows clearly that the adoption took place in June or July 1928, and that the investigation by Thakur Jaswant Singh ended in March 1928, and the Government sanctioned the prosecution of Narbada Prasad in July 1928. It is clear that the prosecution of Narbada Prasad was well on the way before the alleged cause of enmity ever arose. Further the reason of enmity alleged might cause Narbada to dislike Sheo Kunwar, but could hardly cause Sheo Kunwar to have enmity against Narbada.

It is clear from the above that the evidence for the prosecution in this case was overwhelming and that there was really no defence to the charge.

We have already made some comments upon the judgment of the learned Magistrate, but in addition he accepted as proved the enmity of Thakur Jaswant Singh and the conspiracy of Thakur Jaswant Singh with Sheo Kunwar on no real evidence. He, therefore, held that no evidence by any tenant of these two persons could be taken into consideration, although he omits to note that at least five of the prosecution witnesses were not tenants of either of them. He says that Munni Lal and Ram Kumar, ferry contractor, were hangers on in the Court of Thakur Jaswant Singh and therefore could not be believed, and further that the evidence of the mass of the prosecution witnesses was that of men of "absolutely no status". He mentions the evidence of Shahid Husain who gave evidence that Narbada told him that he wanted to take the theka in the name of Jagannath etc. This important evidence (which is not alleged to be tainted with enmity) is dismissed with the observation that Shahid did not mention this to any one. The Magistrate omits to mention the important letter of 27th June 1927, when the allegation that Narbada Prasad was the real contractor was made by this witness to the Engineer and forwarded by him to the Chairman himself long before this case was even contemplated.

On the other hand, the defence evidence, negative as it is, he takes to prove absolutely that there was no connexion between Narbada Prasad and Jagannath in respect of this contract. He hardly mentions the very important accounts exhibited in this case. He certainly never deals with the obvious inference to be drawn from them. He comes to the conclusion that the account found in Jagannath's house show:

"that Jagannath was really the thekadar and Narbada Prasad was only helping him with money."

a perverse finding. He further says:

"This fact (that Narbada Prasad was lending money) evidently gave rise to the rumours that he was the thekadar and gave a chance to his enemies to trump up a case against him."

From what we have said, and from the record, it is obvious that there was no evidence to establish the defence of

enmity or conspiracy, and therefore the whole basis of the Magistrate's judgment is swept away. The Magistrate says that there was no reason why the sanction of the Commissioner could not have been obtained if Narbada wanted the contract. We feel sure the Board knew well there was no likelihood that the Commissioner at that time would sanction the grant of a contract to a member of this Board. The Magistrate further says that Narbada knowing the law would never tell any one he was interested in the contract. He certainly did so, however, and the reason may well be that both he and others in Banda did not consider the breaking of this law as a serious matter. In some circles a man in the position of Narbada is considered foolish if he does not take advantage of his opportunities. We hope the result of this case will show that such conduct involves serious risk.

We find it impossible to believe that any Judge dealing honestly with the evidence before him, and being uninfluenced by considerations other than the evidence, could have come to the conclusion at which Mr. Robb arrived. We consider that this aspect of the case is extremely serious, and we consider it to be our duty in the interest of the purity of the judicial service to direct that a copy of this judgment be sent to the District Magistrate of Allahabad for enquiry into the conduct of the Magistrate.

We allow the appeal of the Local Government, set aside the order of acquittal of the learned Magistrate, direct that Narbada Prasad and Jagannath Prasad be arrested and that, as regards Narbada Prasad, he serve three months' simple imprisonment and further pay a fine of Rs. 1,000. As regards Jagannath, we consider that he was merely a servant of Narbada Prasad in this matter and under his influence. We, therefore, sentence him to one month's simple imprisonment. With regard to the sentence on Narbada Prasad, we have given him a longer sentence and a larger fine than otherwise we would have done, had it not been for the nature of the defence. False allegations against innocent and respectable persons of criminal conspiracy to bring false charges, when used as a defence, aggravate greatly the original offence. This type of defence is

much too common in India and it ought to be recognized that where a defence of this character is obviously false, that fact ought to be taken into consideration in awarding punishment.

R.M./R.K.

Appeal allowed.

1930 Cr. Cases 61

(Allahabad)

YOUNG AND SEN, JJ.

Mt. Bakhtawari—Applicant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 577 of 1929, Decided on 9th September 1929, from order of Sess. Judge, Meerut, D/- 23rd May 1929.

(a) Penal Code S. 302—Mere pressing of mouth of deceased does not amount to murder when death is due to blows dealt beforehand by another person.

P attacked H with a lathi and hit him on his head. P then asked B to press H's mouth with a cloth. B did as she was asked. In the post mortem H's skull was found to be shattered into 14 pieces.

Upon medical examination it was found that death was due to injuries on the head caused by P. The blows were not struck in furtherance of common intention on the part of P and B. There was no evidence that death had been caused by strangulation.

Held: that B was not guilty of murder.

[P 63 C 2]

(b) Penal Code, S. 201—Accused must cause evidence to disappear in order to screen offender.

The essence of S. 201 is that the accused caused the evidence of the commission of the offence to disappear with the intention of screening the offender from legal punishment.

P murdered H and ordered B to help him carrying the corpse to a ditch and burying the wearing appeared.

Held: that the offence under S. 201 was not proved against B. B in helping to carry the corpse to the ditch was acting under orders of P and she appeared to have been bullied into doing the act. B's acts were not voluntary nor done with the intention of screening the offence from punishment.

[P 64 C 2]

(c) Criminal Trial—Evidence—Appreciation of—Cases ought to be decided on tangible evidence whether positive or circumstantial.

Cases ought to be decided upon tangible evidence, be it positive or be it circumstantial. The Court is not justified in convicting an accused upon facts which are not borne out by the record, which militate against the medical evidence and which are the result of nothing but speculation.

[P 64 C 2]

M. Waliullah—for the Crown.

Judgment. — Mt. Bakhtawari was committed to the Court of Sessions at Meerut to take her trial under Ss. 302 and 201 I. P. C.

The charge was that on 27th November 1928, she murdered one Harbans, *chaukidar* by throttling him; and that having reason to believe that Harbans had been murdered, she caused the evidence of the crime to disappear by burying the corpse of Harbans and his clothes etc. in a field adjoining the Guldhar railway station.

The accused pleaded not guilty to both the charges.

The case was tried by Mr. Raghunath Prasad who held Mt. Bakhtawari guilty of both the charges and sentenced her to transportation for life under S. 302, I. P. C., and to one year's rigorous imprisonment under S. 201, I. P. C.

The central figure in the case is one Phool Singh, an Indian Christian, who with his wife Mt. Bhagwati and two children, one of whom is named Bendick alias Balwant lived in a house in mouza Dohai within the police circle of Ghaziabad. Bendick alias Balwant was his son by a deceased wife. Phool Singh was an abandoned profligate. He was indifferent to his wife and used to beat her. About six months before the occurrence, he brought Mt. Bakhtawari to his house. Mt. Bakhtawari is a chamar woman. Her husband is a resident of mouza Dhandhar and appears to have forsaken Mt. Bakhtawari. The latter was proceeding to her father's house in mouza Nandpur when she met Phool Singh at the canal distributary of Asalatpur. Phool Singh saw her, conceived a guilty passion for her and asked her to accompany him. She refused, but Phool Singh forcibly took her to his house and kept her there as his mistress. Upon her arrival, the wife, Petro Nila Bhagwati asked her how and why she came and she said that she had been forcibly brought by her husband. Phool Singh did not allow this woman to go away. The husband, who had never cared for his wife, became more indifferent to her after the arrival of the accused. The wife naturally did not like the continuance of Mt. Bakhtawari in the house. It is not difficult to visualise the bickerings and quarrels, which this unfortunate incident gave rise to.

The matter appears to have forced itself to the notice of the village people and became a subject of village gossip. One Sukhdeo informed Ganga Sahai, the village Mukhia that a "stolen woman"

had come to the house of Phool Singh. The Mukhia asked Harbans *chaukidar* to take Phool Singh to the thana at Ghaziabad. Upon the *chaukidar's* enquiring, Phool Singh said that the accused was his *sali*. The *chaukidar* said that they must go to the thana. They started for the thana. The *chaukidar* had his uniform on. They proceeded on foot along the railway line and the cartage consisted of the *chaukidar*, Phool Singh, his wife Mt. Bhagwati, her two children, Balwant and the accused. When they had passed the Guldhar railway station, the *chaukidar* was asked by a man to release them as he had got no warrant. The *chaukidar* did not agree. A few paces ahead, they met the station master who had two men with him. The station master intervened and asked the *chaukidar* to release them but the latter was obdurate. Ralla Ram station master admits having met these people along the railway line towards the Ghaziabad side, two posts beyond the outer single. He says that the Isa asked him to get him released from the *chaukidar*, who was forcibly taking him off, but he refused to interfere. He is contradicted in this respect by Petro Nila Bhagwati. We prefer to accept her statement.

That the *chaukidar* under the direction of the Mukhia arrested Phool Singh and Mt. Bhagwati with his family proceeded towards the thana is a matter which is proved without any reasonable doubt and is admitted by the accused. All the witnesses for the prosecution namely Sunda, brother of Harbans, Bhagwati, Bendick alias Balwant and Bhagwan Sahai who is a thoroughly independent witness are agreed on this point.

By the time that the party had crossed the wirefencing, Phool Singh appears to have warmed himself up into a rage. The time and place were opportune. It was a lonely spot. The night had set in. Not a single man was visible in the field. Phool Singh started a quarrel with the *chaukidar* and said that night had come and he was not going any further. Phool Singh struck danda on the temple of *chaukidar*. The *chaukidar* fell down. Phool Singh gave him two or three more blows. Mt. Bhagwati states that Phool Singh sent for the accused and both he and the accused dragged the *chaukidar* three or four fields

away into another field. There he called his wife and asked her to make a ditch in which the chaukidar was to be buried. Mt. Bhagwati refused and said that he must do that work for himself. Phool Singh and Balwant made a ditch. After the hole had been dug he asked Mt. Bhagwati and the accused to help him

"in lifting the body of the chaukidar in such a manner so as not to leave any mark as would be otherwise caused if the body were to be dragged.

Mt. Bhagwati said that the chaukidar was still living and that he should not be buried alive. Phool Singh sat over the chest of the chaukidar and asked the accused to press his mouth which the latter did with a banian. Phool Singh, Mt. Bakhtawari and Balwant carried the corpse to the hole, stripped the chaukidar of his uniform and buried him in the hole. The clothes of the chaukidar were buried at different places. His chapras was buried in a field. Phool Singh took his dhoti and shoes and gave the shoes to Mt. Bakhtawari to wear. Mt. Bhagwati continues :

"During the time the accused was pressing the mouth of the chaukidar, my husband and my elder son had gone and further dug the place, which had been previously dug."

It is clear, therefore, that no witness other than Mt. Bhagwati was present at the time when the mouth of the deceased was pressed by the accused. Mt. Bhagwati moreover does not say that the accused tried to throttle Harbans by pressing his neck, nor does she describe how and in what way Mt. Bakhtawari pressed the mouth of the chaukidar.

Balwant substantially supports Mt. Bhagwati. He says that after the blows had been given, the chaukidar began to breathe hard. Phool Singh asked Bakhtawari to drag him into a field. This was done accordingly. This statement does not agree with the version given by Mt. Bhagwati. The witness adds :

"At that place, my father got the accused to press the mouth of the chaukidar, while my father sat upon his chest. At the same time, my father pressed down the neck of the chaukidar. While the throat was being pressed, the woman was pressing the mouth of the chaukidar. The chaukidar then died My father, myself and the accused took over the chaukidar and buried him in that hole.

The corpse of the chaukidar was discovered on 27th November 1928. Information was given to his brother Sunda who identified the corpse from certain peculiarity in the foot. The corpse had one leg and trunk. Two hands and one leg were missing. The corpse was found bet-

ween the railway lines at a distance of one telegraph post from the railway guard-post, known as Sahani post, in the direction of Gharziabad. The usual post-mortem was held. The body had reached an advance stage of decomposition. The skull was found shattered into fourteen pieces and blood clots were found on a piece of the occipital bone at the base of the skull and on a piece of the right frontal bone and parietal bone. Brain and membranes were missing. There was a fracture of the breast bone at the junction of upper and middle third with fracture of the ribs."

The ribs second to sixth on the right side were fractured; the ribs second to the fifth on the left side were decomposed. The left collar bone was also fractured. The liver was decomposed. A portion of the liver and the whole of the right kidney were missing and were probably eaten by animals. According to the Civil Surgeon, death was due to shock and haemorrhage and apparently to the injury to the skull.

The post-mortem was held by Col. O'niel, Civil Surgeon of Meerut. He gave his statement before the trying Magistrate.

Mt. Bakhtawari made a statement under S. 164, Criminal P. C., on 3rd December 1928. Her story appears to be consistent with the statements of the principal witnesses for the prosecution. She makes no attempt to minimise her share in the transaction. Three persons are said to have intervened and to have asked the chaukidar to leave Phool Singh but the chaukidar refused. After this Phool Singh offered the chaukidar a bribe of Rs. 10. The latter did not agree and used abusive language :

"Then Phool Singh hit the chaukidar with a lathi. The chaukidar uttered only one cry saying 'O Balwant Singh' and then he fell down and became unconscious. He hit the lathi blow on the chaukidar's temple. He hit two or three more lathi blows after his falling down and then the chaukidar died. Phool Singh and his wife and I dragged him to a distance of over two or three fields. Phool Singh sat on him there and told both of us to dig a place for burying him. We said that we would not be able to do so. Thereupon, he, after making us sit there, went to dig the earth and told us to keep the chaukidar's mouth pressed. Thereupon the Munshia (Mt. Bhagwati) and I both pressed the chaukidar's mouth. When he came after digging the earth, Munshia, Phool Singh and I carried the chaukidar and threw him into the pit. Then Phool Singh removed the clothes of the chaukidar and all three of us buried them in the sand."

Upon the aforesaid evidence, it is not possible to uphold the conviction of Mt. Bakhtawari under S. 302, I. P. C. Th

murder was committed by Phool Singh, who smashed the skull to pieces by his lathi blows. The assault was made with a design and executed with fury and tremendous violence. The blows were not struck in furtherance of a common intention on the part of Phool Singh and Mt. Bakhtawari. Judging from the medical evidence and considering the nature of the injuries on the mutilated corpse of Harbans, it is clear that death was the result of the blow upon the skull which smashed the skull to fourteen pieces. There is no evidence that the death was caused by throttling or strangulation. There is no evidence that Mt. Bakhtawari pressed the throat of Harbans chaukidar. She admits that she pressed the mouth of the chaukidar and Mt. Bhagwati says that she pressed his mouth with a banian. Phool Singh is proved in this case to be a thoroughbred ruffian. He had a hasty and violent temper. In the presence of Mt. Bakhtawari and of his wife, he had just committed a most brutal and violent murder. Mt. Bakhtawari must have been considerably afraid of him. He asked her to drag the corpse. She had no interest in doing so. It is Phool Singh who dug the trench and not Mt. Bakhtawari. It was Phool Singh, who buried the dead body and not Mt. Bakhtawari. When Phool Singh asked her to press the mouth she evidently acted under the influence of fear and compulsion and may well have made a pretence of pressing the mouth, without exerting such force as may cause suffocation. There is no evidence that the banian was inserted into the mouth of Harbans deceased.

The learned Sessions Judge appears to have realized that the evidence on the record was not sufficient to justify the conviction of Mt. Bakhtawari on a charge of murder. He examined Dr. A. N. Mukerji, Assistant Surgeon attached to the Meerut Hospital, who deposed that if the mouth and the nostrils of an injured person were effectually closed, it would take about ten minutes to bring about his death. And if the said person was gasping at the time and if somebody sat over his chest and another person closed his mouth, the death of that person would certainly be hastened. From this evidence the learned Judge concluded that the accused by closing the mouth of the deceased accelerated his death.

Cases ought to be decided upon tangible evidence, be it positive or be it circumstantial. But there was no warrant for the learned Sessions Judge in convicting the appellant of murder upon facts which are not borne out by the record, which militate against the medical evidence and which are the result of speculation and nothing but speculation on the part of the learned Sessions Judge. The conviction of Mt. Bakhtawari under S. 302, I. P. C., was therefore improper and unjust and must be set aside.

The essence of S. 201, I. P. C., is that the accused caused the evidence of the commission of the offence to disappear with the intention of screening the offender from legal punishment. Mt. Bakhtawari in helping to carry the corpse to the ditch or in burying the wearing apparel of the chaukidar was acting under the orders of Phool Singh. She appears to have been bullied into doing the act. Her acts were not voluntary nor done with the intention of screening the offender from punishment. The murder was committed by Phool Singh. He was interested in wiping off all evidence against himself. He was taking steps to prevent his wife and mistress from coming forward as witnesses against himself. With this object in view, he appears to have asked Mt. Bakhtawari and Mt. Bhagwati in lending a helping hand in either carrying or dragging the corpse and in burying the clothes. With the object of tightening the fetters, he appears to have given the shoes of the deceased to Mt. Bakhtawari to wear. He was anxious to secure a complete severance of connexion between himself and Mt. Bakhtawari and actually sold Mt. Bakhtawari to Bhagwana sweeper for thirty rupees and a coat. But this was not all. He stripped his wife Mt. Bhagwati of all her clothes, made her put on a light sheet and threw her into a canal to be drowned. Fortunately, the woman was not drowned; she was rescued.

The offence under S. 201, I. P. C., is not proved against the accused.

We allow the appeal, set aside the convictions and sentence under Ss. 302 and 201, I. P. C., and direct that Mt. Bakhtawari be released at once.

R.M./R.K.

Appeal allowed.

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(Sind)

PERCIVAL, J. C., AND ASTON, A. J. C.
Cowasji & Sons—Appellants.

Aloo Jootha—Respondent.

Misc. Appeal No. 59 of 1928, Decided on 19th September 1929, against order of Commissioner under Workmen's Compensation Act, 1923.

(a) **Workmen's Compensation Act, S. 12**—Tindal supervising coolies working for Dubashes—Death of workman from injuries received while employed—Tindal is not contractor.

A tindal was receiving Rs. 10 a month from the Dubashes and also received pay at the rate of Rs. 2-8-0 per day, when he was employed in supervising the coolies working for the Dubashes; that is to say, he kept Rs. 2 for himself out of Rs. 25 paid to him daily for the payment of his gang, one of whom was the deceased workman. The workman received injuries during the course of, and arising out of the employment which resulted in his death:

Held: that the tindal was not a contractor.
 [P 66 C 1]

(b) **Workmen's Compensation Act, S. 5, Explanation**—Suit against firm for compensation—Allegation of casual employment—Onus lies on firm to show that there was no break exceeding 14 days.

An applicant, a relative of the deceased workman, in a suit for compensation against a Dubashe firm, contended that there was no continuous service of the deceased workman. He alleged in the plaint that the deceased was a casual labourer employed by the Dubashes' firm for the purposes of their trade. But the firm asserted that the case fell under S. 5 (a) instead of meeting the allegations:

Held: that it was for the firm to show that the service was continuous and that there was no break therein of more than 14 days, so as to bring the case under S. 5 (a): *Jones v. Ocean Coal Co.*, (1899) 2 Q. B. 124 and *Gardener v. Vickers Ltd.*, (1928) 44 T. L. R. 568, *Dist.*

[P 67 C 1]

(c) **Workmen's Compensation Act S. 30**—Finding that workman worked for certain days is not question of law.

There is no question of law in the finding by the Commissioner that the deceased workman worked for a certain number of days only.

[P 67 C 2]

T. G. Elphinston—for Appellants.

Balkishendas H. Lulla—for Respondent.

Percival, J. C.—This is a miscellaneous appeal against the order of the Commissioner under Workmen's Compensation Act 1923, by which he directed that the opponents should pay the applicant, *Aloo Jootha*, Rs. 1387-8-0 and costs.

The applicant was the dependent of
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one Jessasingh Jootha, a workman, who was employed in unloading coal brought by S. S. "Umlazi." The evidence shows that he received injuries during the course of, and arising out of, this employment, which resulted in his death on 11th February 1928.

There is no contention in this appeal that Jessasingh did not die of injuries arising out of his employment, or that the applicant is not the person entitled to compensation.

The only points which have been argued in this appeal are questions connected with the amount of compensation which has been awarded by the Commissioner. The learned Commissioner was of opinion that the case fell under S. 5 (b), Workmen's Compensation Act, and he held that the deceased was in receipt of Rs. 1-8-0 a day during his last continuous period of service, and that he was entitled to monthly wages at 30 times this sum; and that, according to the method of calculation laid down by the Act, he was entitled in all to Rs. 1,387-8-0.

The first point raised by the learned counsel for the opponents who are Dubashes under whom the deceased worked, was that the case fell under S. 12 of the Act on the ground that the tindal, under whose immediate supervision the deceased was working, is to be regarded as a "contractor."

This point was not referred to by the learned Commissioner in his judgment, but an application was made by the learned counsel for the opponents, after the delivery of the judgment, in which he asked the Court to place on record the fact that the opponents had contended under issue 1 that the deceased was employed by Alla Kerson, the tindal "who was a contractor working for the opponents within the meaning of S. 12 of the Act."

The order of the Court was as follows:

"Mr. Elphinston did touch this point only in his arguments at the end of the case. This point was not referred to in written statements nor was it referred to, at the time of the issue. Mr. Lulla objected to the arguments on this point being advanced by Mr. Elphinston. I, however, did not stop him."

It will be seen from this order that the point was argued; but that as pointed out by the learned Commissioner it was not raised in the written statement nor was it referred to in the issues. Objection is taken by the learned

pleader for the applicant against this contention that, if this objection had been raised at the time when evidence was being taken, he would have produced evidence to show that the tindal was in fact not a contractor.

It seems to me that this objection is entitled to weight, and that the opponents, if they wished to show that the tindal was a contractor, should have made a statement to that effect in their written statement, so that the applicant would have been in a position to give evidence on the point if so disposed. Certainly it does not appear to me that *prima facie* the tindal was a contractor. He was a man who was receiving, according to the evidence, Rs. 10 a month from the Dubashes, and also received pay at the rate of Rs. 2-8-0 per day, when he was employed in supervising the coolies working for the Dubashes. That is to say, he kept Rs. 2 for himself, out of the Rs. 25 paid to him daily for the payment of his gang, one of whom was the applicant. At any rate, if he was to be held to be a contractor, the opponents should have given clear evidence to that effect; and in the absence of such evidence it cannot be held that he was a contractor, and that consequently S. 12 applies.

The second point raised on behalf of the opponents was that S. 5 (a) of the Act, and not S. 5 (b) applied.

This point was dealt with by the learned Commissioner in his judgment, and he has observed as follows :

"It was finally argued by Mr. Elphinstone that it was for the applicant to prove that a case was not covered by S. 5, Cl. (a) but was one that fell within the scope of Cl. (b) of the same section. The applicant has given the best evidence available under the circumstances. If Cl. (a) applied to this case in my view the opponents would be the best persons to place facts contemplated by it. Such facts would be within their knowledge. The opponents have not adduced in this matter a tittle of evidence. Evidence such as has been recorded for the applicant proves beyond doubt that Cl. (a) could not possibly apply."

It may be observed that the only evidence recorded in this case was that of Maisoo Kala, the cousin of the deceased, and of Alla Kerson, the above mentioned tindal, the opponents not having produced any evidence in the case. It is argued, however, that on the evidence produced on behalf of the applicant the case falls under S. 5 (a),

on the ground that the deceased during a continuous period of not less than 12 months immediately preceding the accident was in the service of the opponents, who were liable to pay the compensation. The argument advanced is that it is admitted on behalf of the applicant that the deceased worked habitually for the tindal and that the tindal again worked habitually for the opponents; and that, therefore, the deceased was in the continuous service of the opponents.

The evidence, however, is to the effect that, while the deceased worked habitually for this tindal, he did work on occasions for other tindals also. The cousin of the deceased said :

"We go with the same tindal if he wants us or with any other tindal."

Again to the Court he stated :

"Jassasing always worked for opponents if they had work available otherwise he worked for others."

In cross-examination also he said :

"We had been working on coal steamers for three or four years with Tindal Alla Kerson. We worked with Alla Kerson if he had work, otherwise we went with others."

Now it is argued from this evidence and from the evidence given by the Tindal himself that, on the authority of the decision in the case of *Jones v. Ocean Coal Co.* (1), the present case is one of continuous employment. Another case that has been cited in this connexion was that of *Gardener v. Vickers Ltd.* (2). Now there is a distinction between the present case and those cases because, as indicated above, in the present case it is not shown that the deceased worked solely for the opponents. The cases cited refer to instances where an employee worked for one particular employer, although the work was for certain days only during the period in question. Therefore, on that ground alone, there is a distinction between this case and those cited. However, apart from this, if we consider those cases, particularly the latter case *Gardener v. Vickers Ltd.* (2), we find that they do not support the view that this is a case of continuous employment. As observed by Lord Justice Russell in *Gardener v. Vickers Ltd.* (2):

(1) [1899] 2 Q. B. 124=68 L. J. Q. B. 781
=15 T. L. R. 339=47 W. R. 464=80
L. T. 582.

(2) [1928] 44 T. L. R. 563.

"He could understand that it might be said that a man's work continued if the contractual obligation continued, or he could understand that there might be continuous employment without a continuous contractual obligation, if there was continuous work. But he was unable to see how there could be continuous employment without either continuous work or continuous contractual obligation."

In the present case there was no continuous contractual obligation; so it is necessary to see whether there was continuous work in this case. Now from the evidence given above it is clear that the work was not continuous, because it only took place only when there were any ships to be unloaded.

There is further point, which is important in this case in connexion with S. 5 of the Act, namely that that section contains an explanation, which runs as follows :

"A period of service shall for the purposes of this section be deemed to be continuous which has not been interrupted by a period of absence from work exceeding 14 days."

Now the applicant in this case contended that there was no continuous service. In his plaint he said that the deceased was a casual labourer employed by the opponent's firm for the purposes of their trade; and in the written statement of the opponents no reply was made on this point. So that it was for the opponents to show that the service was continuous and that there was no break therein of more than 14 days, if they wished to argue that the case fell under S. 5, Cl. (a). However, as indicated above, there is no evidence to this effect on behalf of the opponents; and it appears to me that they have not shown that the work was continuous in the sense that it was not interrupted for a period of absence from work exceeding 14 days. It is in fact highly probable that there were such interruptions of over 15 days in the opponents' employment of the deceased, as the employment depended on the dates on which steamers happened to require to be unloaded.

Having regard to the facts of the case even if we follow the cases that have been cited above, more particularly the latter of the two cases, we find that the present case does not fall under S. 5 (a). I agree, therefore, with the learned Commissioner on this point.

Two other points remain for consideration in regard to the calculation of the amount due to the applicant. It is con-

tended on behalf of the opponents that the wages of the deceased were Rs. 1-4-0 and not Rs. 1-8-0. But the evidence produced is to the effect that the rate of pay was Rs. 1-8-0, and this has been accepted by the learned Commissioner.

The second point is somewhat similar, namely it is contended on behalf of the opponents that the deceased worked for the opponents for only five out of last seven days previous to his death. The learned Commissioner has, however, held that he last worked continuously for four days, including the day of accident, namely from Monday to Thursday. The suggestion that he worked also on the previous Friday is based only on inferences from the evidence; and it appears to me that it is not desirable to interfere with the learned Commissioner in his finding of fact on this point. It is to be noted that it is laid down in S. 30 that no appeal lies against any order unless some substantial question of law is involved in the appeal; and, as I hold that the view of the above mentioned legal questions taken by the learned Commissioner was correct, it cannot be held that there is any question of law in the finding by the Commissioner that Jessasing worked for four days only. It was a matter for him to decide on the evidence whether deceased worked for four days continuously, or whether he worked there for only five days out of seven before his death.

I see no reason, therefore, to interfere with the finding of fact on this point.

For these reasons, I would dismiss this appeal with costs. We fix Rs. 30 in all as pleader's fee for two days; there is no special reason in this case to warrant an increase of pleader's fee.

Aston, A. J. C.—I concur.

I would like to add a few remarks with regard to one point. Under S. 114, Evidence Act :

"the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case."

The learned Commissioner in spite of the want of recollection on the part of the tindal and of deceased's cousin, might, in my opinion, have applied S. 114 and might have inferred that the

deceased worked on Friday and Saturday also. The evidence showed that the deceased always used to go to work when the opponent had a steamer and that it was his duty to remain at work while the steamer was unloading, that on this particular occasion the steamer began unloading on Friday. Had I been dealing with the case myself as a Court of first instance I would have exercised the discretion conferred by S. 114, Evidence Act, but I do not think, as a Court of appeal, it is desirable to interfere with the finding of the learned Commissioner who on the evidence held that it was proved that the deceased worked from Monday to Thursday inclusive.

V.S./R.K.

Appeal dismissed.

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(Sind)

PERCIVAL, J. C. AND ASTON, A. J. C.
Haji—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 187 of 1929. Decided on 20th September 1929, from an order of First Class Magistrate, Tatta.

(a) Criminal P. C., S. 145 (b)—Time at which Magistrate is to determine who was in possession.

A Magistrate cannot take into consideration the effect of an alleged dispossession more than two months prior to the date of his order; he is required to decide which of the parties between whom a dispute exists is in possession of the subject of the dispute at the time when the Magistrate decides the question of possession: 15 Bom. 152, *Foll.*; 4 Cal. 417, *Doubted.* [P 69 C 1]

(b) Criminal Trial—Evidence—Procedure—Wrong date of hearing given to party—Party appearing on subsequent date after proceedings *ex parte* were taken against him—Refusal of Magistrate to allow to cross-examine witness on date of their appearance is indiscretion.

Proceedings were instituted against a person under Criminal P. C., S. 145. A copy of an order containing a wrong date of hearing was delivered to him. He attended on the date mentioned in the copy but the correct date was not even then given to him. When he subsequently appeared, after certain proceedings had taken place *ex parte*, he was not permitted to cross-examine the complainant and the witnesses examined the same day.

Held: that the trying Magistrate exercised a wrong discretion in not allowing the party to cross-examine the complainant and the witnesses. [P 69 C 1]

Hassaram Jashanmal—for Applicant.

C. M. Lobo—for the Crown.

Facts.—One Nenoomal instituted pro-

ceedings against Haji son of Jumo in the Court of the First Class Magistrate, Tatta, under S. 145, Criminal P. C., complaining that Haji was threatening to trespass on some agricultural land in the possession of the complainant and remove the crops then standing by force and praying that he might be ordered not to interfere with the possession of the complainant. Pending the proceedings the Magistrate ordered on 28th September 1928 that as he apprehended breach of the peace no one should touch the crops. On 18th October 1928 the crops were secured through the Mukhtarkar of the Taluka and on 16th April 1929 orders were passed in favour of the complainant ordering Haji not to interfere in any manner with the possession of the complainant. Haji applied for revision to the High Court complaining that the Magistrate had erred in exercising jurisdiction not given by S. 145, Criminal P. C., and that the Magistrate had acted in contravention of provision 1, S. 145, Criminal P. C., and had failed to record the grounds on which he apprehended breach of the peace on 28th September 1928 and had wrongly relied on 4 Cal. 417 the old section having been considerably amended and that he had given a wrong date and examined certain witnesses *ex parte* whose cross-examination he refused at a subsequent hearing when the applicant *Haji* and his pleader attended.

Aston, A. J. C.—This is an application for revision of the order of the learned First Class Magistrate, Tatta, who directed that one Nenoomal was in possession of Survey No. 90, that there was a likelihood of a breach of the peace and who directed that Nenoomal should remain in possession.

Mr. Hassaram who has appeared for the applicant complains that a copy of an order containing a wrong date of hearing was delivered to his client, that he attended on 1st October the date mentioned in the copy, that the correct date was not even then given to him and that when he subsequently appeared, after certain proceedings had taken place *ex parte*, on 8th October, he was not permitted to cross-examine the complainant and the witnesses, who had been examined on that date.

Objection has also been taken by Mr. Hassaram to a ruling in the order of

the learned Magistrate applying *Mohesh Chandra Khan, In re* (1). As was pointed out by the Bombay High Court in *Huchappa, In the matter of* (2), *Mohesh Chandra Khan, In re* (1) was a ruling on S. 530, Criminal P. C., 1872. That was modified by S. 145 of the Code of 1882 which is similar to S. 145 of the present code.

It appears that the view taken by the learned Magistrate as to the effect of an alleged dispossession more than two months prior to the date of his order was incorrect. I am also of opinion that notwithstanding the fact, that the correct date was entered in a receipt taken from applicant the learned Magistrate exercised a wrong discretion in not allowing Mr. Hassaram to cross-examine the complainant and the witnesses who were examined in his absence. I would set aside the order passed under S. 145, Cl. 6. As the learned Magistrate has expressed an opinion that a breach of the peace is likely, it is desirable that the enquiry should continue. I would therefore remit the record and proceedings to the learned First Class Magistrate, Tatta, in the light of the remarks made about 4 Cal. 417 with a direction to complete the enquiry allowing the parties to appear in person or by pleader if they so desire.

So far as the witnesses who have been examined and cross-examined are concerned it does not appear necessary that they should be examined afresh, but this is left to the discretion of the Magistrate.

V.S./R.K. *Case remanded.*

(1) [1879] 4 Cal. 417.

(2) [1891] 15 Bom. 152.

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(Sind)

PERCIVAL, J. C., AND BARLEE, A. J. C.
Maluk Hasan—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 192 of 1929, Decided on 8th October 1929, from order of City Magistrate, Shikarpur.

Criminal P. C., S. 537—Magistrate following procedure of summons case instead of warrant case—No prejudice to accused—Trial is not vitiated.

Where in a summary trial a Magistrate instead of following the procedure prescribed for a warrant case follows that prescribed for a summons case and there is nothing to show

that the procedure adopted by the Magistrate caused the accused any prejudice, the trial is not vitiated: *A. I. R. 1927 P.C. 44, Ref. ; 29 Mad. 372, Dist.* [P 70 C 1]

B. P. Samtani—for Applicant.

C. M. Lobo—for the Crown.

Judgment.—This is a revision application made by one Maluk, son of Hassan, in which he complains against his conviction by the City Magistrate, Shikarpur, and asks us to interfere in revision on his behalf.

The applicant was tried summarily by the City Magistrate of Shikarpur and the record shows that he was accused of having voluntarily caused hurt without sudden and grave provocation under S. 323, with insult and with criminal intimidation under Ss. 504 and 506. Column 7 of the Register of Summary Trials shows that he pleaded "not guilty" and denied that he had beaten the complainant, abused or threatened him, and said that the case has been got up against him because one Nano wanted to deprive him of a garden. Columns 8 and 9 contain the finding that the applicant had beaten the complainant but that the accused was not guilty of any other offence. The order was that he should pay a fine of Rs. 30.

The applicant then went in revision to the Sessions Judge of Sukkur and the order of that officer is at p. 4 of the paper book. He writes that:

"The only ground on which this application can lie is the assertion that the Magistrate refused to summon defence witnesses."

He found that allegation was not made out and he dismissed the application.

In this Court, the principal point made by Mr. Samtani for the applicant is that the City Magistrate instead of following the procedure prescribed for a warrant case followed that prescribed for a summons case and so caused him serious prejudice. He has also complained that his client was not given an adequate opportunity of calling his witnesses after the charge as he was entitled to do and was prejudiced thereby.

A report was called for from the City Magistrate as to the allegation that he had not followed the proper procedure, and he has replied that he tried the case summarily but that its nature was not lost sight of; but that the procedure of the trial was unfortunately obscured by the form of the register

which is the same for both summons and warrant cases.

It seems to me that this being a summary trial, the distinction between a warrant and a summons case may not have been emphasized, for apparently Mr. Samtani is correct in saying that some of the features of summons procedure were followed. It does appear probable that the applicant was asked for his plea at the beginning of the case. But whether that be so or not, it does not appear to me that there was any such illegality as would be incumbent on us to set aside the order of the Magistrate. Mr. Samtani has quoted the case of *Emperor v. Chinnapayan* (1), as an authority for the view that the use of the procedure of a summons trial instead of that laid down for a warrant case is an illegality. But that case hardly goes so far as he wishes us to understand; for there the accused was convicted on his own admission and sentenced, before any evidence was recorded for the prosecution, though the offence was one which should have been tried as a warrant case; and it is obvious that the irregularity was one which may have prejudiced him. It is not necessary to assume that their Lordships intended to lay down that in every case in which wrong procedure is adopted, there is an illegality. In the recent case of *Abdul Rahman v. Emperor* (2) their Lordships of the Privy Council have considered S. 537, Criminal P. C., and have made it clear that a mere irregularity in procedure can only vitiate a trial if it has actually caused a failure of justice.

In this case, then, the applicant must fail because there is nothing to show that the procedure adopted by the Magistrate caused him any prejudice. It is not clear how the complainant could have obtained any useful information, as suggested by Mr. Samtani, from his very meagre plea; and there is nothing to show us that he was deprived of the opportunity of calling witnesses. We find in the order of the Magistrate that he offered no defence. The learned Sessions Judge who considered the question has accepted this as correct and the Magistrate in the report made by him in

answer to the affidavit filed by the applicant has stated definitely that the applicant had every opportunity of bringing his witnesses if he had wished to do so.

In these circumstances we cannot find that there was any injustice such as would justify us in interfering in revision and we dismiss the application.

V.S./R.K. *Application dismissed.*

* 1930 Cr. Cases 70 (Sind)

PERCIVAL, J. C. AND BARLEE, A. J. C.
Emperor
v.

Mahrab—Accused—Opponent.

Criminal Revn. Appln. No. 223 of 1929, Decided on 9th October 1929, from judgment of Addl. Sess. Judge, Hyderabad.

(a) Criminal P. C., S. 208 — Evidence — Removal from record evidence without objection by accused filed as exhibit is mistake.

It is mistake to remove from record the evidence recorded under S. 208 after it had been filed as an exhibit in the case without objection on behalf of the accused. [P 71 C 2]

* (b) Evidence Act, S. 33—Reservation by Committing Magistrate of cross-examination of witness suo motu—Evidence cannot be admitted in Session Court.

If the cross-examination of a witness is reserved by a Magistrate during committal proceedings of his own accord, that deposition is not complete and should not be admitted if evidence at the trial in the Court of Session.

[P 71 C 2]
(c) Evidence Act, S. 114, Illus. (e)—All official acts must be presumed to have been done properly.

Where a Committing Magistrate writes at the foot of the deposition that the cross-examination is being reserved, he does not mean that it is being reserved by him and that the accused has not been given an opportunity for cross-examination. All official acts must be presumed to have been done properly and it is difficult to suppose that Magistrate who must be presumed to have known the law did not give the accused an opportunity of cross-examination to which he was entitled by S. 208, Criminal P. C. [P 71 C 2]

C. M. Lobo—for the Crown.

M. L. Lalvani—for Opponent.

Barlee, A. J. C.—An application has been made by the Public Prosecutor for Sind for the retrial of a case against Mahrab, son of Gulsher, who was tried by the Additional Sessions Judge, Hyderabad on a charge under S. 302, I.P. C., but was convicted of an offence under S. 324, and sentenced to rigorous impri-

(1) [1906] 28 Mad. 372.

(2) A. P. R. 1927 P. C. 44=5 Rang. 53=54 I. A. 96 (P.C.).

sonment for two years to be served in the Dharwar jail for juveniles.

The main ground on which the application is based is that the learned Additional Sessions Judge wrongly excluded the medical evidence from the record and a subsidiary ground is that he has sentenced the accused to undergo imprisonment in the Dharwar jail without recording a finding as to his age.

The judgment of the Sessions Judge shows that the accused was charged with the murder of one Usman in the following circumstances:

It was alleged that the accused a lad of age 20 became intimate with Usman's wife. Usman chastized his wife and complained of the matter in the village but the accused would not reform. On 15th November Usman went to the village water trough to fill two pitchers with water and he was there met by the accused who was armed with a hatchet. The accused abused him, Usman retorted and the accused struck him with the hatchet. Usman replied with a blow from wooden bar on which he was carrying the water and then the accused struck him another blow with the hatchet. This assault was witnessed by two men Ghazi and Ismail. And after the police inquiry the accused was sent up for trial on the charge of murder as Usman had died.

The learned Additional Sessions Judge after considering all the facts came to the conclusion that it was amply proved that the accused had struck two blows with the hatchet and thereby caused Usman's death. But he sentenced him for causing grievous hurt. His reasons for not sentencing him for murder or culpable homicide are given at the end of his judgment. He writes as follows:

"But as regards the nature of the injuries and whether the same culminated in death, it will be difficult to say in the absence of the medical evidence. Sub-Medical Officer who examined the corpse of the deceased was examined in the City Magistrate's Court but his cross-examination was reserved for Sessions Court. This was surely a mistake on the part of the committing Magistrate. The cross-examination of the Doctor should not have been reserved. Magistrate's attention is invited to S. 509, Criminal P. C. There is not even the usual certificate attached to the deposition as required. It is a pity the S. P. P did not seek to remedy this defect. Evidently he had not read this deposition. Evidence of a witness means his examination in chief, cross-examination and re-examination; where cross-examination is reserved and not declined the evi-

dence is not complete. It is not clear whether the cross-examination was reserved by the Magistrate of his own motion or at the request of the accused. This deposition has, therefore, to be eliminated from consideration, for examination-in-chief of a witness without an opportunity being given to opposite party to cross-examine is not legally acceptable."

We are of opinion that the learned Additional Sessions Judge made a mistake in removing from the record the medical evidence after it had been filed as an exhibit in the case without objection on behalf of the accused. He is no doubt correct when he says that if the cross-examination of a witness is reserved by a Magistrate during committal proceedings of his own accord that deposition is not complete and should not be admitted in evidence at the trial in the Court of Sessions. But we can find no reason for supposing that because the committing Magistrate wrote at the foot of the deposition that the cross-examination was being reserved he meant that it was being reserved by him and that the accused had not been given an opportunity for cross-examination. All official acts must be presumed to have been done properly and we find it difficult to suppose that the Magistrate who must be presumed to have known the law did not give the accused an opportunity of cross-examination to which he was entitled by S. 208, Criminal P. C. Had the Magistrate merely written "cross-examination reserved" it might possibly be supposed that he meant reserved for a later stage of the proceedings before him and that it was subsequently overlooked. But he wrote "reserved for the Sessions Court" and that makes it clear that the accused's pleader did not want to cross-examine in his Court.

We consider then the learned Additional Sessions Judge was not justified in discarding from the record the evidence which had been filed without protest. At the same time we would point out that the endorsement should have been "cross-examination declined" for there was no reservation in the true sense."

The learned Judge's second objection that the certificate of the Magistrate had not been filed has turned out to have been mistaken for it was found afterwards in the Committing Magistrate's record.

The question then is whether we should in these circumstances order retrial. The learned counsel who has appeared for the accused has raised several objections. Firstly he has contended that even if the medical evidence be admitted it does not show that the offence was one of culpable homicide since the doctor stated that he could not say definitely that the wounds were likely in the ordinary course of nature to have caused death. But though the opinion of the doctor was equivocal it is not the opinion of the doctor which is wanting in this case but the finding of the Sessions Judge on the medical evidence and we cannot say that the learned Additional Sessions Judge could not have held on this evidence coupled with the other evidence in the case that the offence of culpable homicide had been committed.

The learned counsel further has criticized the evidence for the Crown but it is not open to us at this stage to go into it. All we can say is that the Magistrate found that a *prima facie* case was established and the learned Additional Sessions Judge agreed with him on the main issue in the case. This is sufficient for our present purpose and we must not prejudice the case by expressing an opinion on the merits.

Lastly, the learned counsel has urged that the punishment of two years rigorous imprisonment was sufficient. But with this we are unable to agree. If the offence was one of culpable homicide or murder the sentence appears to have been inadequate.

For these reasons we agree with the learned Public Prosecutor that the case should go for retrial so that the effect of the medical evidence be considered. We think this course preferable to considering the record with the medical evidence and deciding the matter for ourselves since there is a possibility the accused may have been prejudiced by the absence of the doctor from the Sessions Court if he expected to be able to cross-examine him there.

We think the best order is that which is asked for on behalf of the Crown that we, therefore, set aside the conviction and sentence and direct that the accused should be retried.

*We recommend that the Sessions Judge should record a definite age of the accu-

sed if there is any question of sending him to Dharwar jail.*

Percival, J. C.—I would like to add a few words regarding the action taken by the learned Magistrate, First Class, Diplo. He stated at the end of the evidence of the Medical Officer:

"Cross-examination of the accused reserved for the Sessions Court."

It was really this endorsement which has caused the difficulty in the case. I am of opinion that the Magistrate should rather have noted:

"Accused offered for examination, cross-examination declined."

If he had made a note to the effect then there would have been no question about the correctness of the admission of the evidence in the Sessions Court.

I was at first inclined to take the view that we should dispose of the case ourselves, accepting the view that the deposition of the Medical Officer was rightly on the record. But there is one point in favour of a retrial namely that if we were to dispose of the case now we would be disposing of it without having the opinion of the learned Additional Sessions Judge on the medical evidence. It is more satisfactory in view of the remark made by the Magistrate that the cross-examination was reserved for the Sessions Court and in view of all the facts of the case that in this particular instance the Medical Officer should be examined by the Judge who will hear the case. The Judge will then be able to give his opinion regarding the medical evidence and if by chance the case comes before this Court again, this Court will have the advantage of the opinion of the Judge on the said medical evidence. It may be noted also that the application of the Public Prosecutor was for a retrial and not for enhancement of the sentence.

V.S./R.K.

Retrial ordered.

1930 Cr. Cases 73 (1)

(Lahore)

BHIDE, J.

Vir Singh—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 635 of 1929, Decided on 30th July 1929.

Penal Code, S. 216—Proclaimed offender harboured—No satisfactory evidence that accused knew till so informed by police officer—False information given to police to assist evading apprehension—Offence under S. 216 was committed.

A person was charged for harbouring a proclaimed offender. There was no satisfactory evidence on record to show that the accused knew that the person harboured was a proclaimed offender till police officer informed him to that effect. But after the police officer had so informed him, the accused gave false information in order to assist evading apprehension and eventually the offender was found in his house.

Held: that the false information given after having been informed that person was a proclaimed offender is sufficient to bring the accused within the purview of S. 216: *A. I. R. 1926 Lah. 205, Rel. on.* [P 73 C 1]

Nand Lal—for Petitioner.*S. L. Puri* for Govt. Advocate—for the Crown.

Judgment.—The petitioner *Vir Singh* has been convicted in this case under S. 216, I. P. C., and sentenced to rigorous imprisonment for two years. The charge against *Vir Singh* was that he had harboured a dacoit named *Sham Singh* who was a proclaimed offender. Both the Courts below have found that there is no satisfactory evidence on the record to show that *Vir Singh* knew that *Sham Singh* was a proclaimed offender before the arrival of the police to search his house. It appears, however, that after the Sub-Inspector had informed *Vir Singh* that *Sham Singh* was a proclaimed offender and asked him whether *Sham Singh* was in his house he denied the fact and gave prevaricating answers, evidently with the object of enabling *Sham Singh* to evade apprehension, eventually *Sham Singh* was found in his house. The learned Sessions Judge has held that the false replies given by *Vir Singh* to the Sub-Inspector after he had been informed that *Sham Singh* was a proclaimed offender are sufficient to bring him within the purview of S. 216. This view appears to me supported by the ruling *Tara Singh v. Emperor* (1).

(1) *A. I. R. 1926 Lah. 206=7 Lah. 80.*

1930 Cr. C. 10

The offence was, however, of a technical character and, considering the fact that the son and the nephew of the petitioner had themselves given information which led to the discovery of *Sham Singh* in *Vir Singh's* house, I do not think that the punishment need be severe. I uphold the conviction, but accept the petition for revision to the extent of reducing the sentence to the period of imprisonment already undergone.

V.B./R.K.

Sentence reduced.

1930 Cr. Cases 73 (2)

(Lahore)

FFORDE, J.

Harnam Das—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 854 of 1929, Decided on 29th November 1929, from order of Addl. Dist. Magistrate, Hoshiarpur, D/- 22nd July 1929.

Penal Code, S. 75 — Greatly enhanced punishment should not be inflicted for trivial offence.

For an offence trivial in nature in itself, greatly enhanced punishment should not be inflicted, merely because there have been previous convictions against the offender.

[P 73 C 2]

Judgment.—The appellant has been convicted of stealing a khes, the original cost price of which was Rs. 4.

He has been sentenced to five years' rigorous imprisonment on the strength of two previous convictions.

The first of these convictions, which was under S. 411, I. P. C., was had on 19th May 1925, when a sentence of ten days imprisonment was imposed. The second conviction was on 25th April 1928, under S. 379, when 3 months' imprisonment was inflicted.

I have repeatedly pointed out that for an offence trivial in itself as is the present one, greatly enhanced punishment should not be inflicted merely because there have been previous convictions against the offender.

In my judgment a sentence of six months' imprisonment would meet the ends of justice, and I, accordingly, accept this appeal to the extent of reducing the punishment from five years' rigorous imprisonment to six months' rigorous imprisonment.

R.M./R.K.

Order accordingly.

1930 Cr. Cases 74
(Patna)

MACPHERSON, J.

Kantir Missir—Petitioner.

v.

Emperor—Opposite Party.

Criminal Misc. Cases No. 9 of 1929,
Decided on 15th March 1929, against
order of Sub-Divisional Magistrate,
Patna, D/- 23rd January 1929.

(a) Criminal P. C., S. 195 (5)—“Authority”
covers District Magistrate in relation to
police of his district.

Whether the police are public servants sub-
ordinate to the District Magistrate under S. 195
(1) (a) or not, there is no reason to doubt that
the very wide expression in S. 195 (5) “any
authority to which such public servant is sub-
ordinate” connoting apparently a more distant
and general entity than departmental superior,
covers the District Magistrate in relation to
the police of his district. [P 77 C 2]

(b) Criminal P. C., S. 195 (1) (a)—Cogni-
zance of offence under Penal Code, S. 211
on complaint of investigating police officer
—Charge failing—Accused cannot be con-
victed under Penal Code, S. 182.

There is no bar to cognizance being taken of
an offence under Penal Code, S. 211 on the
complaint of the investigating police officer
though he is not also an officer referred to
under S. 195 (1) (a), Criminal P. C.; but if the
charge under Penal Code, S. 211 fails, there
cannot by reason of Criminal P. C., S. 195 (1)
(a) be a conviction under Penal Code, S. 182.

[P 78 C 1]

(c) Criminal P. C., S. 195 (1) (b)—Offence
under Penal Code, S. 211 not committed in
Court—S. 195 (1) (b) is no bar to take cogni-
zance—Once cognizance of complaint is
taken, nothing in S. 195 (1) (b) deprives
Magistrate of his jurisdiction.

Where the offence under Penal Code S. 211
has not been committed in, or in relation to a
proceeding in any Court S. 195 (1) (b) is no bar
to cognizance of a complaint of that offence.
But it is impossible to hold that when a Magis-
trate has taken cognizance of a complaint, any-
thing that can subsequently happen will
suffice or anything in S. 195 (1) (b) can operate
to deprive him of jurisdiction to proceed there-
on in accordance with law: *A. I. R. 1925 Pat.*
717, Dist. and *A. I. R. 1930 Pat. 30, Ref.*

[P 78 C 2]

K. B. Dutt and *A. C. Roy*—for Peti-
tioner.

Assistant Government Advocate—for
the Crown.

Judgment.—This matter has a
lengthy and tangled history and with a
view to avert in future cases some at
least of the difficulties which have arisen
I deal with it at some length.

The petitioner, who is clerk of an
advocate of this Court, lodged informa-
tion before Sub-Inspector D. Mukerji in
charge of the Kotwali police-station,

Patna, on 18th June against the chauffeur
of his master who he alleged had taken
an advance of Rs. 36 and then decamped
without permission taking away also
motor accessories of the value of
Rs. 55-8-0 a list of which he supplied.
The case was made over to and investi-
gated by the junior Sub-Inspector Ram
Singh who on 23rd June reported it to be
maliciously false and prayed that orders
be passed for the prosecution of the
complainant for an offence under S. 211,
I. P. C. Having perused the report the
Sub-Divisional Magistrate on 3rd July on
an ordersheet marked G. R. (General
Register) No. 253 of 1928 recorded that
the investigating officer reported the
case to be maliciously false and directed
notice to issue to the petitioner to show
cause why he should not be prosecuted
under S. 182 or S. 211, I. P. C.

On 19th July a complaint by Sub-In-
spector Ram Singh dated 13th July under
S. 211 was put up to the Sub-Divisional
Magistrate who directed it to be placed
with the record. On that date also the
petitioner showed cause verbally through
a pleader but filed no petition. On 25th
July the Magistrate recorded that having
carefully gone through the case diary of
the investigating officer, he had come to
the conclusion that the petitioner should
be prosecuted under S. 182 and added:

“The Sub-Inspector of Police before whom
the information was lodged has already filed
a complaint. Summon *Kantir Missir* under
S. 182, I. P. C.”

Thus summons was issued upon the
complainant already mentioned and the
ordersheet thenceforward showed the case
as No. 253-G.R./643-C, the latter number
being that of Sub-Inspector Ram Singh's
complaint in the Complaint Register.

On 14th August the case was trans-
ferred to Thakurai B. D. Singh for dis-
posal.

On 23rd August an application was
made to the High Court but was returned
with a suggestion to apply to the Dis-
trict Magistrate. An appeal to the Ses-
sions Judge was rejected on 27th August
and a motion to the District Magistrate
on 4th September. In the latter the only
legal flaw suggested was that the Sub-
Divisional Magistrate took cognizance
before a complaint had been lodged, and
the fact alleged was negatived. On 17th
September this Court made absolute a
rule obtained on behalf of the petitioner

substantially on the ground that the Sub Divisional Magistrate having called upon the petitioner to show cause against his intended prosecution should not have reduced the opportunity so afforded to a mere formality but should in the circumstances of the case, where three legal practitioners were alleged to support the prosecution story, have discussed the cause shown. Thereafter the judgment proceeded :

"If the learned Sub-Divisional Officer is inclined to proceed against the petitioner he should examine the witnesses mentioned in the first information report and then make up his mind as to whether it is expedient in the interests of justice to put the accused on his trial or not."

When this order was communicated to the Sub Divisional Magistrate he stayed proceedings on 17th October noting on the order-sheet of Case No. 643-C that he understood that the police officer concerned was about to file a complaint. The point was that so far as an offence under S. 182 was concerned, the complaint of Sub-Inspector Ram Singh was not tenable by reason of S. 195 (1) (a) since it was not made by the :

"public servant concerned or some other public servant to whom he is subordinate,"

the information to the police having been given not to him but to the Sub-Inspector in charge of the police station. Accordingly the record of the original case was deemed to be closed and when Sub-Inspector D. Mukerji lodged before the Sub-Divisional Magistrate a complaint against the petitioner under S. 182, a new case record was started and numbered 1016-C of 1928 and on 4th December summons under S. 182 was issued on petitioner. On the same date the case was transferred for disposal to Thakurai B. D. Singh who fixed the hearing for 17th. On 10th December, however, Case 1016-C was withdrawn by the Sub-Divisional Magistrate to his own file and he directed that it should await the disposal of Case No. 643-C. In the order-sheet of the latter under the same date the Sub Divisional Magistrate set out that as another case had been started on the complaint of Sub-Inspector D. Mukerji before whom the first information was lodged and who was the proper person to file the complaint, further steps had not been deemed necessary in case No. 643-C as the Magistrate's orders summoning the accused had already

been set aside by the High Court, but as the accused had filed a petition to the effect that the orders of the High Court had not been complied with and the new complaint should be dismissed and as the accused seemed to insist that the new case should not proceed, he gave him an opportunity to prove his case by examining witnesses named in the first information report. He explained that as the new complaint was filed by a different complainant he had not thought it incumbent upon him, to take therein the action indicated by the High Court in the earlier case.

"On 17th December the District Magistrate disposed of an 'appeal' or application under S. 195 (5) made by the petitioner against the order of the Sub-Divisional Magistrate taking cognizance of the complaint of Sub-Inspector D. Mukhorji and summoning the accused on the ground that in view of the order of the High Court the Magistrate had no jurisdiction to entertain the complaint. The learned District Magistrate held that the Sub-Divisional Magistrate had acted strictly in accordance with the order of the High Court and proceeded :

"In view of this I do not think it is necessary for the case under S. 182 I. P. C. (Case No. 1016 C of 1928) to proceed and I accordingly direct that this case shall be withdrawn. If the learned Sub-Divisional Officer after examining the witnesses produced by the present petitioner and considering the other papers in the case comes to the conclusion that the case is false, he can himself file a complaint for his prosecution under Ss. 211 or 182, I. P. C."

The Public Prosecutor appeared in case No. 1016-C of 1928 and withdrew the case whereupon the Sub-Divisional Magistrate recorded an order of discharge under S. 494, Criminal P. C.

The petitioner was then called upon to produce his witnesses in case No. 643. He appeared eventually and pleaded that the High Court had directed the Magistrate to summon the witnesses and not to ask the petitioner to produce them. The Magistrate stated that he had no objection to summon them but would examine the petitioner straightaway, not as an accused but as the person who gave information to the police, whereupon the petitioner's pleader expressed his intention of moving an application for transfer if the Magistrate insisted upon the examination of

the petitioner that day, and the case was accordingly adjourned.

The petitioner then moved this Court for a rule for the transfer or the quashing of the proceedings and as Mr. K. B. Dutt contended on his behalf that the order of the District Magistrate was without jurisdiction it was assumed that if the earlier proceedings were dropped on the ground that the complaint of Sub-Inspector Ram Singh was not valid so far as S. 182 is concerned, all that would be necessary would be to deal with the complaint of Sub-Inspector D. Mukherji in case 1016-C by setting aside the order of summons passed thereon and directing in the very special circumstances that the Magistrate proceed on the lines of the direction or suggestion of this Court in case No. 643-C.

But with the assent of the Crown the case has been argued as if an open rule had issued. The contention of the learned vakil now is that the proceedings should be set aside because the complaint of Sub-Inspector D. Mukherji having been lawfully withdrawn under S. 195 (5) by an authority having jurisdiction to do so, nothing remains against the petitioner except an invalid complaint of Sub-Inspector Ram Singh, the Sub Divisional Officer having no power to make a complaint either executively or judicially, and that in any event the proceedings should be transferred to another Court owing to general prejudice as the petitioner does not want to prove his case and is not even entitled to give evidence and yet the Sub-Divisional Magistrate insists on examining him.

To appreciate these submissions and the reply of the Crown it is essential to ascertain the legal position at each stage.

When issuing notice on the petitioner on 3rd July, the Sub Divisional Magistrate manifestly was not acting upon the investigating Sub-Inspector's report for prosecution, and apparently the Sub-Inspector himself contemplated a mere formal complaint, which in fact he sent in on 13th July. The Magistrate on 3rd July seems either to have been acting administratively or under S. 476 read with S. 195 (1) (b) through inadvertence in *Daroga Gop v. Emperor* (1).

(1) A. I. R. 1925 Pat. 717=5 Pat. 33.

It is indeed held that S. 195 (1) (b) applies if the judicial proceeding is in existence at the time when it is sought to prosecute the offender for the offence in question. But as there was at the time no proceeding in existence in this Court, these provisions were of course inapplicable. And he did not take cognizance of the complaint of Sub-Inspector Ram Singh, under which the bar in S. 190 (1) (a) might be supposed to be removed, until the 25th, or at the earliest 19th.

Next when petitioner appeared on 19th July he cautiously refrained from filing any written petition, as is usually done, being apprehensive that under the decision cited it might be treated as a complaint and that the Magistrate could then act under S. 476, as the offence under S. 211 would then be committed in, or in relation to a proceeding in this Court.

Again the complaint of Sub-Inspector Ram Singh of an offence under S. 211 does not, on the ruling of this Court in *Barhamdeo Singh v. Emperor* (2) comply with S. 195 (1) (a) so far as an offence under S. 182 is concerned, as he was "not the public servant concerned," being only the investigating officer and not the public servant to whom information was given.

The order of this Court as well as the direction or suggestion with which the judgment concluded assumed that the Sub-Divisional Magistrate had taken cognizance of the complaint and it operated to replace matters at the stage of cognizance and of starting on an inquiry under S. 202.

The action of the Sub-Divisional Magistrate on receipt of the High Court's order showed that he was not "inclined to proceed against the petitioner," the reason being that he then considered only S. 182 and doubted whether the proceedings under that section were legally well-founded on the complaint of Sub-Inspector Ram Singh.

The complaint of Sub-Inspector D. Mukherji, however, did not suffer from any legal defect and the procedure adopted in respect of it was correct so far as legality alone is concerned. As was said in *Jokhi Mian v. Mahmud, Dafadar* (3):

(2) A. I. R. 1928 Pat. 102.

(3) A. I. R. 1929 Pat. 92.

"When a complaint is made by a public servant for an offence punishable under S. 182 the Magistrate is governed only by the rules in Chap. 16, Criminal P. C. As in a complaint made by a private person he will normally issue summons but in exceptional cases, 'for reasons to be recorded in writing' he may under S. 202 postpone issue of process and make an inquiry or direct a magisterial or police inquiry or investigation. The position would be the same if a police officer complained, for instance, under S. 211, I. P. C. Apart possibly from a complaint made by a Court under S. 476 (1), Criminal P. C., no complaint is in any sense invalid merely because the person accused has not had an opportunity of showing cause against the complaint being made."

In this instance, however, the circumstances were specially exceptional—the High Court had already expressed an opinion in another case on the same subject matter and the preferable procedure therefore was that the Magistrate, on taking cognizance of the complaint of Sub-Inspector D. Mukherji should hold an inquiry under S. 202 before issuing process.

What a pity it is that the learned Sub-Divisional Magistrate should have allowed himself to be flustered and stampeded as indicated in his order of 10th December. It was not open to him; once he had issued summons, to go back. He had acted in case No. 643-C strictly in compliance with the order of this Court and if there was some appearance that he had not, he ought to have trusted this Court to distinguish the real from the apparent. It was alike legal and proper that action against the petitioner under S. 182, I. P. C. should proceed on the complaint in case No. 1016-C, but the Magistrate, because of the suggestion of this Court in case No. 643, should, in the exercise of a sound discretion, have proceeded under S. 202.

The next question is whether the District Magistrate had jurisdiction under S. 195 (5) to order the withdrawal of the complaint in case No. 1016-C. Is the District Magistrate an authority to which an officer in charge of a police station is subordinate within the purview of that provision? The subsection is new and it is to be observed that the language differs from S. 195 (1) (a) where the person whose complaint is required to remove the bar to prosecution is the public servant concerned, or some other servant to whom he is subordi-

nate. The decisions of the Allahabad and of the Calcutta High Courts differ as to whether an officer of police in his district is subordinate to the District Magistrate, the former basing their affirmative answer on the terms of S. 4, Police Act 1861 which place the police under the general direction and control of the District Magistrate. But whether the police are public servants subordinate to the District Magistrate under sub-S. 1 (a) or not, I see no reason to doubt that the very wide expression in sub-S. 5 "any authority to which such public servant is subordinate" connoting apparently a more distant and general entity than departmental superior, covers the District Magistrate in relation to the police of the district. It would not seem at all unreasonable that the legislature should restrict the making of the complaint to the department and yet permit the withdrawal thereof (at times perhaps on grounds of policy transcending departmental considerations) by superior authorities also. It follows that the withdrawal of the complaint in case 1016-C was valid, and as the District Magistrate exercised jurisdiction administratively, his order is not open to interference by a judicial tribunal, which moreover would be most reluctant to interfere in such circumstances even if it was entitled to do so. It does not matter therefore that his reason for the withdrawal rested on what in the obscure circumstances may well have been a misconception of law, such as that the Sub-Divisional officer could himself file a valid complaint.

When the authority referred to under S. 195 (5) forwards a copy of its order of withdrawal of a complaint to the Court the enactment provides that on receipt thereof by the Court, no further proceeding shall be taken on the complaint. Not only was such a copy sent but the District Magistrate himself noted on the order sheet of case 1016-C his order of withdrawal. Action under S. 494 Criminal P. C. was at least superfluous and only complicated matters, as the only order possible under S. 494 was one of discharge. Whether it could have the effect of introducing the Local Government into the category of 'authority' under S. 195 (5) need not here be decided as it has been held that the District Magistrate acting administratively had

authority to withdraw the complaint in Case No. 1016-C. In my opinion that case is finally closed, unless possibly the District Magistrate's order could be revised by the Commissioner or by the Local Government as to which it is not necessary to express any opinion.

In support of the contention that the complaint of Sub-Inspector Ram Singh could not remove the bar under S. 195 (1) (a), reference is made to the decision of a Bench of this Court in *Brahmdeo Singh v. Emperor* (2). That decision is binding on me. According to it, the Sub-Divisional Magistrate could not take cognizance of a complaint of Sub-Inspector Ram Singh of an offence under S. 182. But Sub-Inspector Ram Singh did not complain of such an offence. He complained of an offence under S. 211 and the question whether the investigating police officer could prefer a complaint under S. 211, even if he was not the public servant to whom information had been given was expressly not considered by the learned Judges. The decision is therefore not applicable.

I am unable to discern any reason why even if a Magistrate is disentitled by a statutory bar to take cognizance of any offence under S. 182 cognizance by him of an offence under S. 211 should also be barred without any statutory provision to that effect. No doubt S. 182 is a minor offence to S. 211, and in a trial on a charge under S. 211 there may under S. 238 (2) be a conviction of an offence under S. 182, if the intention to injure, which is an essential ingredient in S. 211, is not established against the person who is proved to have lodged false information charging a person with having committed an offence. But the inwardness of the matter here is that if the intention to injure is not established there cannot on the section itself be a conviction under S. 211, and also, since S. 238 (2) must yield to S. 195 (1) (a), there cannot be conviction of the minor offence under S. 182. Thus there is no bar to cognizance being taken of an offence under S. 211 on the complaint of the investigating police officer though he is not also an officer referred to under S. 195 (1) (a); but if the charge under S. 211 fails, there cannot by reason of S. 190 (1) (a), Criminal P. C. be a conviction under S. 182; I. P. C.

Next since the offence under S. 211,

has not been committed in or in relation to a proceeding in any Court, S. 195 (1) (b) is no bar to cognizance of a complaint of that offence. Again it cannot, after cognizance has been taken, be brought under S. 195 (1) (b) by any complaint which may thereafter be filed by the present petitioner. The decision in *Daroga Gop v. Emperor* (1) is not applicable because, as has been pointed out in *Parmanand Brahmachari v. Emperor* (4) the formal complaint of the offence had in *Daroga Gop v. Emperor* (1) been filed in Court by the informant under S. 211 before the formal complaint of the police officer against him was submitted to the Court whereas here the Court has already taken cognizance of the Sub-Inspector's complaint and

"It is impossible to hold that when a Magistrate has taken cognizance of a complaint, anything that can subsequently happen will suffice or anything in S. 195 (1) (b) can operate to deprive him of jurisdiction to proceed thereon in accordance with law."

The main contention of the petitioner therefore fails and case No. 643-C must proceed as a complaint under S. 211. I. P. C. Both on his own initiative and by reason of the direction of this Court the Sub-Divisional Magistrate is committed to an inquiry under S. 202. As he appears to be somewhat uncertain as to procedure under that provision, he may obtain some assistance from the following quotation from the decision cited above:

"It is next urged that in any event the petitioner was not afforded adequate opportunity of showing cause against his prosecution. Assuming that under the superseded provisions of the Code he was entitled to such an opportunity, he is no more entitled to it under the procedure laid down in the amended Code than any other person against whom a complaint is made. It was open to the Magistrate to issue process without any notice to him if on reading the complaint he found sufficient ground for proceeding, or to proceed under S. 202 for the purpose of ascertaining the truth or falsity of the complaint. An inquiry or investigation under S. 202 is designed to afford the Magistrate an opportunity of either confirming or removing such hesitation as he may feel in respect of issuing process against the accused; The nature of the inquiry varies with the circumstances of each case, and it is certainly not contemplated that it should always be exhaustive. Frequently all that is required is the elucidation of some minor point or the summary determination of the sufficiency of the available evidence, but least of all is the inquiry a preliminary trial of the accused at which he is entitled to adduce his evidence before process can issue upon him. The degree

(1) A. I. R. 1930 Pat. 80=1930 Cr. C. 6.

of formality of the proceedings and the width and depth of the inquiry is entirely in the discretion of the Magistrate (so long at least as he confines himself to the simple question of issue of process or dismissal of the complaint). The provision is enabling and not obligatory as soon as he has satisfied himself that process should issue, its object is fulfilled and it is certainly not incumbent upon him or ordinarily expedient that he should practically enter upon a trial of the case."

Ordinarily therefore the Magistrate would have called upon the complainant Sub-Inspector Ram Singh to prove his case, but under the very exceptional circumstances this Court has already indicated the procedure appropriate to the particular case, namely, that the Magistrate having failed to issue process at once on the complaint should before making up his mind to do so examine the witnesses whom the petitioner named in his first information and who are of good position, and deal with the points raised by him in showing cause. This must now be done but while the complainant's side must naturally also be considered, it is inexpedient, as indicated above, that this inquiry under S. 202 should develop into something comparable to a preliminary trial.

There is no foundation whatsoever for the prayer that the proceedings should be quashed on the ground that the petitioner has been harassed, the fact is that he has expended his energy on artifices to delay or avert inquiry, and nothing could be more prejudicial to the administration of justice than to place a premium on such tactics.

As to the application for transfer, I see no reason to entertain it. In the course of his extensive wriggling, the petitioner manoeuvred the Magistrate into passing an order which though incorrect was intelligible in the tangled state of the proceedings, namely that the petitioner should give his own deposition. Whether the position of the petitioner was that of a complainant or that of an accused was obscure by reason of the confusion occasioned by the use of terminology based on rulings under the unamended Code. As he had guarded himself against filing a 'complaint,' the petitioner had no locus standi 'to prove his case.' It has now been ascertained that he is at present in the position of an accused on whom process has not yet been issued so that the Magistrate acting under S. 202, Criminal

P. C., may, if so advised, accept any explanation from him but cannot force him to depose. But the order of the Magistrate was due merely to a misconception of the position. There is no adequate reason to transfer the complaint from his file now that misconceptions which indeed were general, have been removed and it would be highly inexpedient to do so at this stage. But if after this inquiry under S. 202 which should be conducted by him with all reasonable expedition he decides that the accused should be placed on trial under S. 211 he will after issuing process on the complaint transfer the case for disposal to some other Magistrate of the First Class who is subordinate to him.

Apart from the direction as to the manner of inquiry and as to transfer, the rule is discharged. Let the record be sent down at once.

V.S./R.K.

Rule discharged.

1930 Cr. Cases 79

(Patna)

MACPHERSON, J.

Ramnandan Singh—Accused — Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 464 of 1929, Decided on 7th November 1929, from an order of First Class Magistrate, Monghyr, D/- 22nd February 1929.

(a) Penal Code, S. 225-A—"Negligence"—Omission to secure door of room where prisoner was confined is indication of negligence.

Where a person properly arrested, is confined in a room, omission to secure the door of the room, the main cause of escape of the prisoner from custody, is an indication of negligence.

[P 80 C 1]

(b) Penal Code, S. 225-A—Arrest without warrant or order of Magistrate under S. 55—Consequent confinement—Confinement is legal custody.

Section 55, Criminal P. C., is independent of Chap. 8 of the Code, which includes S. 110, although proceedings under that chapter might follow an arrest under S. 55 as a natural sequence and a police officer can therefore arrest or cause to be arrested without warrant or an order of a Magistrate any person who comes within provisions of S. 55. And where such person is arrested without warrant or order of Magistrate, confinement of such person is legal custody within the meaning of S. 225-A : A. I. R. 1925 Lah. 628, 629 ; 35 All. 407, Ref.

[P 80 C 2]

H. L. Nandkeolyar and H. N. Singh—
for Petitioner.

Asst. Government Advocate — for the Crown.

Order.—This is an application in revision against the conviction of the petitioner under S. 225-A, I. P. C., and the fine of Rs. 30 imposed upon him.

The facts found are that the petitioner who is a Sub-Inspector of Police, under the direction of the Inspector of Police who was his superior officer, arrested under S. 55, Criminal P. C., Etwari Kahar and three others who were about to be prosecuted under S. 110, Criminal P. C., placed them in a room in the inspection bungalow at Dharaha and negligently permitted Etwari Kahar to escape from confinement in which he was legally bound as a public servant to keep him.

The bungalow which faces and has a verandah to the north consists of two rooms with an intervening door and dressing-rooms to the south. The door mentioned and the doors leading from each room on to the verandah were the only doors open. The prisoners after arrest were placed in the eastern room and the Sub-Inspector and his constables were at the door north of it. At the order of the Sub-Inspector a constable went in to handcuff the prisoners whereupon Etwari Kahar slipped out by the open door in the western room where the Inspector and the Head constable were or at least the latter was, and then into the verandah by the northern door of that room and escaped. At a later date he was recaptured through the efforts of the petitioner and on a complaint of the petitioner was convicted of an offence under S. 225-A for escaping from the petitioner's custody. The present prosecution has been undertaken under the orders of the Superintendent of Police.

Mr. Nandkeolyar raises two points only : (1) the facts found do not constitute negligence, and (2) Etwari Kahar was not in legal custody of the petitioner.

The first point is clearly untenable. It was certainly negligence to leave open the connecting door between the two rooms and the omission to secure it was the main cause of the escape of the prisoner from custody. Other indications

of negligence are also set out by the Courts below.

In support of the second point reliance is placed upon a decision of a single Judge of the Lahore High Court in *Kala v. Emperor*, A. I. R. 1925 Lah. 623, for the proposition that the police have no authority to arrest in anticipation of proceedings under S. 110, Criminal P. C. In the first place, I am not prepared to accept the correctness of the decision. Further in any event the facts are distinguishable from the present case because in the case cited a report had already been submitted to the Magistrate for proceedings under S. 110 on which the Magistrate had failed to issue either summons or warrant of arrest. To my mind the correct decision on the point is to be found in *Nepal v. Emperor* (1), where Tudball, J. pointed out that S. 55, Criminal P. C., is independent of Chap. 8 of the Code which includes S. 110, although proceedings under that chapter might follow an arrest under S. 55, Criminal P. C., as a natural sequence, and that a police officer can, therefore, arrest or cause to be arrested, without a warrant or an order of a Magistrate, any person who comes within the provisions of S. 55 (1) (c). It is not denied that Etwari Kahar came within the category described in that enactment. Accordingly under the provisions of S. 551 read with S. 55 (1) (c) the petitioner was entitled to arrest, as he did arrest, Etwari Kahar, without an order from the Magistrate and without a warrant, and the confinement from which the petitioner suffered the said prisoner to escape was a lawful confinement in which the petitioner was legally bound to keep him. Thus the second point also fails.

On the understanding that this is the only punishment to which the petitioner will be subject, I do not interfere with the sentence.

The rule is discharged.

V.B./R.K.

Rule discharged.

1930 Cr. Cases 81

Allahabad

SEN, J.

Hukum Singh—Applicant.

Emperor—Opposite Party.

Criminal Revn. No. 447 of 1929, Decided on 13th August 1929, from order of Sess. Judge, Etah, D/- 12th June 1929.

(a) Criminal P. C., S. 403—Where two indictments are essentially different and relate to independent transactions acquittal under one does not bar complaint with reference to other.

To set up the plea of autre fois acquit it is essential that there must have been a previous trial of the offence terminating in the order of acquittal. It must be established that the offences were substantially the same and grew out of same facts. Where the two indictments are essentially different and relate to separate and independent transactions affecting distinct individuals it cannot be held that acquittal with reference to complaint of the one is a bar to entertainment of the second complaint. It is not necessary that both complaints should be before the same person but before the presiding officer of the same Court. [P 84 C 1, 2]

Band C instituted a joint complaint against H. Transactions out of which the complaints arose were different and independent, and separate complaints ought to have been presented. B and H compounded the case with the result that C's case was no longer subject of judicial inquiry. C filed a fresh complaint. H contended that he had been acquitted of all charges in the original complaint, and no fresh complaint could be entertained under S. 403.

Held: that the effect of acquittal with reference to B's complaint was no bar to the entertainment of the complaint by C. No order for acquittal had been passed with reference to C's complaint and H was not ordered to be discharged on the same: 9 All. 52; (1895) 4, W. N. 86; 5 A. L. J. 197; 29 All. 7 and 36 All. 129. Ref.; 4 C. W. N. 242; 34 Mad. 253 and 41 Mad. 685, Dist. [P 82 C 2]

(b) Criminal P. C., S. 345 (6)—Joint complaint—Composition operates as acquittal with reference only to particular offence compounded.

Where in a joint complaint with reference to distinct and independent transactions there is composition with respect to one transaction the effect of such composition is acquittal with respect to charges brought under the particular transaction. The composition does not operate as acquittal with reference to the offence committed in the other transaction. [P 82 C 2]

A. M. Khwaja—for Applicant.

M. Waliullah—for the Crown.

Judgment.—The facts of the case which have given rise to this application for revision are that, on 7th August 1928, Mt. Champavati and one Bahori Lal instituted a complaint under Ss. 417 and 406, I. P. C., in the Court of a Special Magistrate with second class powers. The District Magistrate of Etah trans-

ferred the case to the Sub-Divisional Magistrate of Kasganj. The latter, in his turn, transferred the case to Mr. Sayed Ghayoor Ahmad, Magistrate, First Class.

Mt. Champavati is the widow of a predeceased brother of Bahori Lal. Both her husband and Bahori Lal were in the railway service. After the death of her husband, Mt. Champavati received a considerable sum of money from the railway authorities on account of the provident fund of her deceased husband. Bahori Lal also received a large sum of money from the railway on his own account as his share of the provident fund. It is common ground that Mt. Champavati and Bahori Lal occupied the same house and Bahori Lal may well be taken to be the natural protector of Mt. Champavati and her minor son. It was alleged that by trickery and by a pretence of friendship, Hukum Singh, the applicant, insinuated himself into the confidence of Mt. Champavati and Bahori Lal in various ways. Hukum Singh persuaded Mt. Champavati to believe that there was a danger of her cash and jewellery being appropriated by Bahori Lal and that it would be safer and more prudent if she allowed Hukum Singh to take charge of her cash and jewellery and keep them in deposit for her. The unsuspecting widow believed Hukum Singh and put him into possession of ornaments, worth Rs. 350 and cash Rs. 1,100. The complaint of Mt. Champavati against Hukum Singh was limited to these two items which concerned her and which had nothing to do with Bahori Lal. She charged Hukum Singh with cheating and criminal breach of trust with reference to the two items indicated above.

In the same petition of complaint, dated 7th August 1928, Bahori Lal charged Hukum Singh with cheating and criminal breach of trust with reference to large sums of money aggregating to Rs. 2,500. The money belonged to Bahori Lal. Mt. Champavati had no share in this money. The person who had been imposed upon with reference to this was Bahori Lal and not Mt. Champavati. The transactions which formed the basis of the complaint of Mt. Champavati were essentially different from those which afforded a cause of action to Bahori Lal.

It was unfortunate and inexpedient to address a joint complaint to the Magistrate with reference to two independent

transactions affecting two individuals separately and which did not present any common feature excepting in so far that two persons were alleged to have been victimized by the wily machination of the same individual. The Magistrate ought to have insisted upon two complaints being presented before him, one by Mt. Champavati and the other by Bahori Lal. It would have been reasonable and more businesslike to do so, to avoid any future complications or embarrassment in the trial of the cases and would have limited the scope of the issue which emerged for decision in each case separately.

On 16th November 1928, it had dawned upon the two complainants that it was not right that the offences committed against them should be heard and disposed of in the course of a joint trial; and that on that date, they addressed a petition to the Magistrate that the trial of the case should be limited to such items only as affected Bahori Lal. The only order passed by the Magistrate on this application was "file." He, however, confined his enquiry to such items only as had been alleged to have been obtained from Bahori Lal either by cheating or by criminal breach of trust. He committed Hukam Singh to the Court of sessions, alternatively under Ss. 406 and 420, I. P. C.

The charges on the aforesaid sections constitute a warrant case under the Criminal Procedure Code, but they are compoundable under S. 345, Criminal P. C., with the permission of the Court before which any prosecution for such offence is pending. Hukam Singh appears to have persuaded Bahori Lal to agree to have the dispute referred to the arbitration of one Babu Gulzari Lal. The parties applied to the Court of Sessions for leave to compound the case. The Court granted the permission and the case was compounded on 23rd February 1929.

The effect of the petition dated 16th November 1928, was that the original complaint of Mt. Champavati was no longer the subject of a judicial enquiry. There was no non-appearance of Mt. Champavati within the meaning of S. 247, Criminal P. C., and the Magistrate passed no order acquitting the accused on the complaint of Mt. Champavati. It is abundantly clear that Mt. Champavati's complaint has never so far been the sub-

ject of a judicial investigation. No evidence had been recorded and the truth or falsity of the complaint had not been tested on the merits. Hukam Singh has not been ordered to be discharged on the complaint of Mt. Champavati.

The effect of the composition with Bahori Lal was that Hukam Singh was acquitted of the charges brought by Bahori Lal against him. S. 345 (6), Criminal P. C., is clear on the point:

"The composition of an offence under this section shall have the effect of an acquittal of the accused with whom the offence has been compounded."

The offence which has been compounded was an offence against Bahori Lal and not against Mt. Champavati. The composition of that offence by Bahori Lal could not operate as an acquittal with reference to the offence committed against Mt. Champavati.

After the disposal of the Sessions case, a change had taken place in the personnel of the officer presiding in the Court of the Deputy Magistrate who had committed the case to the Court of Sessions. Mr. Sayed Ghayoor Ahmad was transferred and his place was taken by B. Jwala Prasad, Magistrate First Class.

On 5th April 1929, Mt. Champavati filed a fresh complaint in the Court of Babu Jwala Prasad against Hukam Singh charging him with the commission of offences punishable under Ss. 417 and 420, I. P. C. In this petition, Mt. Champavati rehearsed the same facts, on which the complaint, dated 7th August 1928, was founded.

Upon notice being issued to Hukam Singh, he contended that the effect of the order passed on the petition of Mt. Champavati, dated 16th November 1928, was that he was discharged by the Court and that the said discharge could not be set aside by another Magistrate of co-ordinate jurisdiction. It was further argued that the effect of the acquittal by the Court of Sessions upon the composition of the offence by Bahori Lal was that Hukam Singh was acquitted of all charges which were set out in the original complaint dated 7th August 1928, preferred jointly by Mt. Champavati and Bahori Lal, and that having regard to the provision of S. 403, Criminal P. C., it was beyond the competence of the Magistrate to entertain a fresh complaint on the same facts against Hukam Singh.

These contentions were repelled by the Magistrate, who by his order dated 1st June 1929, directed that the case of Mt. Champavati must proceed against the accused. Hukam Singh applied to the learned Additional Sessions Judge, who, held that the order of the lower Court was correct in law and dismissed the application.

Hukam Singh comes up before this Court in revision.

The learned Additional Sessions Judge was of opinion that the complaint of Mt. Champavati had not been disposed of by the Magistrate in any shape or form; that, at the outset, the order of the Magistrate on the application of Mt. Champavati dated 16th November 1928, and his subsequent order of commitment amounted to a discharge of Hukam Singh; and that under the law the Magistrate was not precluded from rehearing the complaint or from entertaining a fresh complaint based upon the same facts.

The learned counsel for the applicant has cited certain authorities in traverse of the view taken by the learned Additional Sessions Judge. In *Moul Singh v. Mahabir Singh* (1) all that was held was that it was not proper for a District Magistrate to direct proceedings to be taken on a police report with reference to a matter which had come up before a Sub-Divisional Magistrate and in which the said Magistrate had made an order that it was not necessary to proceed against certain accused persons, unless the District Magistrate had withdrawn the whole matter from the Court of such Subordinate Magistrate. In the matter of *Guggilapu Paddayya of Palakot* (2) it was held that the effect of S. 247, Criminal P. C., was that the order amounted to an acquittal and that the non-mention of S. 247 in the explanation to S. 403, Criminal P. C., was indicative of the fact that the latter section was not intended in any way to limit the effect of an order of acquittal under S. 247. In the present case, no order was passed on the complaint of Mt. Champavati either under S. 247 or under S. 403, Criminal P. C. This ruling, therefore, is not helpful to the applicant. It has been held in *Kumar-*

swami Chetty v. Kuppuswami Chetty (3) that :

"an offence is complete when the acts, constituting it, have been committed apart from whether any complaint or charge has been laid before the Court or not and that the compounding of offences mentioned in para. 1, S. 345, Criminal P. C., is lawful even if it takes place before any complaint is filed in respect thereof."

In the present case, no composition had been arrived at between Mt. Champavati and Hukam Singh either before the Court or outside the Court and therefore there was no composition in existence which could operate as an acquittal.

The case of *Queen Empress v. Adam Khan* (4) was strongly relied on. It was ruled in this case by Blair and Burkitt, JJ., that when a competent tribunal had dismissed a complaint, another tribunal of exactly the same powers cannot reopen the same matter on a complaint made to it :

"We think it utterly contrary to sound principles that one Magistrate of co-ordinate jurisdiction should, in effect and substance, deal with, as if it were an appeal or a matter for revision, a complaint which had already been dismissed by a competent tribunal of co-ordinate authority."

This ruling has no application to the facts of the present case because the complaint of Mt. Champavati had not been dismissed by a competent tribunal. Moreover, the aforesaid view does not appear to have been adopted or agreed to by some of the learned Judges of this Court. In an earlier decision in *re-Queen Empress v. Chotu* (5) a divergent view appears to have been taken. In *Queen Empress v. Umedam* (6) it was held by Knox and Aikman, JJ., that :

"a Magistrate, who had passed an order dismissing a complaint, may at the instance of the complainant, and without direction from any superior authority take cognizance of the same offence or of any other offence constituted by the same facts upon a second proper complaint being laid before him."

In *Bhagwan Din v. Dibia* (7) it was held :

"that the same Court was not precluded from entertaining a second complaint in *pari materia*."

(3) [1918] 41 Mad. 685=34 M. L. J. 217=44 I. C. 588=(1918) M. W. N. 498.

(4) [1899] 22 All. 106=(1899) A. W. N. 211.

(5) [1881] 9 All. 52=(1886) A. W. N. 281 (F.B.).

(6) [1895] A. W. N. 86.

(7) [1908] 5 A. L. J. 187=(1908) A. W. N. 67 =7 Cr. L. J. 297.

(1) [1900] 4 C. W. N. 242.

(2) [1911] 84 Mad. 253=9 I. C. 258=12 Cr. L. J. 41.

The case law on the subject was considered by Richards, J., in *re, Emperor v. Meharban Husain* (8), and the learned Judge is reported to have observed as follows :

"I can find nothing in the Criminal Procedure Code which prevents the Magistrate from entertaining a second complaint made against the same person, even though the second complaint may be connected with a previous complaint which has already been dismissed under the provisions of S. 203."

In *Ram Bharos v. Bahan* (9) the 'second complaint was instituted before the same tribunal although the incumbent was a different individual, and it was ruled that :

"where the question is as to the competence of a Magistrate to entertain a second complaint in *pari materia* with a former complaint which has been dismissed under S. 203, Criminal P. C., it was not necessary that both complaints should be before the same person but before the presiding officer of the same Court."

Both, in principle and in view of the weight of authority, there was nothing to preclude Babu Jwala Prasad from taking cognizance of the second complaint instituted by Mt. Champavati.

In construing S. 403, Criminal P. C. the explanation appended to the section ought not to be lost sight of.

"The dismissal of a complaint, the stopping of proceedings under S. 249, the discharge of the accused or any entry made upon a charge under S. 273, is not an acquittal for the purposes of this section."

A verdict of acquittal is immune from challenge and the applicant is entitled to its full benefit; but the applicant has not produced a certified copy of the record or proceedings of an acquittal to show that he has been acquitted of the offence of which he has been arraigned or that he might have on his former trial in the Court of sessions been convicted of the offence of which he is now sought to be arraigned. To set up the plea of *autrefois acquit*, it is essential that there must have been a previous trial of the offence charged, terminating in an order of acquittal. The explanation appended to the section places this matter with the greatest clearness and in fact beyond the realm of controversy. There is an order of acquittal in favour of Hukam Singh but to sustain the

plea now advanced Hukam Singh had to establish that the offences were substantially the same and grew out of the same facts. One of the tests for determining the identity of the offences is whether the evidence necessary to support the second indictment would have been sufficient to procure a legal conviction upon the first. In view of the circumstances of this case; it is impossible to hold that the evidence, which had a direct relation to Bahori Lal's case, could have any bearing upon the case propounded by Mt. Champavati. Any immaterial details may be eliminated, and the substance, rather than the form of charges in the two indictments have to be considered. But the two indictments are essentially different. They relate to separate and independent transactions, affecting distinct individuals. It is impossible to hold that the effect of acquittal with reference to the complaint of the one is a bar to the entertainment of the second complaint. This application is without force and is dismissed.

R.M./R.K. *Application dismissed.*

1930 Cr. Cases 84

Allahabad

YOUNG AND SEN, JJ.

Durjan—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 728 of 1929, Decided on 4th September 1929, against order of Sess. Judge, Cawnpore, D/- 17th July 1929.

Evidence Act, S. 30—Retracted confession—It must be relied in whole and not in part where it is sole evidence against accused.

In cases where the sole evidence against the accused is that of a retracted confession, such confession if it is relied on must be relied on as a whole and not only in part. [P 85 C 2]

Narain Sahai—for Appellant.

U. S. Bajpai—for the Crown.

Judgment.—*Durjan* the appellant in this case, along with two others, all sweepers, were charged under S. 302, I. P. C., with murdering one Khilla before the Sessions Judge of Cawnpore. Manian and Lallu were acquitted, but *Durjan* was convicted and sentenced to death.

We are not satisfied with the evidence in this case against the appellant. On 28th January of this year a dead body was discovered near village Baragaon

(8) [1906] 29 All. 7=3 A. L. J. 562=(1906) A. W. N. 245.

(9) [1914] 36 All. 129=22 I. C. 734=12 A. L. J. 106.

The dead body had wounds upon it and clearly there had been a murder committed. Part of the face of the corpse had been burnt. It is alleged that the dead body was that of Khilla who was missing from the village.

We are not satisfied in the first place that this corpse was that of Khilla. No proceedings were taken for nearly two months after the discovery of the corpse. A photograph had been taken, however, of the corpse. The wife of Khilla was quite unable to identify the photograph as that of her husband. We have carefully examined this photograph and we are certainly of the opinion that if the corpse had been that of Khilla, the wife ought to have been able to identify the photograph of her husband's body.

The Judge, however, relies upon the identification of a dhoti and a shirt which were found upon the corpse. These articles are common articles and we do not think it satisfactory that the identification should solely be upon these particular articles of clothing.

We are not satisfied that there was any motive for the murder. The Judge himself says that he is in a difficulty about this point. There is no direct evidence that Durjan murdered Khilla. There was nothing found in Durjan's house to incriminate him. The only evidence that exists upon the record against Durjan is his own retracted confession. As to this we are not satisfied that the proper procedure was adopted in taking this confession. The learned Magistrate who recorded it is clearly confused in his evidence, and does not even remember whether he recorded this statement in his Court or at his bungalow. He says on cross-examination that:

"If he records a confession at his bungalow he generally sends away the constables to the Mall Road."

This is extremely unsatisfactory, and the learned Magistrate in question ought to be very much more careful in recording these important statements.

As regards the confession, the learned Sessions Judge finds that, as regards an important part of it, it is not reliable. The confession records that Khilla was killed with a spear. The medical evidence, given after a careful examination of the body, is to the effect that the murder was committed with a heavy

weapon like a gandasa or kulhari. In cases where the sole evidence against the accused is that of a retracted confession, we think it clear that if such a confession is relied on, it must be relied on as a whole and not only in part.

We are satisfied that the evidence therefore in this case is insufficient to support the conviction. We, therefore, set aside the conviction and sentence and direct that the appellant be set at liberty provided he is not required for any other offence.

R.M./R.K. *Conviction set aside.*

1930 Cr. Cases 85

Bombay

KEMP, AG. C. J. AND MURPHY, J.
Parsu Dhondi—Applicant.

v.

Trustees of the Port, Bombay—Opponent.

Civil Ref. No. 18 of 1928, Decided on 31st July 1929.

Workmen's Compensation Act (1923), S. 2 (1) (n) and Sch. 2 (5)—Workmen actually engaged in loading from wharf to hold of ship are protected—But workman injured while working in shed alongside wharf is not, being not engaged for purpose of loading ship.

Protection under the Act is meant for the workmen who are actually engaged in the process of handling the bales, so as to transfer them from the wharf to the hold of a ship which is actually being loaded. But where, a workman is injured while stacking certain bales in a shed alongside the wharf, the workman at the time when he met with the accident is not engaged for the purpose of loading a ship.

[P 86 C 2]

A. A. Adarkar—for Applicant.

O'Gorman and Little & Co.—for Opponent.

Kemp, Ag. C. J.—This is a reference under the Workmen's Compensation Act 8 of 1923. The applicant one Parsu Dhondi was employed by the Port Trust on 23rd June 1928, to unload bales of cotton from a railway waggon standing in the Victoria Docks and to take them to a shed adjoining the wharf. From his evidence it appears that he was arranging the bales in the godown and that whilst he was stacking them one of the bales fell down and he sustained a fracture which is described in the medical evidence as a simple fracture of the middle third left leg (both bones). Under these circumstances he sought compensation under S. 2, Cl. (1) (n) read with Sch. 2, item 5 of the Act. The joint effect of that section and subsection and item 5 in the

Schedule is that the workman must be employed for the purpose of loading, unloading or coaling any ship. His injury occurred not whilst he was engaged in any such duty but whilst stacking the bales in the shed. It is not suggested he was injured whilst the bales were in process of being loaded on to the ship. The intention expressed in item 5 in Sch. 2 is to restrict the compensation to persons who are occupied in the actual present operation of loading, unloading or coaling. That this is so is further borne out by the Government Notification which, since the Act, extended the right to compensation to cases where the person injured is engaged in loading, unloading or fuelling a ship in any harbour, roadstead or navigable water: see Government Notification dated 15th July 1927 published in the Bombay Government Gazette, Part 1, p. 1978. S. 7, Act 5 of 1929, amended Cl. 5, Sch. 2 and extended the protection to a person who is employed for the purpose of loading, unloading, fuelling, constructing, repairing, demolishing, cleaning or painting any ship of which he is not the master or a member of the crew. These tend to show that the intention of the legislature was that the person injured should be directly concerned in the act of loading, &c., the ship. Under these circumstances, I am of opinion, in this case the applicant has no right to compensation under item 5, Sch. 2 of the Act. Nor do I think the words "for the purpose of" in that subclause extend the benefits of the Act to him. It is unnecessary to consider how far, if at all, the Act applies to any one who is not actually concerned in handling cargo, &c.

The construction of item 5, Sch. 2, is a question of law although no question of law appears to have been specifically framed in the Commissioner's reference unless it is intended to be included in the issue which he has framed stating the facts of the case. I would answer the issue:

"Was the applicant at the time when he met with the accident engaged for the purpose of loading a ship?"

in the negative.

No order as to costs. Mr. O'Gorman for the Port Trust says that the Court may rest assured that the Trustees will consider the applicant's case sympathetically.

Murphy, J.—The workman in this case was injured while stacking certain bales in a shed alongside the wharf in the Victoria Docks, Bombay. It is contended before us that the words "for the purpose of" unloading, loading, &c., which are to be found in Sch. 2 (5), Workmen's Compensation Act 8 of 1923, should be interpreted very liberally, and as implying a wider meaning than had the word "in" been used in their place. But it seems to me that such a meaning cannot be read into them and that the expression "for the purpose of" used in this connexion means the same thing as "in" and that other words would have been used had it been intended to include a man, injured while engaged in preparations for the purpose of ultimately loading bales on to a ship. In fact the same argument might be used to apply to the case of every person engaged in working on such bales at any one of the many steps which intervene from where the bales are pressed in the mill to where they are stacked ready for loading into a ship, and it is clear that a line must be drawn somewhere. I think that the meaning of the term used is clear, and that protection under the Act is meant for the workmen who are actually engaged in the process of handling the bales, so as to transfer them from the wharf to the hold of a ship which is actually being loaded. But the workman, in question was only stacking the bales in a shed and it does not appear that the ship which was to carry them was then being loaded. I agree with the answer proposed by the learned Chief Justice to the question in the reference and think that the claimant cannot be awarded compensation in this case.

V.S./R.K.

Order accordingly.

1930 Cr. Cases 86

Madras

WALLER AND CORNISH, JJ.

Subba Goundan—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Case No. 212 of 1929 and Criminal Revn. Petn. No. 184 of 1929, Decided on 9th August 1929, against order of Joint Magistrate, Tirupattur, in Criminal Appeal No. 13 of 1929.

Criminal P. C., S. 423 (b)—Sentence by appellate Court—Alteration of sentence of three months' rigorous imprisonment to

one month and fine of Rs. 60 and in default two months does not amount to enhancement.

The accused was convicted and sentenced to undergo three months' rigorous imprisonment. He appealed and his conviction was affirmed but the sentence was altered into one of one months' rigorous imprisonment and a fine of Rs. 60 with a further two months' rigorous imprisonment in default of payment.

Held: that the appellate Court in effect reduced the sentence. The proper list being whether the accused really considers the fine as heavier sentence than imprisonment: 23 *Bom.* 439, *Rel. on*; A.I.R. 1924 *Pat.* 563; 23 *All.* 497; and 36 *All.* 485, *Dist.* [P 87 C 2]

A. C. Sampth Ayyangar—for Petitioner.

K. N. Ganpathi—for the Crown.

Waller, J.—The petitioner was convicted and sentenced to undergo three months' rigorous imprisonment. He appealed and his conviction was affirmed, but the sentence was altered into one of one month's rigorous imprisonment and a fine of Rs. 60, with a further two months' rigorous imprisonment in default of payment. He asks us in revision to say that the sentence passed on him by the appellate court is illegal as amounting to an enhancement. He has the support of several decisions, for example, *Bhola Singh v. Emperor* (1) which followed *King Emperor v. Sagara* (2). The ratio decidendi in these cases was this—that, in the event of the fine not being paid, the prisoner would serve a sentence equivalent to that passed by the trial Court, and still he liable to have the fine collected from him. The same view was taken in *Emperor v. Mehar Chand* (3). With great respect, it seems to us that the proviso to S. 386 (1) (b), Criminal P. C. takes much of the force out of this line of reasoning. The legislature recognized that no sane man, who had money or credit at his disposal, would go to jail, if he could avoid it by paying a fine. It, therefore, provided that, if the whole of a sentence of imprisonment imposed in default of payment of a fine had been served, no warrant should issue against the defaulter's property "unless for special reasons to be recorded in writing the Court considers it necessary to do so." In practice, no Court would, we imagine, try of levy execution, unless there was property to attach and, as we have pointed out above, it is almost incon-

ceivable that a man would go to jail, if he had means to pay the fine. It is, consequently, in the highest degree improbable that the contingency which influenced the High Courts of Allahabad and Patna would ever arise. A contrary view was taken in *Queen Empress v. Chagan Jagannath* (4), which followed an unreported decision of this Court.

It cannot be denied, indeed, Mr. Sampath Ayyangar, admits that, in this case, the appellate Court, in effect, reduced the sentence. The petitioner had only to pay his fine in order to escape from two months' in jail. We find it very difficult to say that a sentence which, if submitted to, had not been enhanced, but reduced, must be held to have been enhanced merely because the prisoner has refused to submit to it. He has an option in the matter. If he does not choose to exercise that option in his own favour, is he to be heard to say:

"you must still further reduce my already reduced sentence, because, if I am contumacious, I shall not only have to serve a sentence equal to my unreduced sentence, but will also be liable to have my property attached to pay the fine I have refused to pay."

It is, of course, impossible to decide the question academically or to lay down a principle applicable to all cases. In this particular instance, the petitioner does not appear to say that he is unable to pay the fine or would prefer to suffer the sentence passed on him by the trial Court. Judging by the energy with and the expense at which he has conducted the proceedings, we feel no doubt but that he could pay the fine without any difficulty. We are satisfied that, if he were before us and we offered him the option of paying Rs. 60 or going to jail for two months, he would choose the former alternative without hesitation. There is therefore no reality in his argument that, academically speaking, his sentence has been enhanced. The same test was applied by Piggot, J., in *Emperor v. Mehr Chand* (3) above cited. We think that the proper test is whether the petitioner really considers a fine of Rs. 60 a heavier sentence than two months' rigorous imprisonment. That he does consider it to be so, he has not attempted to allege. His contention is that his sen-

(1) A. I. R. 1924 *Pat.* 563=3 *Pat.* 638.

(2) [1901] 23 *All.* 497=(1901) A. W. N. 176.

(3) [1914] 36 *All.* 485=24 I. C. 607=12 A. L. J. 827.

(4) [1899] 23 *Bom.* 439.

tence would be perfectly legal, if we reduced the default term of imprisonment by one day that is, if his already reduced sentence were still further reduced. We consider it absurd and dismiss his petition.

P.R.S./V.S. *Petition dismissed.*

1930 Cr. Cases 88

Madras

CURGENVEN, J.

M. Kanniappan—Petitioner.

v.

Kullammal—Respondent.

Criminal Revn. No. 48 of 1929, and Criminal Revn. Petn. No. 38 of 1929, Decided on 30th July 1929, against order of Third Presidency Magistrate, Egmore, Madras, D/- 27th November 1928.

(a) Evidence Act, S. 112 — Divorce not legally taking place—Child is born during continuance of valid marriage.

Where divorce in the sense of a legal dissolution of the marriage, has not taken place, a child born must be taken to be born during the continuance of a valid marriage between a woman and her husband. [P 88 C 2]

(b) Evidence Act, S. 157—Entry in vaccination register regarding father's name of illegitimate child made three years after child's birth is inadmissible in evidence—Evidence Act S. 35.

Where an entry in the vaccination register, which includes a statement by a woman that a person, bearing the name of the alleged father of her illegitimate child, was the father of the illegitimate child, is made three years after its birth, the entry does not satisfy the terms of S. 157, and is not admissible in evidence.

Query.—It is doubtful whether such a statement is rendered admissible by S. 35. [P 88 C 2]

(c) Evidence—Appreciation of.

The lower Court is the proper and, in general, the final Judge of the credibility of evidence.

[P 89 C 1]

M. A. T. Coelho—for Petitioner.

V. Rajagopalachari—for the Crown.

B. R. Krishnaswami Iyengar—for Respondent.

Order.—This is a Revision Petition against an order of the Third Presidency Magistrate granting the petitioner maintenance allowance at the rate of Rs. 5 per mensem in respect of her younger child. The question in issue is whether the counter petitioner has been shown to be the father of that child.

The first point taken is that the learned Presidency Magistrate has overlooked the provisions of S. 112, Evidence Act. He appears to find that petitioner's husband divorced her, but he does not explain what meaning he attaches to that

term, and using it in the sense of a legal dissolution of the marriage it is clear that no divorce has taken place. I must take it therefore that, in the language of S. 112, the child was born "during the continuance of a valid marriage" between the petitioner and her husband. It has then to be shown, for the petitioner to succeed, that the parties to that marriage "had no access to each other at any time when he (the child) could have been begotten." On the date when petitioner gave evidence (5th October 1928) she gave the age of the child as four years, and stated that the counter petitioner had been keeping her for fourteen years. Her husband was employed in Bangalore, but some years before the child was born she came to Madras and lived with her father. Evidence which the lower Court has accepted shows that when the elder son three years senior to the younger was born petitioner's husband severed relations with her, on the ground that he was not the father even of that child; and certainly for some long while before the younger was born he had been living in Bangalore and his wife had been living in Madras. I think it may fairly be inferred, from this circumstance and from the relations shown to have been existing between petitioner and her husband, that he had no access to her at the time the younger child was begotten.

On the specific issue of the counter petitioner's paternity, the learned Presidency Magistrate has admitted certain evidence which is in my view inadmissible. The entry Ex. A in the vaccination register, which includes a statement by petitioner that a person bearing counter petitioner's name was the father of the child, was made three years after its birth and does not therefore satisfy the terms of S. 157, Evidence Act. I doubt whether such a statement is rendered admissible by S. 35. So too, the activities of P. W. 6, the caste headman, in trying to prevent counter petitioner's marriage do not constitute admissible evidence, though the objection does not apply to the evidence of P. W. 3, that the counter petitioner sought his help to pay money to the petitioner to dissuade her from creating trouble over the marriage.

Excluding what is inadmissible, it appears to me that there is quite enough

evidence on the record to show beyond reasonable doubt that counter petitioner is father of the child. What that evidence is will be found detailed in the lower Court's order. That Court is the proper and, in general, the final Judge of its credibility, but I may add that I see no reason to differ from the view which it takes. The Criminal Revision Petition is dismissed.

P.R.S./V.S' *Petition dismissed.*

* 1930 Cr. Cases 89

Nagpur.

STAPLES, A. J. C.

Nanhe—Applicant.

v.

Municipal Committee, Jubbulpore — Non-Applicant.

Criminal Revn. No. 167 of 1929, Decided on 19th August 1929, from order of Sess. Judge, Jubbulpore, D/- 6th March 1929, in Criminal Revision No. 10 of 1929.

(a) C. P. Municipal Act, S. 218—Police officer authorized to make complaints by committee—Police officer making complaint and not committee is complainant.

Where a police officer is authorized under S. 218 by the Municipal Committee to make complaints with regard to offences under the Municipal Act, that police officer making the complaint and not the committee is to be regarded as complainant. [P 90, C1]

(b) Municipal Act, S. 218 (2) — Committee delegating authority to public servant by virtue of his office—Such public servant acts in his capacity as public servant when making complaint and his personal attendance in Court, for examination is not necessary—Criminal P. C., S. 200, proviso (aa).

As a Municipal Committee is empowered to delegate its authority of making complaint under S. 218 (2), when such authority is delegated to a public servant by virtue of his office and not by name, he acts in his capacity as a public servant when making a complaint within the meaning of S. 200, proviso (aa) Criminal P. C., and his personal attendance for examination is not necessary. [P 90, C1]

* (c) Penal Code, S. 21—Scope.

A corporation such as a Municipal Committee, is not a public servant though the members forming the corporation are public servants. [P 90, C2]

* (d) Police Act, S. 23—Scope.

The Municipal Committee is a competent authority within the meaning of S. 23. [P 90, C1]

J. Sen—for Applicant.

N. G. Bose and G. P. Dick—for Non-Applicant.

Order.—The applicant Nanhe has applied for revision against the order of the Sessions Judge, Jubbulpore, dismissing the applicant's application for revision against an order of the Hono-

rary Magistrate, Jubbulpore. A complaint was filed against the applicant in the Court of the Honorary Magistrate, Jubbulpore, under section 178 (5) of the Municipal Act. The complaint was on a printed form and was signed by a police officer, City Superintendent Sant Singh. Upon the complaint being received the Magistrates ordered process to issue against the applicant. The case was adjourned on several hearings, but at the hearing of the 22nd December 1928, the pleader for the applicant asked that Sant Singh, the City Superintendent, must attend in person. The Court, however, held that his appearance was not necessary as Ss. 200 (aa) and 247, proviso, Criminal P. C., gave ample authority that his presence might be dispensed with. The case was then fixed for evidence on 22nd January. In the meantime the applicant made an application for revision to the Sessions Judge, contending that the provisions of S. 200, Criminal P. C., were imperative and that Sant Singh ought to have been examined and that, if he did not appear, the case should have been dismissed under S. 247 of the Code. It was further contended that Sant Singh was not a public servant for the purposes of the Municipal Act and that when he filed a complaint under the Municipal Act he did not act in the discharge of his official duties.

The Sessions Judge held that, as the City Superintendent had been authorized under S. 218, Municipal Act, by the Municipal Committee to make complaints with regard to offences under sections of the Municipal Act, the Municipal Committee was really the complainant. He further held that a Municipal Committee was a corporate body composed of Municipal Commissioners and that under S. 21, I. P. C., a Municipal Commissioner is a public servant. From this the Sessions Judge reasoned that it could be held that the Municipal Committee which was composed of public servants is itself as a corporate body, a public servant. The Sessions Judge therefore gave his opinion that the Municipal Committee was a public servant and that therefore the agent who was appointed to represent them in filing a complaint in Court need not be examined as provided under S. 200 (aa), Criminal P. C.

Before me it was admitted by the Standing Counsel, who appeared for the Crown, that the view taken by Mr. Woodward, that the complainant was the Municipal Committee, was wrong and that the complaint was really by Santsingh the City Superintendent. It, is, however, contended that Santsingh was a public servant and therefore his examination was not necessary. The learned counsel for the applicant contended that Santsingh was only a public servant as a police officer and in discharge of his duties under the Police Act, but that he was not a public servant when making a complaint under the Municipal Act, nor could the making of such a complaint be said to be in the discharge of his official duties. I am clearly of opinion that this view is wrong and that as a Municipal Committee is empowered to delegate its authority of making complaints under S. 218 (2), Municipal Act, when such authority is delegated to a public servant by virtue of his office and not by name, he acts in his capacity as a public servant when making a complaint within the meaning of S. 200, proviso (aa), Criminal P. C. It is further clear that a police officer is a public servant under clause 8, S. 21, I. P. C., and one of the duties mentioned in that clause is to give information of offences. I would further point out that under S. 23, Police Act, it is the duty of every police officer to obey and execute all orders lawfully issued to him by any competent authority and therefore a police officer is bound by that section to make complaints when authorized to do so by a Municipal Committee under S. 218, Municipal Act, as the Municipal Committee must be held to be a competent authority within the meaning of S. 23, Police Act.

I am of opinion, then, that the view taken by the Bench of Honorary Magistrates is correct that the complaint was by Santsingh, but that Santsingh was a public servant and was acting in the discharge of his official duties in making the complaint and that therefore his personal attendance of examination was not necessary under S. 200 (aa), Criminal P. C., nor was the complaint liable to be dismissed according to the proviso of S. 247, of the Code. I would only add that, in my opinion, the view taken by the Sessions Judge, that the com-

plaint was by the Municipal Committee and not by Santsingh, is incorrect and that also the view propounded by him that a Municipal Committee is a public servant, is incorrect. A corporation such as a Municipal Committee, is not a public servant though the members forming the corporation are public servants. I therefore dismiss the application for revision and send the case back to the Honorary Magistrate for decision according to law.

P.N./R.K.

*Revision dismissed.***1930 Cr. Cases '90**

Patna.

JWALA PRASAD AND JAMES, JJ.
Jhari Lal—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 21 of 1929, Decided on 4th April 1929, from decision of Sess. Judge, Darbhanga.

Criminal P. C., Ss. 347 and 369—Sentence pronounced before completing judgment is illegal and vitiates conviction.

Pronouncing sentence before completing the judgment, that is to say before preparing the essential parts of it, such as the statement of points for determination and the reasons for decision, makes the sentence illegal and vitiates conviction; 14 *All.* 242 and 27 *Mad.* 237, *Foll.*; 21 *Cal.* 121, *Dist.* [1911 C 1]

H. L. Nandkeolyar and Gopal Prasad—for Petitioner.

James, J.—In this case the Sub-Divisional Magistrate of Samastipur delivered sentences on 10th September 1928. The persons convicted appealed to the Court of Sessions, but they were unable to obtain a copy of any part of the judgment, except the final portion consisting of the findings and the sentences until 1st October when the judgment was completed.

Mr. H. L. Nandkeolyar argues that the failure to sign and date the complete judgment at the time of pronouncing it, vitiates the conviction and sentences. In *Damu Senapati v. Sridhar* (1) two Judges of the Calcutta High Court held that the failure to complete judgment before delivering the sentence was curable by the provisions of S. 537, Criminal P. C., but it is not clear that the judgment in that case was not actually completed on the day when the sentence was delivered. In *Queen Empress v. Hargobind Singh* (2) Sir John Edge held

(1) [1894] 21 *Cal.* 121.(2) [1892] 14 *All.* 242.

that it was illegal to pass sentence before judgment was written, and in *Madras, in Bandanu Athayya v. Emperor* (3) Sir Arnold White held that when the judgment was written some days after the passing of sentence, the defect vitiates the conviction and sentence. The provisions of S. 367, Criminal P. C., are mandatory; the judgment must contain the decision and the reasons for the decision and it must be dated and signed by the presiding officer in open Court at the time of pronouncing it. Under S. 369, no Court, after signing its judgment, can alter or review it; and as the judgment must be signed at the time of pronouncing it, this implies that no substantial alteration or addition can be made after delivery. In the present case, essential parts of the judgment, that is to say, the statement of the points for determination, and the reasons for the decision, were not prepared until three weeks after the pronouncement of the judgment in open Court. This is clearly in contravention of Ss. 367 and 369, Criminal P. C., and the convictions and sentences must be set aside. We do not consider it necessary that the accused should be subjected to the harassment of a retrial, particularly in view of the fact that the sentences imposed upon most of them were to run concurrently with the sentences passed in the case which has been disposed of in Criminal Revision No. 20 of 1929 in which the convictions were upheld. We, therefore, set aside the order of the lower Court and direct that the petitioners in this case be acquitted.

Jwala Prasad, J.—I agree.

V.B./R.K. *Rule made absolute.*

(3) [1904] 27 Mad. 237.

1930 Cr. Cases 91

Rangoon

Special Bench

HEALD, OFFG. C. J., CHARI AND
ORMISTON, JJ.

Guddai Mutayalu, In the matter of.

Civil Ref. No. 7 of 1929, Decided on 19th August 1929, made by Commissioner for Workmen's Compensation.

(a) **Workmen's Compensation Act (1923), S. 30 (d)**—Except as provided by S. 30 no authority is conferred on any Government

Officer to direct commissioner to reverse his decision.

Section 30 allows appeals to the High Court from certain orders, in particular, from an order disallowing a claim of a person alleging himself to be a dependant. Except, however, as provided by this section no appeal lies from his orders and there is no authority conferred, by the Act, or by rules framed thereunder on the Financial Commissioner or any other officer of Government to direct the Commissioner to reverse any decision at which he may have arrived and if a Financial Commissioner purports to direct the Commissioner to reopen the proceedings, his action is ultra viros. [P 93 C 1]

(b) **Workmen's Compensation Act (1923), S. 8 (4)**—Commissioner has power to order redeposit of compensation.

Subject to the observance of the provisions of S. 8, the Commissioner has power to order the redeposit of the compensation. [P 94 C 1]

(c) **Workmen's Compensation Act (1923), S. 8**—Act does not forbid compensation being paid otherwise than through Commissioner.

The Act does not forbid compensation being paid otherwise than through the Commissioner. The whole scheme of S. 8 under sub-S. (1), whereof compensation "shall" be paid to the Commissioner, seems to be designed for the protection of the employer against claims in respect of accidents where his liability is admitted or established. [P 94 C 1, 2]

Saw Po Chit—for Employer.

Ormiston, J.—This is a reference under S. 27, Workmen's Compensation Act 1923 (Act 8 of 1923), by a Commissioner for Workmen's Compensation appointed under that Act. On 1st February 1927, an accident occurred in a mill belonging to Ah Nyan at Zinmathwe, Thaton District, which resulted in the death on the same day of a workman employed therein named Guddai Ramannah or Yammaya. The accident was reported to the Commissioner on 25th March 1927, whereupon notice was issued to the mill owner to deposit the amount of the compensation specified in S. 4 (1)-A of the Act. The mill owner, on 9th May 1927, pursuant to S. 8 (1), deposited the sum of Rs. 807-8-6, furnishing at the same time, as provided in R. 6 of the Workmen's Compensation Rules 1924, a statement in Form-A annexed to those rules therein describing the workman as Yamaya of Zinmathwe village, which must have been at the time his correct address. R. 7 requires the Commissioner to cause to be displayed in a prominent position outside his office an accurate list of the deposits received by him under S. 8 (1), together with the names and addresses of depositors and of the workmen in respect

of whose deaths the deposits have been made.

The Commissioner ordered this to be done, and on 11th May 1927, it was done, the list displayed containing the name of Yammaya of Zinmathwe village. S. 8 (4) directs the Commissioner, on the deposit of any money under sub-S. (1), if he thinks it necessary, to cause notice to be published or to be served on each dependant in such manner as he thinks fit, calling upon the dependants to appear before him on such date as he may fix for determining the amount of compensation. If he is satisfied, after any enquiry which he may deem necessary, that no dependant exists, he shall repay the balance of the money to the employer by whom it was paid. On 6th June 1927, no one having appeared to claim compensation, the Commissioner directed a notice to be published calling upon the dependants to appear before him on 2nd July 1927, for determining the distribution of the compensation. The notice was to be published at the mill, at the headman's house, and also at a conspicuous place in the village where the mill was situate, by beat of gong after reading out the contents of the notice. Copies were ordered to be posted also at the District Court and at the Deputy Commissioner's Court-house. The notices were so published, and no one having appeared on the day fixed, they were so published a second time. The notices described the workman as Yammaya of Zinmathwe. No one appeared on 24th August 1927, which was the adjourned date.

The Commissioner was satisfied that no dependant existed, basing his decision in part on S. 10 (1) of the Act, to which I will presently refer. Apart from that subsection, he had ample materials on which he could have arrived at his conclusion. He was not obliged to serve the notice on any particular dependant, and he could have had no means of knowing who the dependants were, neither the Act nor the rules providing that he should be supplied with a list of them, or with any address of the workman other than the village where he was working at the time of the accident. The Commissioner having recorded his satisfaction that no dependant existed directed the return of the deposit to the

mill owner, which was done on 16th September 1927.

On 28th September 1927, the Commissioner received a claim from Guddai Mutayalu, the widow of the workman residing in the Ganjam District of the Madras Presidency, which was supplemented by a further claim received on 1st October 1927. The claims were filed, a copy of the second claim having been sent by the claimant to the mill owner for information and favourable disposal. The mill owner made to the widow an ex gratia payment, which she acknowledged.

On 21st June 1928, the Officer-in-Charge, Labour Statistics Bureau, Rangoon, as a result of an inspection of the proceedings in the case wrote to the Financial Commissioner (transferred subjects) criticising the action of the Commissioner, and suggesting that he should be enlightened as to the correct procedure. He received a reply dated 9th August 1928, from the Financial Commissioner, endorsing the criticisms of the Officer-in-Charge, Labour Statistics Bureau, and adding further criticisms. The reply concluded by requesting that the attention of the Commissioner be drawn to the alleged errors in procedure and that he be asked to take steps or rectify them. The claimant, he wrote, should be given an opportunity of proving her claim, for which purpose it was suggested that the District Magistrate, Ganjam, be asked to investigate it.

The correspondence was forwarded to the Commissioner, who after causing the claim to be investigated as suggested, and satisfying himself that it was a true claim, on 26th March 1929, required the mill owner to redeposit the amount of compensation. The mill owner objected on the ground that the Commissioner having by his order held that no claim was admissible, because none was made within six months of the date of the death, the Financial Commissioner had no power to reverse the order and direct the proceedings to be reopened. The Commissioner appears to have been inclined to agree with this view, and, in consequence, he made the present reference. It should be stated that the Commissioner who made the order directing the return of the compensation, the Commissioner who reopened the proceedings on receipt of the Financial Commis-

sioner's letter, and the Commissioner who made the reference, were successive holders of the office.

The questions referred are:

(1) Was the Commissioner correct in accepting the reversal of his order by the Financial Commissioner and reopening the case without reference to the High Court?

(2) If he was correct, has he the power to direct a new deposit of the sum returned to (presumably "by" is meant) him?

Another question is suggested and may be thus formulated:

(3) If the answer to questions (1) and (2) are answered in the affirmative, should the ex gratia payment of Rs. 300 be deducted from the amount of compensation payable to the claimant?

The answer to the first question is simple. The Act gives the Financial Commissioner no power to issue any such order. S. 30 allows appeals to the High Court from certain orders, in particular, from an order disallowing a claim of a person alleging himself to be a dependant. Except, however, as provided by this section, no appeal lies from his orders, and there is no authority conferred by the Act, or by rules framed thereunder, on the Financial Commissioner or any other officer of Government to direct the Commissioner to reverse any decision at which he may have arrived. If and in so far as the Financial Commissioner did purport to direct the Commissioner to reopen the proceedings, his action was *ultra vires*. It is open, of course to anyone to make suggestions to the Commissioner, but if such suggestions are made by a superior officer of Government, it is desirable that they be not made in such a form as to be capable of interpretation as orders.

The second question, in the form in which it is put, having regard to the answer to the first question, does not exactly arise. It suggests, however, the question whether the Commissioner, having satisfied himself in the manner prescribed by the Act and the rules made thereunder that there were no dependants of the deceased workman, and having, in consequence, refunded to the employer the compensation deposited by him, has the power to reopen the matter on the application of a workman and to require the redeposit of the compensa-

tion. I have already stated that, in my opinion, the Commissioner had complied with the provisions of the Act and the rules, and had materials before him on which he could be satisfied that the workman had no dependants. He was, therefore, amply justified in refunding the deposit to the mill owner. S. 10 (1) enacts in the case of the death of a workman resulting from an accident, that no proceedings for the recovery of compensation shall be maintainable before a Commissioner, unless the claim for compensation with respect to the accident has been instituted within six months from the date of the accident but there is a proviso that the Commissioner may admit and decide any claim to compensation in any case, notwithstanding that the claim has not been instituted within six months from the date of the death, if he is satisfied that the failure to institute the claim was due to sufficient cause. At the date of the order of 24th August 1927, no claim had been instituted before the Commissioner by any dependant, and being satisfied that there was no dependant, all that he had to do was to record that fact and, under the provisions of S. 8 (4) to order the return of the deposit. Subsequent to the order, on 28th September 1927, he received a claim from an alleged dependant, which was amended by a claim received three days later. It was, under the terms of the proviso, open to him to admit and decide the claim, if he was satisfied that there was sufficient reason for not instituting it within six months from the death. Once the claim is instituted it lies open to the Commissioner, whether on his own motion, or on the suggestion of the Financial Commissioner (Transferred Subjects), or of any one else, to satisfy himself whether or not the applicant had brought herself within the terms of the proviso. The Commissioner, however, has never had his attention directed to this aspect of the case, and it is still open to him to make the necessary enquiries with a view to ascertaining whether there was sufficient cause for the delay, and if he is satisfied that there was such cause, to admit the claim.

If the claim is admitted, he has to decide it. The mill owner has already admitted liability for the consequence of the accident by depositing the com-

pensation. It is suggested that the Commissioner, having under S. 8 (4), directed its refund, is functus officio and that he has no power under the Act to direct its redeposit. I do not consider that there is any substance in this argument. Section 8 (1) provides that compensation "payable" in respect of a workman whose injury has resulted in death shall be deposited with the Commissioner. The employer may dispute his liability. In that event, under S. 19 (1) the question of his liability has to be decided by the Commissioner. If the Commissioner decides against him, there is an obligation on the part of the employer to pay the compensation to the Commissioner, which may be enforced by the issue of an order under R. 8 of the Workmen's Compensation Rules, on the application of a dependant, but until the decision there is no such obligation. I fail to understand why an employer who has admitted liability should be in any better position than an employer who has not admitted liability. The circumstances that he has already made the deposit and that it has been returned to him under what must ex hypothesi be considered to be a mistake of fact, seem to me to be immaterial. I am of the opinion that subject to the observance of the provisions of R. 8, the Commissioner has power to order the redeposit of the compensation. I should point out, although the question does not strictly fall within the scope of this reference, that under R. 6, the employer is entitled to be a party to the distribution proceedings, and that it is open to him, if so advised, to contest the status of the alleged dependant.

The last question, in the form in which I think it should be stated, is whether the ex gratia payment of Rs. 300 should be deducted from the amount of compensation payable to the claimant. I am assuming for the purpose of the answer that it will be either admitted or established that the Rs. 300 was paid by the employer to the widow and was so paid as compensation for the accident. If there is any dispute on the point it should be enquired into and settled by the Commissioner. The Act does not forbid compensation being paid otherwise than through the Commissioner. The whole scheme of S. 8 under sub-S. (1) whereof compensation "shall"

be paid to the Commissioner, seems to be designed for the protection of the employer against claims in respect of accidents where his liability is admitted or established. If he does so pay the compensation, he is protected against the claims of all dependants, whether or not they have applied to be parties to the distribution. If he makes the distribution himself he lays himself open to attack by persons who may afterwards turn up and claim to be dependants. But if he pays the correct amount to the only person who is a dependant, it is not, I think, open to that person to claim the amount over again, and if he makes to him a payment of less than the correct amount, he should, I think, be only required to pay the difference. It would probably be a protection to the employer in the present instance against the claims of other persons who may hereafter put forward belated claims if (in the event of the widow's claim to compensation being admitted and decided in her favour) the employer were to pay the whole of the compensation to the Commissioner under S. 8 (1). Section 8 (4) does not oblige the Commissioner to cause notice to be published and in the present instance, he might well dispense with republication. If that event he would refund Rs. 300 to the employer and pay the balance to the widow.

Heald, Offg. C. J.—I concur.

Chari, J.—I concur.

V.S./R.K.

Reference answered.

1930 Cr. Cases 94

Sind

PERCIVAL, J. C. AND BARLFF, A. J. C.

Mahomed—Applicant.

v.

Bacho and others—Opponents.

Criminal Revn. Appln. No. 239 of 1929, Decided on 8th October 1929, from order of Dist. Magistrate, Nawabshah.

Criminal P. C., S. 503—Charge under Penal Code, S. 498—Identity of woman enticed in question—Accused insisting on issue of commission for her examination—**Woman should be examined in chambers and not on commission.**

In a prosecution under S. 498, Penal Code, where the identity of the woman, alleged to have been enticed, is in question and the accused insists on issuing a commission for her examination on the ground that she is married to a zamindar who observes pardah, the better course is, instead of issuing commission, the

woman should be examined by the Magistrate in chambers: 4 S. L. R. 257, *Rel. on.*; A. I. R. 1926 Sind 124, *Ref.* • [P 95 C 2]

Dipchand Chandumal—for Applicant.

Hirdaram—for Opponents.

Percival, J. C.—This is a revision application against the order of the learned District Magistrate, Nawabshah, in which he directed that a commission should issue for the examination of the witness Sumri.

The case is brought by one Mahomed, son of Khairo Ode, against Bacho and others under S. 498, I. P. C. and it has been proceeding for a considerable time before the District Magistrate, Nawabshah, and the question is whether Sumri, who, according to the prosecution story, has been enticed away by the opponents, should give evidence at Nawabshah or be examined on commission at Dadu in the Larkana District. The complainant says that Sumri is his wife, while on the other hand the accused say that she is not the wife of the complainant, but she is married to a zamindar, named Chutto, who observes *pardah*; and that therefore a commission ought to issue.

In the course of the discussion it was admitted on behalf of the opponent that she could appear before the Magistrate at Dadu on commission; and that enquiry could be made as to whether she was wife of the complainant or not. Thus she will have to unveil herself at Dadu, as her identity is questioned. But if, this is once admitted, there does not appear that there is much distinction between her being examined on commission at Dadu and her appearing in chambers before the Magistrate at Nawabshah. Thus the question therefore really is whether she should appear before the Magistrate at Dadu or whether she should be obliged to go to Nawabshah. If we accept that position, then it seems to me that the right of the complainant that she should be examined by the Magistrate who is actually trying the case should prevail. It is suggested as she is living in the Larkana District, it will be hardship to her to be brought to Nawabshah, and reference is made to *Vishnoo Nainaram v. Dipchand Sital Das* (1) in which it is stated that the issue of commission is discretionary in criminal cases. It may

be noted, however, that even in that case it was laid down that such discretion should be sparingly exercised and it was not granted in that particular instance.

It appears therefore that, on the ground of the distance of Dadu from Nawabshah, there is not sufficient reason for the grant of commission; and on the ground of her being *pardanishin* woman (assuming that she is a *pardanishin* woman because that is a question which is disputed between the two parties) there does not appear to be a sufficient reason, as indicated above, why she should be examined before the Magistrate at Dadu and not before the Magistrate at Nawabshah in chambers. It is laid down in *Imperator v. Mewa Ram* (2):

"*Pardanishin* woman cited as witnesses can be examined in suitable cases on commission, but the better course would probably be to examine them in chambers."

This view of the case appears to me to be correct; and, having regard to all the facts of the case, I am of opinion that the discretion exercised by the learned District Magistrate for the grant of commission was not justified in this case, and the better course would be, as indicated in *Imperator v. Mewa Ram* (2) that the woman Sumri should be examined in chambers at Nawabshah.

The order of the learned District Magistrate, is, therefore set aside, and Sumri is directed to appear before the trying Magistrate at Nawabshah, and be examined there in chambers. It may be stated that one objection taken was that there was a risk of the woman being dragged away by force by the relations and friends of the complainant. It does not appear, however, that this objection can be held to be valid. The opponent, if necessary can apply for police protection to prevent any such outrage taking place in or near the Court where she is to be examined.

Barlee, A. J. C.—I concur. The learned District Magistrate has given as a reason for his order that the lady is now married to a zamindar who observes *parda*. As it is the question at issue whether she is the wife of the zamindar or the run away wife of the complainant, I take it, the learned District Magistrate really meant that she must be as-

(1) A. I. R. 1923 Sind 124=20 S. L. R. 28.

(2) [1910] 4 S. L. R. 257=11 I. C. 582=19 Cr. L. J. 398.

sumed for the present to be the wife of a man with whom she is living and to be entitled to *parda* until it is proved that she is the wife of the complainant; and that he was unwilling to allow that this ostensible wife of a respectable zamindar should undergo the indignity of appearing in Court until there is some good reason for supposing that she was contrary. I think that there is considerable force in this view and where it is possible to avoid the examination of a lady in Court, I think, we should do so. But it is not a question in this case of merely recording a statement of a witness, for the principal question at issue is as to the identity of this lady; and whether she appears at Dadu or whether she appears at Nawabshah she will have to remove her Burka and expose her face to the Magistrate and to the witnesses for the prosecution. Otherwise the complainant will not have a fair chance of proving his case. This being so, I think, the most of the objections disappear. For it is obvious if the lady is to be obliged to expose her face in Court or in chambers, it is far better that she should go to Nawabshah and appear in the chambers of the trying Magistrate than that she should be examined at Dadu.

For these reasons, I concur in the order proposed by the learned Judicial Commissioner.

V.S./R.K.

Order set aside.

1930 Cr. Cases 96

Lahore

ZAFAR ALI, J.

Mt. Bhag Sultan—Applicant.

v.

Muhammad Akbar Khan—Respondent.

Criminal Revn. No. 580 of 1929, Decided on 10th May 1929, reported by Sess. Judge. Attock, on 21st March 1929.

Criminal P. C., S. 488, Cl. 4—Wife living in adultery does not automatically deprive her of maintenance unless maintenance order is cancelled.

A wife who had been granted maintenance sued for recovery of arrears due and an order cancelling the maintenance on ground of adultery had been afterwards passed,

Held: that the cancelling order could not have retrospective effect so as to disallow the prior allowed maintenance and that a maintenance order stood good until it is cancelled.

[P 96 C 2]

Ghulam Mohyuddin—for Applicant.

Report.—On 12th July 1921, Mt. Bhag Sultan, applicant, was awarded maintenance at the rate of Rs. 13 per mensem from her husband Muhammad Akbar Khan respondent.

On 23rd June 1928, Muhammad Akbar Khan put in an application that as Mt. Bhag Sultan was living in adultery the order of maintenance should be cancelled. This application was granted on 11th December 1928, and I rejected the application for revision on 22nd February 1929.

On 7th July 1928, Mt. Bhag Sultan applied for the realization of Rs. 156 as the amount of her maintenance from 1st August 1927 to 31st July 1928. This application was rejected on the ground that the order of her maintenance had been cancelled.

The learned Magistrate having cancelled the order of maintenance on 11th December 1928, could not make it retrospective and disallow the maintenance from 1st August 1927 to 31st July 1928, for during that period the order of maintenance was in force. According to Cl. 4, S. 488, no wife shall be entitled to receive maintenance from her husband under this section, if she is living in adultery; but the fact that a wife is living in adultery does not automatically deprive her of the maintenance, for the order of maintenance once passed stands good until it has been cancelled. I have, therefore, the honour to report that the order of the learned Magistrate which is not warranted by law should be set aside.

Order.—Nobody appears on behalf of the respondent. I agree with the learned Sessions Judge that the order of the Magistrate could not be given a retrospective effect. The wife is entitled to the allowance that was due to her before the order under sub-S. 4, S. 488, Criminal P. C., had been made against her. I, therefore, set aside the order of the Magistrate disallowing maintenance for the prior period.

P.R./R.K.

Order set aside..

1930 Cr. Cases 97
(Lahore)

ZAFAR ALI AND BHIDE, JJ.

Emperor

Diwan Chand Jolly—Accused—Respondent.

Criminal Appeal No. 529 of 1929, Decided on 25th November 1929, from order of Addl. Sess. Judge, Lahore, D/- 2nd February 1929.

(a) Criminal P. C., S. 196—Sanction for offence under Penal Code, S. 294-A—Name of accused appearing on back of paper—Presumption was raised under Evidence Act, S. 114, *illus* (e) and sanction held to be valid

While sanctioning the prosecution of accused for an offence under Penal Code S. 294-A the name of the accused was shown on the back of the paper instead of in the body of the sanction merely because there was not sufficient space left on the front side.

Held : that the initial presumption was that all the official acts were done in a regular manner and hence the sanction was valid.

[P 97 C 2]

(b) Penal Code, S. 294-A—Delivery of ticket books of lottery is sufficient publication.

Where the ticket books of a lottery were delivered with a view to the tickets therein being sold to others, the High Court, taking the delivery as a sufficient publication, confirmed the conviction of the accused under the latter part of S. 294-A : *A. I. R. 1926 Sind 213, Dist.*

[P 98 C 1]

Abdul Rashid—for the Crown.

B. R. Puri—for Respondent.

Bhide, J.—This is an appeal by the Local Government against the acquittal of one Mr. D. C. Jolly who was convicted by the trial Court under the second part of S. 294-A, I. P. C., and sentenced to a fine of Rs. 500 but was acquitted on appeal by the Additional Sessions Judge, Lahore.

A preliminary point has been raised by the learned counsel for the respondent that the whole trial was vitiated by the absence of a proper sanction under S. 196, Criminal P. C. It appears that sanction of the Local Government was produced at the outset but the names of the persons against whom the sanction was given were shown on the back of the paper instead of being mentioned in the body of the order. The order, however, clearly refers to 'under-mentioned' persons. The names of the persons were apparently shown on the back of the paper merely because there was not sufficient space left on the front side. The name of the present respondent is mentioned first and no

question of any subsequent addition arises. The initial presumption is that all official acts are done in a regular manner. It cannot, therefore, be believed that the Chief Secretary signed the sanction, without the names of the accused persons being specified. No objection to the sanction was taken till the stage of arguments. If it had been taken at the initial stage—as it should have been when the sanction was produced the point could easily have been elucidated by putting the Chief Secretary into the witness box. We overrule the preliminary objection.

The case against the respondent briefly was that he was guilty of publishing 'proposals' in connexion with an unauthorized lottery inasmuch as he distributed tickets thereof which embodied the conditions on which prizes in the lottery were obtainable. The learned Additional Sessions Judge found that the respondent had a hand in the printing of the tickets and that a large number of tickets were found in the office of Messrs. Jolly Brothers at Lahore. He considered, however, the evidence as regards the actual sale of the lottery tickets by the respondents to be doubtful and held further that even if that evidence were to be believed a casual sale of a few tickets would not amount to sufficient 'publication' for the purposes of part 2, S. 294-A, I. P. C. It has been proved beyond any doubt that it was the respondent who gave the printing order to the Civil and Military Gazette Press. The learned counsel for the Crown has urged that this fact alone constitutes sufficient publication and has cited 26 *Cox's Criminal Cases* 664 as an authority in support of the contention. But this was never the case of the prosecution up till now and the respondent had no chance of meeting it. It was apparently assumed in the Courts below that printing did not constitute publication and even in the grounds of appeal before this Court it has been described as a 'preparation.' We, therefore, do not think it fair to allow the prosecution to set up an entirely new case at this stage.

The decision of the appeal really turns on the credibility of the evidence as regards the delivery of the lottery tickets by the respondent to three or four persons, who have appeared as

witnesses. The trial Court remarked in one place that the fact the witnesses were met by a Head Constable of Police immediately after they came out of the office of Messrs. Jolly Brothers with the lottery tickets, raised the doubt that these people were sent to the office by the Head Constable himself. But even, if this were so, this fact alone will, obviously, not be sufficient to discard the testimony of those witnesses. The trial Court has not referred to any other ground for discrediting the evidence and in fact eventually believed it; for it has given a clear finding in the latter part of the judgment that it was proved that 'Mr. D. C. Jolly gave the tickets to several prosecution witnesses.' The learned Additional Sessions Judge, before whom the Crown was unfortunately not represented, seems to have overlooked this finding and assumed that the trial Court did not believe the evidence of the above witnesses. He has not discussed that evidence nor given any reasons whatever for considering it to be doubtful. Apparently, he considered it unnecessary to discuss the evidence as he held on the authority of *A. I. R. 1926 Sind 213*, that a 'mere casual and gratuitous' delivery of a few lottery tickets does not constitute an offence under S. 294-A, I. P. C. The remarks of the Judicial Commissioner, Sind, on this point in the above ruling are really in the nature of obiter dicta but apart from this they cannot apply to the present case as it does not appear that the delivery of tickets was casual or gratuitous in the present instance. The evidence shows clearly that the ticket books were delivered with a view to the tickets therein being sold by the witnesses to others, and this cannot be considered to be, in any sense, a mere casual or gratuitous delivery.

It has been urged by the learned counsel for the respondent that in an appeal from an order of acquittal, the appellate Court is not justified in interfering if the question is merely one of the credibility of the evidence, unless the finding of the Court below is manifestly wrong or perverse. But in the present instance, the finding of the Additional Sessions Judge does appear to fall under the latter category. The learned counsel for the respondent in taking us through the evidence was

unable to point out any substantial ground for disbelieving the prosecution witnesses who have deposed to the delivery of the tickets. The witnesses appear to be disinterested. The trial Court, which heard the evidence, relied on their evidence while the learned Additional Sessions Judge gave no reasons whatever for discarding it. In these circumstances, we think the finding of the learned Additional Sessions Judge must be held to be manifestly wrong.

We accept the appeal and restore the conviction of the respondent under part 2, S. 294-A, I. P. C. As regards the sentence, the offence is punishable with fine up to Rs. 1,000 only. It seems unfortunate that the Crown was not represented in the Court of Sessions. If it had been represented, perhaps, the necessity of this appeal would not have arisen. Taking into consideration all the circumstances we sentence the respondent to a fine of Rs. 100 only. In default of payment of fine he will undergo simple imprisonment for two months.

V.S./R.K.

Appeal allowed.

1930 Cr. Cases 98

(Lahore)

ZAFAR ALI AND BHIDE, JJ.

Amar Singh—Accused—Appellant. ..

v.

Emperor—Opposite Party.

Criminal Appeal No. 835 of 1929, Decided on 7th November 1929, from order of Sess. Judge, Ferozepore, D/- 21st August 1929.

Criminal Trial—Prosecution witness examined in Committing Magistrate's Court but not in Sessions Court on ground that he was hostile—Witness present but not examined by defence — Public Prosecutor is not bound to produce and examine such witness.

A prosecution witness was examined in the Court of the Committing Magistrate but was not examined by the Public Prosecutor as a witness in the Sessions Court on the ground that the witness was hostile. The witness was, however, present and the defence did not avail itself of the opportunity of examining him.

Held: that the Public Prosecutor was not bound to produce any witness who was not expected to give true evidence: *A. I. R. 1922 Lah. 1, Rel. on.* [P 100 C 1]

Hem Raj Wadhwa—for Appellant.

D. R. Sawhney—for the Crown.

Judgment.—*Amar Singh*, a Jat of the village Langiana, has been convicted in

this case by the Sessions Judge, Ferozepore, of the murder of Mt. Saddam and sentenced to death. He has appealed and his case is also before us under S. 374, Criminal P. C., for confirmation of the death sentence. The murder was committed on 25th April 1924, but the trial was delayed, as the appellant is said to have been absconding till he was recently arrested. The material facts as alleged by the prosecution are briefly as follows: The deceased Mt. Saddam was at first married to Bhagwan Singh, brother of Amar Singh appellant. Bhagwan Singh died some six or seven years before the murder. Amar Singh, with whom Mt. Saddam was living thereafter, forced her to go through some form of marriage ceremony with him at Chambeli in the Faridkot State, but Mt. Saddam soon managed to escape and married thereafter Nikka Singh (P.W. 2) and began to live with him. Amar Singh brought a criminal complaint under S. 498, I. P. C., as well as a civil suit for restitution of conjugal rights against Nikka Singh but was unsuccessful. The relations between the parties were strained and the appellant as well as Nikka Singh were bound down under S. 107, Criminal P. C.

On the morning of 25th April 1924, at about 10 a. m. as Mt. Saddam was returning to her house after throwing some refuse on a dunghill at a distance of about 100 karams, she was attacked by the appellant with a chhavi and given several blows which resulted in her death. Her cries attracted Nikka Singh and the other witnesses to the spot, but the appellant managed to escape. The matter was promptly reported to the police by Nikka Singh on the same day at about 3 p. m.

The medical evidence proves beyond any doubt that Mt. Saddam was done to death by inflicting blows with a heavy sharp-edged weapon like a chhavi. The evidence as to the motive for the crime seems equally clear and is supported by documentary evidence in the shape of the judgments in the civil and criminal cases between the appellant and Nikka Singh. The eyewitnesses to the murder are Nikka Singh, Waryama, Raunaq Ram, Jiwan Singh, Sundar Singh, Prithi Nath and Sujana Singh. The first four appeared in the Sessions Court, but the remaining witnesses could not be ex-

amined in that Court, as the whereabouts of Sundar Singh and Prithi Nath were unknown and Sujana Singh had become insane. The evidence of Sundar Singh was, however, taken by the Committing Magistrate and that evidence as well as the statement of Prithi Nath and Sujana Singh taken down under S. 512, Criminal P. C., were transferred to the Sessions record. The learned counsel for the appellant has strenuously urged that the statements of Prithi Nath and Sujana Singh were not recorded by the Magistrate himself as required by S. 512, Criminal P. C., and were, therefore, inadmissible. The learned Public Prosecutor has contended on the other hand that the statements were duly recorded in accordance with the general provisions of Chap. 25, Criminal P. C. But from the evidence of the Ahlmad of the Magistrate's Court, who was examined as a witness, it seems doubtful if the evidence was recorded even in the presence of the Magistrate. The Magistrate has not recorded any memorandum of the substance of the evidence, nor given any reasons for not recording it.

In these circumstances, it seems clear, that even the provisions of Chap. 25 cannot be said to have been duly complied with. But even excluding the evidence of Prithi Nath and Sujana Singh, there seems to be ample evidence on the record to establish appellant's guilt and there is, therefore, no good ground for remanding the case for retrial as we are requested to do. There is some doubt as to whether Nikka Singh actually witnessed the crime, as his presence was not noticed by the other witnesses except Waryaman and the latter states that he saw Nikka Singh on the roof of his house while Nikka Singh says that he went to the lane when the murder was committed. But there seems to be no good reason whatever to disbelieve the testimony of the remaining witnesses. These witnesses appear to be disinterested. They were examined either on the first or the second day of the investigation and their cross-examination in the Court has not disclosed any substantial ground for discrediting their evidence. In the first information report Nikka Singh had tried to implicate two tenants of the appellant along with him as the assailants. The facts that these witnesses have not supported

Nikka Singh on that point goes to show that they are not giving evidence at his bidding. •

The learned counsel for the appellant urged in the end that one Jethu who was named as an eyewitness in the first information report was not produced in the Sessions Court. This witness was examined in the Court of the Committing Magistrate but did not state the facts correctly as alleged by the prosecution. The Public Prosecutor did not examine him as a witness in the Sessions Court in the circumstances on the ground that the witness was hostile. The witness was, however, present and the appellant had the opportunity of examining him in defence, but did not care to avail himself of it. The learned counsel for the appellant has urged that the Public Prosecutor could not give up the witness merely because he was 'hostile'. But the Public Prosecutor was not bound to produce any witness who was (according to his case) not expected to give true evidence: cf. *Narain Das v. Emperor* (1). In addition to the evidence of reliable eyewitnesses, there is also the significant fact that the appellant was absconding for some years after the murder, of which he has failed to give any reasonable explanation. The guilt of the appellant seems to be established beyond any doubt. His appeal is accordingly dismissed and the sentence of death confirmed.

P.N./R.K. Sentence confirmed.

(1) A. I. R. 1922 Lah. 1=3 Lah. 144.

1930 Cr. Cases 100

(Lahore)

SHADI LAL, C. J., AND AGHA HAIDAR, J.
Emperor
v.

Soopi—Accused—Respondent.

Criminal Appeal No. 526 of 1929, Decided on 18th November 1929, against order of First Class Magistrate, Gurdaspur, D/- 22nd December 1928.

(a) Evidence Act, S. 8—Rape—No direct evidence—Child on whom rape committed refused to make any statement—Prosecution tried to put statement of mother as regards answers given by child in reply to questions put to her—Statements held not admissible.

There was no direct evidence of the alleged offence of rape committed by a boy on a child. The raped child in answer to certain questions put to her by her mother made certain statements implicating the accused. When placed before the Court the child cried and in spite of

every facility given by the Court to make her feel at home refused to make any statement whatsoever. The counsel for the Crown realizing the difficulty asked the Court to admit under provision of S. 8, the statement of the mother as regards the answers given by the child in reply to questions put to her.

Held: that the answers given by the child in reply to mother's queries could not be admitted in evidence by letting in the mother's statement and that to hold otherwise would be admitting hearsay evidence. [P 101, C 2]

(b) Evidence Act, S. 24—Oral confession—Accused not shown to know language in which questions put but in answer making signs—Conduct held did not amount to confession.

Where an accused, not shown to have understood English, is asked in broken English as to whether he was responsible for the act and he nods his head and salams in reply, the conduct does not amount to confession. It is impossible to determine what the accused understood to be the meaning of remarks addressed to him as to his complicity in the crime and without being satisfied that the accused exactly understood the meaning and the import of the question addressed to him, the signs made by him, standing by themselves are meaningless. He might have completely misunderstood what was sought to be conveyed to him and have thus made the signs which were intended to be in answer to something which was entirely different from what his questioners were anxious to put him and therefore confession remains unproved and so is no confession. [P 101 C 2, P 102 C 1]

(c) Criminal Trial—Conviction—Accused cannot be convicted on suspicion only.

Suspicion cannot take the place of legal evidence and proof and on the strength of mere suspicion an accused cannot be convicted.

[P 102 C 12.]

Abdul Rashid—for the Crown.

Farrukh Hussain—for Respondent.

Agha Haidar, J.—A brutal and dastardly crime was undoubtedly committed on the person of a child aged about four years and nine months. The respondent, Soopi, a lad who gave his age as eleven or twelve years but who, according to the Magistrate, appeared to be about fifteen or sixteen was charged under S. 376, I. P. C., and tried by Magistrate with S. 30 powers. That Magistrate acquitted the accused. The Government has preferred an appeal to this Court against the order of acquittal under the provisions of S. 417, Criminal P. C.

The unfortunate victim of the rape is Violet Bartlett, the daughter of Sergeant Bartlett and Mrs. Bartlett. The respondent was in their service for four weeks but was dismissed on 27th February, 1928. The case for the prosecution is that Mrs. Bartlett on 27th February 1928, took a siesta after lunch,

and that, while she was asleep the respondent raped the child Violet Bartlett. On 2nd March 1928 at about 12-30 p. m. the girl complained to her mother that she felt pain in her private parts. The mother, on examining the child's body, had no difficulty in finding that the girl had been raped and it is said that, on her asking the girl as to who was the person who had done the deed, the girl informed her that it was the accused. Sergeant Bartlett was sent for and the wife conveyed to him what the girl had told her. Sergeant Bartlett at once communicated the matter to the military police, with the result that the accused, who, after his dismissal by Sergeant Bartlett, had entered the service of Sergeant Major Sturgess, was brought to Sergeant Bartlett's quarters in the custody of the military policeman, Private Hughes. Private Ellis, the medical orderly, examined the private parts of the girl and without any hesitation came to the conclusion that the child had been raped. The matter was reported at the thana. In the meantime the child and the accused were both sent to the Civil Surgeon, who, after medically examining them, came to the conclusion that the private parts of the girl contained some gonorrheal discharge, while a similar discharge was found in the urethra of the accused. It is said that, when the accused was brought to the house occupied by Bartlett, the girl, Violet Bartlett, as soon as she saw him, said that he was the man who had "interfered with her." It is further stated that, on certain questions being put to the accused as to whether he had committed the act, he "confessed" that he had done so.

The question for the determination of the Court, therefore, is whether or not the guilt of the accused has been sufficiently established by reliable and legal evidence. The learned Magistrate, who tried the case, as already pointed out, did not consider the evidence sufficient to support a conviction. We have further to see whether, having regard to the manner in which S. 417, Criminal P. C., has been considered in a series of judgments in this Court, it can be said that the order of the Magistrate was foolish or palpably wrong and should not be allowed to stand.

It is admitted that there is no direct

evidence of the alleged rape. The child according to the prosecution on 2nd March 1928, in answer to certain questions put to her by her mother, made certain statements implicating the accused. When placed before the Court, the child cried and, in spite of every facility given by the Court to make her feel at home, refused to make any statement whatsoever. The counsel for the Crown, realizing this difficulty asked the Court to admit, under the provisions of S. 8, Evidence Act, the statement of the mother as regards the answers given by the child in reply to questions put to her and relied upon a certain English precedent. This precedent, however, had no bearing whatsoever on the present case and may be dismissed from consideration at once. We have considered the language of S. 8, Evidence Act, and, in our judgment, the answers given by the child in reply to her mother's queries cannot be admitted in evidence by letting in the mother's statement under the provisions of that section. To hold otherwise would be admitting hearsay evidence in the case.

Reliance was also placed upon certain statements which the child made when the accused was brought before her. But then on this point there is a good deal of confusion and various statements are put into the mouth of the child by various witnesses. In these circumstances it would not be advisable to attach any importance to any alleged statement which the child might have made without knowing exactly the words used by her.

As regards the so called confession, the question has to be looked at from two points of view. Firstly, whether a confession was made in fact; and, secondly, if it was made, whether it is admissible in evidence. It has not been shown that the accused understood English. It is said that the accused was asked in broken English as to whether he was responsible for the act and that he nodded his head and salamed in reply. This conduct does not amount even to an oral confession. The accused only made certain signs and those signs were sought to be construed as being tantamount to a confession. In this connexion we may quote a passage from Taylor on Evidence, para. 161:

"Evidence of oral admission ought always to be received with great caution. Such evidence is necessarily subject to much imperfection and mistake; for either the party himself may have been misinformed, or he may not have clearly expressed his meaning or the witness may have misunderstood him, or may purposely misquote the expression used."

(The italics are ours).

It is impossible to determine what the accused understood to be the meaning of the remarks addressed to him as to his complicity in the crime, and without being satisfied that the accused exactly understood the meaning and import of the question addressed to him, the signs made by him, standing by themselves, are meaningless. He might have completely misunderstood what was sought to be conveyed to him and have thus made the signs which were intended to be in answer to something which was entirely different from what his questioners were anxious to put him. Therefore, the confession, as a fact, remains unproved.

This being so, it is not necessary for us to consider the further question as to how the confession would be admissible in view of the fact that it was made in the presence of a military policeman.

The accused, when examined in July 1928 was not suffering from gonorrhea. The medical evidence, however, on one point is sharply divided. Doctor Kartar Singh said that gonorrhea could not be cured without treatment while on the other hand, Dr. Santsingh has stated that if the accused was suffering from gonorrhea in March last there was possibility and not probability of his being cured without treatment. We are inclined to accept the evidence of Major Gale, Civil Surgeon, Multan, who, on examining both the child and the accused on 2nd March 1928, found gonorrheal matter in the private parts of both. This coincidence no doubt creates some suspicion in our minds. But after all suspicion cannot take the place of legal evidence and proof and on the strength of mere suspicion the accused cannot be convicted.

We have given the matter our most anxious thought and we regret that the culprit, who was responsible for this atrocious crime, has not been brought to book; but, having regard to the fact that there is little or no evidence to connect the accused with the commission

of the crime and in view of the principles which govern appeals from acquittals, we cannot see our way to disturb the conclusion arrived at by the trial Magistrate.

We, therefore, dismiss the appeal.

V.B./R.K.

Appeal dismissed.

1930 Cr. Cases 102

(Lahore)

DALIP SINGH, J.

Sant Ram—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 879 of 1929, Decided on 9th November 1929 against order of Dist. Magistrate, Hoshiarpur, D/- 10th July 1929.

Penal Code, S. 124-A—Report of speech not verbatim—Portions taken down correctly taken down—Excerpts fair representation of general drift and subject matter bringing speech under S. 124-A—Conviction is justified.

Even though the speech taken down by the reporter may not be verbatim, provided there is nothing to show that such portions as were taken down were incorrectly taken down or that excerpts of the speech are not a fair representation of the general drift of the speeches and also provided the entire subject matter of the speech was such as to bring it within the purview of S. 124-A the conviction can be justified. [P 102 C 2, P 103 C 1. P 104 C 1.]

Badri Das—for Appellant.

Sunder Das for the Govt. Advocate—
for the Crown.

Judgment.—The appellant one Pandah Sant Ram, alleged to be a petition-writer of Sialkot District, has been convicted under S. 124-A on account of two speeches delivered on 27th and 28th October 1928, and has been sentenced to one year's and to 18 months' rigorous imprisonment respectively. He has been recommended for treatment as a special class prisoner.

He has appealed and his learned counsel has taken me through the record. The main argument of the learned counsel was that the cross-examination of the reporter, Sardar Arjan Singh, showed that he had interpolated words afterwards and that the whole of the speeches had not been taken down at the time when they were delivered. It is fairly clear to me after seeing the original note-books of the Inspector that the whole of the speeches were not taken down, but there is nothing to show that such portions as were taken down were incorrectly taken down or

that the excerpts of the speeches are not a fair representation of the general drift of his speeches. However, in considering the matter I bear in mind the fact that the speeches were not taken down verbatim.

In the first speech, which was made on 27th October, the appellant started by stating that he himself was non-violent at present though his opinion might change to-morrow. He then proceeded to invoke blessings on Dhanna Singh and Kartar Singh and on the paths which they used to tread. It has been proved that Dhanna Singh was a Babbar Akali, who was arrested in connexion with that movement and he appears to have died as a result of a bomb explosion. The Diwan itself at which these speeches were delivered was held to commemorate the memory of Dhanna Singh and other Babbar Akalis. It is a fact of history that the Babbar Akalis were for some time engaged in Jullundur and Hoshiarpur Districts in a series of murders and dacoities whose ostensible object was to wage war against the Government. The appellant proceeded to wish that his life should be as useful as that of Dhanna Singh and Kartar Singh. He then proceeded to exhort his sisters to protect their honour in the same way as Sita did in the troublous times that might come in 1930 when a struggle with the Government was to begin. He then stated that the king had promised that the blacks and the whites were to be treated as one without distinction, but that the English nation had not fulfilled that promise and if they did not do so soon they would have to leave India bag and baggage. Far from fulfilling that promise they had created communal dissensions and had brought Hindus and Mahomedans to ruin. He then stated that 1930 was fixed for Swaraj when instead of a drop of blood, rivers would have to be shed. Referring to the Simon Commission he spoke of them as the seven dacoits out of lakhs of dacoits, who had come to see how long India could be looted. He felt ashamed of the people who had given evidence before them and said that the proper persons had not been asked to give evidence. He recommended a boycott of the Simon Committee and praised the Nehru report describing the Government as satanic. He pro-

ceeded, the Indians should shed their blood to establish Swaraj. The spirit of India had changed; Indians would no longer be eaten but would eat others. Then comes a sentence, which, however is so cryptic that it is obvious that the sentence was not taken down in full and I do not, therefore, propose to lay any stress on it. The sentence begins "I say that a memorial of the English." The speech proceeds to exhort Hindus to be ready to shed their blood and Mahomedans to be ready to give a percentage of theirs as apparently they claimed a percentage of offices, taxes should be in kind and not cash, and it was necessary to prepare for the coming struggle and establish a Bardoli in the Doaba.

In the speech of 28th the speaker began by saying that he could trust the writers of diaries but not the Deputy Commissioner (an opinion which he seems to have changed now.) He then proceeded to extol the action of Dhanna Singh, who died to free his country. The Englishmen would not allow the Indians to live and nothing was to be gained by supplicating them as the example of the Purbias showed. Everybody should be ready in the Doaba to try and secure Swaraj and liberate the Punjab. The relations of the Babbar Akalis and their heirs should be provided for by the people of the Doaba. The Sikhs had the power to destroy London and to destroy the edifice of the satanic type of Government brick by brick. The speaker asserted that he was delivering this message on behalf of Malviya Ji, Satyapal and others. He declared that he had no confidence in Simon and that the ruddiness on the cheeks of each Englishman represented the blood of a hundred Indians. After this comes a sentence which is obviously dislocated from its context, in which it is stated that :

"in the presence of this rule our country our religion and even our gods are slaves."

The Sikhs should have courage to liberate their country as they have liberated their Gurdwaras. The real India was represented by the labourers and peasants who were then present and the rule of the poor was due to visit the world. If any one opposed this the speaker exhorted the audience to be ready to fight against him and to die.

After considering the entire subject matter of the speeches as well as the particular passages on which special stress has been laid by counsel for the Crown I am definitely of opinion that both the speeches come within the purview of S. 124-A and the conviction under that section is amply justified.

Counsel for the Crown did not, however, contend that the speech on the second occasion was worse than the speech on the first occasion and with this I agree. There is, therefore, no reason to distinguish between the sentences inflicted for the two speeches.

After considering the occasion, the audience present, the words used and and other relevant matters including the status of the appellant and the absence of the verbatim report, I reduce the sentence in each case to nine months' rigorous imprisonment; the sentences to run concurrently. As regards the recommendation made by the learned Magistrate, who tried the case, it is a matter for the Local Government.

V.B./R.K.

Sentence reduced.

1930 Cr. Cases 104

(Lahore)

BROADWAY AND AGHA HAIDAR, J.J.

Rahman—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 351 of 1929, Decided on 10th May 1929, from an order of Sess. Judge, Shahpur, D/- 7th March 1929.

(a) Evidence Act, S. 24—Retracted confession made voluntarily is sufficient to warrant conviction.

A confession made voluntarily without any pressure having been brought to bear upon the accused, is sufficient to warrant the conviction of the accused even although such confession may subsequently be retracted.

[P 104 C 2 ; P 105 C 1]

(b) Evidence Act, S. 24—Case entirely resting on confession—Manner in which confession obtained uncertain—Accused should get benefit of doubt—Criminal Trial.

If the case against the accused entirely rests on the confession made by the accused and there is a conflict as to the manner in which the confession is obtained, the accused is justified in asking the Court to give him the benefit of doubt.

[P 105 C 2]

Chandra Gupta—for Appellant.

I. M. Mackay for Govt. Advocate—
for the Crown.

Agha Haidar, J.—In this case the appellant, Rahman, has been convicted under S. 302, I. P. C., by the learned

Sessions Judge, Shahpur Division at Sargodha, and sentenced to death. He has appealed to this Court through the Jail authorities and the record is also before us under S. 374, Criminal P. C., for the confirmation of the sentence.

On the night of 3rd October 1928, Muhammad Ali deceased, son of Mirza (P. W. 5), left his house with the object of sleeping in his bajra field. He did not return home in the morning. His father Mirza went out to his fields and was informed by his younger son, Karam Ali, that Muhammad Ali was not to be found in the bajra field, and that there were marks of blood at the place. Mirza went to the spot and found a crowd of people already assembled there. He also found a trail of blood leading upto an unused well. Blood was also found at the brink of the well and a gunny bag was found in it containing a dead body. Mirza reported the matter to the police and the Sub-Inspector soon arrived at the spot and had the gunny bag containing the dead body taken out of the well. The corpse turned out to be that of Muhammad Ali who had apparently been murdered. The police started investigation and, in the end, challoped five persons, including the present appellant. With four of these persons we are not concerned, as they have been acquitted by the learned Sessions Judge. The learned Sessions Judge, however, convicted Rahman, who is the appellant before us.

The case against Rahman depends mainly upon the alleged confession which he made on 9th October 1928, before a Magistrate of the First Class. This confession is a detailed document and gives the account how Muhammad Ali was done to death by Rahman and his four accomplices. Certain articles were recovered from the house of Muhammad Ali, and it is argued on behalf of the prosecution that at least one of these articles, namely, a chadar, contained blood-stains, and, therefore, this recovery corroborates the confession of Rahman. It is admitted, however, that this chadar, standing by itself, apart from the confession, would not be sufficient to support the conviction of the appellant. If this confession were a voluntary one and made by Rahman without any kind of pressure having

been brought to bear upon him, then there cannot be any doubt as to his guilt and his conviction must be maintained, even although it was subsequently retracted by Rahman in the Sessions Court.

It is argued on behalf of the appellant that Sardar Khan (P. W. 9), who is a Zaildar, in his cross-examination, stated as follows :

"I joined the investigation on 5th October . . . It was proposed during the investigation that Rahman should be given pardon. Rahman was told by me as well as by the Sub-Inspector and others that he will be granted pardon if he will disclose the true facts."

This witness was re-examined by the counsel for the prosecution and amplified the statement, which he had already made in the course of his cross-examination by saying :

"I, Sub-Inspector, Haidayat lambardar, Alam, son of Malli, and Alam lambardar were present when Rahman was asked to disclose the fact."

Now, if this statement were to be accepted as true, then under the provisions of S. 24, Evidence Act, the confession becomes inadmissible in evidence. The Sub-Inspector, Sayad Fateh Shah (P. W. 19), was examined and he stated in the course of his examination-in-chief that :

"no promise of pardon or inducement was held out by me nor was he (the accused) beaten by me."

In his cross-examination he said :

"I think I arrested him (the accused) after all the recoveries were made. So far as I remember, I took him to Sargodha on 8th morning. He expressed his readiness to confess from the very beginning."

Certain questions were put to this witness by the Court and in answer the witness stated as follows :

"There was no talk or proposal during investigation to make Rahman an approver on grant of pardon. It was on 8th that I made a request that Rahman's statement should be recorded."

I may also mention that Hidayat and Alam lambardar were also examined on behalf of the prosecution as P. Ws. 11 and 12 respectively. Alam, son of Malli, was offered only for cross-examination, but no questions were put to them.

The question now arises whether the statement of Sardar Khan is to be believed or not. If this witness is telling the truth then, of course, the confession will have to be eliminated from all consideration. It is a significant fact that, although Hidayat and Alam lambardar were examined after Sardar Khan had

made his statement, no question whatsoever was put to them on behalf of the prosecution as to whether or not any inducement or promise was held out to Rahman in their presence by the Sub-Inspector and other persons taking part in the investigation along with him. The statement of the Sub-Inspector was relied upon by the learned Public Prosecutor as rebutting the evidence of Sardar Khan. The fact, however, remains that Sardar Khan, who was apparently an important witness on behalf of the prosecution, did make this statement and there cannot be any doubt that the appellant, under these circumstances is entitled to ask this Court to accept the evidence of this prosecution witness. In any case there is a conflict as to the manner in which this confession had been obtained by the prosecuting agency in the present case. Under these circumstances the appellant would be justified in asking this Court to give him the benefit of the doubt which undoubtedly arises in one's mind, having regard to the state of the evidence on the record as to the manner in which the confession of the accused had been obtained.

I am satisfied, therefore, that the appellant is entitled to the benefit of the doubt. I, therefore, giving him this benefit and setting aside his conviction and sentence, accept his appeal and order that he be released forthwith.

Broadway, J.—Admittedly the evidence on the record other than the confession of the appellant is insufficient to warrant his conviction. The question, therefore, is whether that confession is or is not admissible in evidence. The confession was retracted at the first possible moment by the appellant and he stated that it had been made at the instance of the police and was false. On 5th March 1929, Sardar Khan gave his evidence at the trial and in the course of this statement stated that Rahman had been told by him as well as by the Sub-Inspector and other responsible persons that he would be given a pardon, if he made a clean breast of the affair. Hidayat lambardar, Alam lambardar and Alam, son of Malli, were stated by Sardar Khan to have been present at the time and to have taken part in the offer. These three witnesses were not examined

till 6th March 1929, and possibly for that reason the defence did not think it advisable to put any questions to them on this point and the prosecution not unnaturally refrained from raising the question. When the Sub-Inspector went into the witness-box on 6th March 1929, the question was raised definitely in examination-in-chief and again more definitely by the Court, and the Sub-Inspector flatly denied the statement made by Sardar Khan. I do not think it necessary to express any opinion as to which of these two witnesses is correct, as in any event the fact that a responsible person, such as the Zaildar, has made a definite statement that he together with others did make the promise and held out the inducement to the appellant that Sardar Khan says he did would be, to my mind, sufficient in this particular case to create a doubt as to how far the statement of Rahman was a purely voluntary one. To this doubt Rahman is clearly entitled, and I consider it would be unsafe to convict him on the evidence such as exists in this case. I, therefore, agree with my learned brother in accepting the appeal and acquitting the appellant. The sentence of death is not confirmed.

V.B./R.K. *Appeal allowed.*

1930 Cr. Cases 106

(Lahore)

SHADI LAL, C. J. AND TAPP, J.

Rana—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 828 of 1929, Decided on 6th November 1929.

Penal Code, Ss. 300 and 302—Death of boy due to dhatura poisoning administered in sharbat causing death within three or four hours—Intention to cause death held not essential to bring case under S. 300 as accused would be deemed to have intended bodily injury sufficient in ordinary course to cause death.

Dhatura was administered in sharbat on a boy 10 years old in order that according to accused's explanation the victim might become mad and his mother might seek accused's assistance for medical treatment of her son and so come under his influence. The boy died within three or four hours after drinking sharbat. The assessors were of opinion that there was no intention to cause death.

Held: (1) That the fact that the accused had no intention to cause death does not take the case out of the purview of S. 300. The act by which the death was caused was done with the intention of causing such bodily injury as was sufficient in the ordinary course of nature to

cause death and the case satisfied the requirements of S. 300 so as to sustain conviction under S. 302. (2) That the explanation was reasonable and so case did not call for extreme penalty. [P 107.C 1]

Bhagat Ram Puri—for Appellant.

M. Sleem for the Govt. Advocate—for the Crown.

Shadi Lal, C. J.—The Sessions Judge of Ferozepore, concurring in the unanimous opinion of the assessors, has found the appellant, Rana, guilty of having administered dhatura poison to Suleman, a boy of ten years of age: and has sentenced the convict under S. 302, I. P. C., to the penalty of death.

The facts of the case lie within a narrow compass. There is ample evidence on the record that on the morning of 17th June 1929, the boy went out to play at about nine o'clock, and returned to his house at about ten, suffering from a severe pain in the stomach; and stated that he had drunk some sharbat given to him by the prisoner. He then vomited some watery substance and felt convulsions in his legs and arms. After about two hours he expired. The report of the Chemical Examiner makes it absolutely clear that dhatura was found in the stomach as well as in the small and large intestines of the unfortunate boy, and there can be no doubt that he died of dhatura poisoning.

The question for determination, however, is whether the poison was administered to the deceased by the prisoner Rana. On that point, we have the evidence of a woman Mt. Nura, who states that on the morning in question she went to the house of the accused in order to bake bread at his oven, and, while she was there Rana fetched the boy Suleman from the street where he was playing and gave him a glass of sharbat. The boy's grandmother Mt. Dani and one Haji depose to the fact that, when he returned to his house at about 10 a.m. he told them that he has taken some sharbat given to him by Rana, and that he felt sick shortly afterwards. Indeed, the prisoner himself admitted in the statement which he made before the Committing Magistrate on 3rd July that he had mixed dhatura in the sharbat which he had given to Suleman to drink. It is true that this confession was retracted on 16th July but taking into consideration the evidence summarised above there can be no doubt that the

sharbat, which the boy drank, was given to him by the convict, and that the poison, the symptoms of which appeared shortly after the drinking of the sharbat, and which led to the death of the victim, was administered in the sharbat.

The assessors were of the opinion that the culprit had no intention to cause the death of the boy, but that fact does not take the case out of the purview of the definition of murder as contained in S. 300, I. P. C. It is true that dhatura is not exactly a deadly poison, but, if administered in a large quantity, it often proves fatal. That a large quantity was administered in the present case is clear from the fact that the victim died three or four hours after drinking the sharbat. The circumstances of the case show that the act, by which the death was caused, was done with the intention of causing such bodily injury as was sufficient in the ordinary course of nature to cause death: and the case, therefore, satisfies the requirements of S. 300, I. P. C. The conviction under S. 302, I. P. C., must, therefore be affirmed.

The prisoner had no enmity with his victim, though he entertained a feeling of resentment against his mother. In his confession referred to above he declared that he had administered dhatura in the sharbat in order that the victim might "become mad" and his mother Mt. Rajo might seek his assistance for the medical treatment of her son and again come under his influence. This explanation does not appear to be unreasonable, and do not think that this is a case in which the extreme penalty of the law should be exacted.

I would, therefore affirm the conviction but reduce the sentence of death to one of transportation for life. The appeal is accepted pro tanto and the order of the Sessions Judge modified accordingly.

Tapp, J.—I concur.

V.B./R.K.

Sentence reduced.

1930 Cr. Cases 107

(Lahore)

BHIDE, J.

Sohan Singh—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 871 of 1929, Decided on 29th July 1929, against order of Sess. Judge, Gurdaspur, D/- 4th May 1929.

Criminal Trial—Person convicted on mere evidence that he pointed out places from which portions of stolen property were recovered—Person's father and brother also suspected but eventually discharged—Recoveries alone do not justify persons conviction—Evidence Act, S. 27.

The only evidence on which a person's conviction was based was that he pointed out three places from which portions of the stolen property was recovered. Person's father and brother were also suspected and eventually discharged.

Held: that as his relations were also concerned in the crime, it was possible for the person to have knowledge of the places without himself being guilty for any offence and so the recoveries alone were not sufficient to justify the conviction: 18 P. R. 1917 Cr. Dist.

Nand Lal—for Petitioner.

S. J. Puri—for the Crown.

Judgment.—The petitioner, Sohan Singh, has been convicted in this case under S. 411, I. P. C., and sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs. 100. The only evidence on which the conviction is based is to the effect that the petitioner pointed out three different places from which portions of the stolen property were recovered. Reliance has been placed on *Mattu v. Emperor* (1), but in the present instance it is to be remembered that two other relations of the petitioner, namely, his father and brother were also suspected and they were eventually discharged for want of adequate evidence. If these persons were concerned in the crime, it was quite possible for the petitioner to have knowledge of the places where the stolen property was concealed without being himself guilty of any offence. It seems to me, therefore, that these recoveries alone are not sufficient to justify the petitioner's conviction in the present case.

The learned counsel for the Crown attempted to support the conviction on the basis of a confession alleged to have been made by the petitioner. This confession was ruled out by the learned Sessions Judge on the ground that it was taken before the petitioner was actually arrested. It has been urged that the learned Sessions Judge has not taken correct view of the law and that the appellant must be deemed to be in police custody during the period when he was under police surveillance prior to his arrest. This is a point on which there appears to be conflict of authority:

(1) [1917] 18 P. R. 1917 Cr.—36 I. C. 83—18 Cr. L. J. 6.

it is not necessary to discuss it in detail as the learned Sessions Judge appears to have disbelieved the evidence as to confession even on merits. I accept the petition for revision and, setting aside the conviction and sentence of the petitioner, acquit him. The fine, if paid, shall be refunded.

P.N./R.K.

Conviction set aside.

1930 Cr. Cases 108 (1)

(Lahore)

BROADWAY, J.

Emperor

v.

Nur Hussain—Accused—Respondent.

Criminal Revn. No. 946 of 1929, Decided on 25th October 1929, case reported by Dist. Mag., Rawalpindi, D/- 1st July 1929.

Criminal P. C., S. 562—First offence under Penal Code, S. 406 committed several years ago—Offender 55 years old—Amount involved not large—Sentence of Magistrate under S. 562 was upheld.

An offence under S. 406, Penal Code, was committed several years ago some time in 1925 and the amount involved was not large. The offender was 55 years of age and taking into consideration that it was his first conviction the Magistrate had sentenced him under S. 562, Criminal P. C. Reference was made under S. 438 for severer sentence.

Held: that Magistrate had not acted without reason in applying S. 562. [P 108 C 2]

*Partap Singh for Government Advocate—*for the Crown.

*Mohsin Shah—*for Respondent.

Facts.—Nur Hussain accused was the Secretary of the Co-operative Society, Nambal. On 31st December 1924, Fazal Muhammad, Sub-Inspector, Co-operative Societies, entrusted Rs. 56-7-0 to the accused for the purpose of deposit with the Central Bank, Murree, and obtained receipt Ex. P. T. from him. Fazal Muhammad had realized this amount from the various members of the Nambal Society. The accused did not deposit the amount in the Central Bank, but appropriated the same for his private use. On 20th July 1925 M. Zahur Hussain, Assistant Registrar, while inspecting the accounts of the Nambal Society questioned the accused about this sum, but the accused denied having received it from the Sub-Inspector. This was obviously false. The accused was prosecuted under S. 406, I. P. C., for committing criminal breach of trust in respect of Rs. 56-7-0 belonging to the society. In his statement in Court dated 31st January 1929

accused admitted the receipt of this sum and also the fact that he had spent it in defraying the marriage expenses of his daughter.

Grounds.—The Magistrate trying the case rightly convicted the accused under S. 406, I. P. C., but instead of sentencing him to any punishment he has directed his release under S. 562, Criminal P. C. The accused was holding a responsible post of the Secretary of a Co-operative Society and as such had committed criminal breach of trust in regard to the public money placed in his charge. An offence of criminal breach of trust by a person in charge of public moneys is one of a specially serious nature and calls for a severe sentence: vide 106 *Indian Cases* 337. The Magistrate has taken a very lenient view of the case and has, I suggest, wrongly exercised his discretion in releasing the accused under S. 562, Criminal P. C., on inadequate grounds.

I, therefore, forward the case under S. 438, Criminal P. C., for the orders of the High Court with a recommendation that the order of the Magistrate, First Class, dated 15th April 1929 releasing the accused under S. 562, Criminal P. C., be set aside, and to meet the ends of justice an adequate sentence of imprisonment be passed against the accused.

Order.—I have heard counsel and carefully considered the case, and have come to the conclusion that the conviction of the respondent must be sustained. The question of sentence is a difficult one. The offence was committed several years ago some time in 1925 and the amount involved is not large; the respondent is 55 years of age and, as stated by the Magistrate, this is his first conviction. While therefore I might myself have awarded a sentence of imprisonment I am not prepared to hold that the Magistrate acted without any reason when he applied S. 562, Criminal P. C. In these circumstances I must decline to alter the punishment awarded.

V.B./R.K.

Order accordingly.

1930 Cr. Cases 108 (2)

(Lahore)

BROADWAY, J.

Dalip Singh—Convict—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 972 of 1929, Decided on 26th October 1929.

Penal Code, S. 167 — Lahore High Court Rules and Orders, R. 48 (5)—All conditions under R. 48 (5) not existing—Process server directed to sell attached immovable property made false report—Held he had committed offence under S. 167 (5).

Whether a process server is or is not to be used for the purposes of conducting a sale of attached moveables when all the conditions do not exist is for High Court to consider in connexion with subordinate Court concerned and not for the process server and that should be no excuse for the process server to make a false report. And if in spite the process server makes false report his conviction under S. 167 is justified. [P 103 C 1]

Shamihar Chand—for Petitioner.

Judgment.—It has been urged that the act done by the petitioner did not fall within the ambit of S. 167, I. P. C., for the reason that it was not the duty of the petitioner to conduct a sale.

Reference was made to Vol. I of the Rules and Orders issued by this Court for the guidance of the Subordinate Courts according to R. 48 (5) of which (p. 104) a process-server is not to be used for the purpose of conducting a sale of attached moveables except under certain conditions, all of which did not exist in the present case. It seems to me, however, that that is a matter for this Court to consider in connexion with the Subordinate Court concerned and that it forms no excuse for the petitioner's acts. He made a report which he was bound to do and that report was false and of such a nature as brings it within the four corners of S. 167, I. P. C.

In the circumstances I am not prepared to interfere in revision except in the matter of the sentence. The conviction involves the petitioner in serious consequences and I therefore, reduce the fine to one of ten rupees (Rs. 10.)

V.B./R.K. *Revision dismissed.*

1930 Cr. Cases 109 (Lahore)

AGHA HAIDAR, J.

Mahandi—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 664 of 1929, Decided on 8th November 1929, from order of Addl. Sess. Judge, Lahore, D/- 1st June 1929.

Penal Code, S. 96 — Person inflicting wounds in defending himself is not guilty — Penal Code, S. 304.

The law does not require a citizen to behave like a rank coward on any occasion. The right

of self-defence as defined by law must be fostered in the citizens of every free country. If a man is attacked he need not run away and he would be perfectly justified in the eye of law if he holds his ground and delivers a counter attack to his assailants provided always that the injury which he inflicts in self-defence is not out of proportion to the injury with which he is threatened. [P 111 C 1]

Where the accused is attacked by a party of men armed with dangs and having no alternative but to defend himself to the best of his ability retaliates, he acts in private defence although in doing so he inflicts injuries some of which prove fatal. [P 110 C 2]

V. N. Sethi—for the Crown.

Judgment.—Mahandi and Siraj have each been convicted by the Additional Sessions Judge, Lahore, under S. 304, part 2, or in the alternative, under S. 325, I. P. C.. Mahandi has been sentenced to four years' rigorous imprisonment while Siraj's sentence is three years' rigorous imprisonment. The two convicts have appealed from the jail separately.

The trial of the accused in the Courts below was a protracted one. They were once convicted by a Magistrate and sentenced. On the matter coming up in appeal before the Sessions Judge the conviction was quashed and a retrial ordered. The result was that the case lasted for about a year. The Additional Sessions Judge has written a long judgment and I do not propose to go into the details which are to be found in it. Briefly stated, the facts are that Mt. Karimo went to live with her sister Mt. Nawab Bibi, who is the wife of Mahandi accused. It was suspected that Mt. Karimo was carrying on a liaison with Mahandi. She was, therefore, removed from Mahandi's house and ultimately came to live with Dina, her uncle. Some time after this Mahandi and Siraj, while going to a certain railway station, were walking along the bank of a minor which passed through the village in which Mt. Karimo was living with her uncle Dina. It is said that Mahandi was seen talking to Mt. Karimo while she was drawing water at the well. Another woman Mt. Kamon raised an alarm with the result, that Dina, Nur and Jhanda and perhaps two others came running with dangs towards the place where Mt. Karimo was. The Additional Sessions Judge has accepted the story that Dina jumped across the minor order to get at Mahandi and Siraj who were on the opposite bank and that

Dina took the lead and was the first to aim a blow at Mahandi. This was followed by a free fight, according to the Additional Sessions Judge, between Dina and Nura on the one side and the accused on the other side. Dina received two injuries. One of these injuries was not very serious while the other caused fracture of the skull of which Dina died shortly afterwards. Nura, the henchman of Dina, received four simple contusions. The accused Mahandi also received four injuries. One of the injuries received by Mahandi was a dang blow behind his ear. Siraj received five injuries, three on the head, the fourth on the back and the fifth on the cheek involving one of the eyes. It would thus appear that while Dina and Nura received four injuries between them the number of injuries received by Mahandi and Siraj was nine.

The Additional Sessions Judge while dealing with the plea of self defence observed as follows:

"All the eyewitnesses referred to above and Jhanda (P. W. 3) and the injured man Nura (P. W. 5) have unanimously deposed that both the culprits were standing on the other side of the minor. The deceased Dina was the first man to come from his village and to jump over that minor. He then went to the other bank where the accused were standing and threatened them as to why they had come to his village. Mahandi accused then inflicted the first blow to his head and he fell down wounded. Other two blows were simultaneously inflicted to his head by both the accused. Nura advanced further in order to rescue him and he too was assaulted and ran away through fear. According to these eyewitnesses Nura had given only one blow to Siraj accused. None of these witnesses have attempted to explain as to how Mahandi received injuries. On the other hand the three defence witnesses who are quite disinterested persons have deposed unanimously that on learning the news that Mahandi was found talking to the girl Dina and his men came running to the spot with dangs in their hands. Both the accused were standing on the other side of the bank and Dina and his men jumped over the minor and assaulted the culprits. Dina had taken the lead and was the first man to aim a blow on Mahandi. Then a free fight ensued between Dina and Nura on one side and both the accused on the other, with the result that all four of them received injuries. This version appears more probable and true and it is fully corroborated by the medical evidence."

After recording this finding, which has not been challenged by the learned Public Prosecutor before me, the Additional Sessions Judge, curiously enough, proceeded to observe as follows:

"The presence of the accused on the spot is

already explained. It does not appear improbable, as suggested by the assessors that the accused were travelling along the canal minor when by chance they came in contact with the girl. As there was a suspicion in the minds of her people that the accused Mahandi was carrying on a liaison with that girl, Mt. Koman's alarm succeeded in bringing the girl's uncle and cousin to the spot. They then indulged in a free fight with the accused Mahandi who was no doubt inimical to them. In a free fight like this when both the parties are armed with dangs it is impossible to say that one party had acted in self defence."

To my mind these two findings are clearly inconsistent as the Public Prosecutor had to admit somewhat reluctantly. I attach importance to the fact that Dina's party started by making a determined attack in that they were the first to jump across the minor in order to get at the accused who happened to be on the other side. It need hardly be emphasized that the accused could not possibly have visited the village which was the scene of the occurrence with any intention other than a pacific one. The theory of any attempted abduction on the part of the accused is very properly discarded by the Additional Sessions Judge himself, and the learned Public Prosecutor before me has very properly not supported it. The fact, therefore, remains that while the accused were going along the bank of the minor, Dina and his party ran towards them and jumping across the minor Dina opened his attack by aiming a dang blow at Mahandi. Under these circumstances Mahandi had no alternative but to defend himself to the best of his ability.

The Additional Sessions Judge at the conclusion of his judgment while justifying the conviction of the accused observed that

"the accused had a chance to run away and as they persisted in standing at the minor thus giving an ample opportunity to other party to indulge in a fight with them they cannot be saved from the penal consequences of their active participation in the same fight."

This line of reasoning does not appeal to me and cannot be supported either by any known principle of law or by an appeal to common sense. I know there is a tendency in some Courts practically to ignore the sections of the Indian Penal Code which deal with the right of private defence; but it is my considered opinion that the law does not require a citizen, however, law abiding he may be to behave like a rank coward on any oc-

casion. The right of self defence as defined by law must be fostered in the citizens of every free country and I am perfectly clear in my mind that if a man is attacked he need not run away and he would be perfectly justified in the eye of law if he holds his ground and deliver, a counter attack to his assailants provided always, that the injury which he inflicts in self defence is not out of proportion to the injury with which he was threatened. In the present case, there is no doubt on the finding of the Additional Sessions Judge that Dina's party opened the attack upon the accused and aimed a dang blow at Mahandi. It does not appear that beyond giving blow for blow the accused acted in a particularly cruel and brutal manner. Their assailants were armed with dangs and the accused carried nothing more than ordinary lathis. The party of the accused received injuries on the head but those injuries did not prove to be fatal. Unfortunately it happened that a blow given by one of the accused fell on the head of Dina with fatal results. I have already noted that Mahandi received a blow behind his ear and Siraj got three blows on his head. In my opinion under all the circumstances of the case and having regard to the findings of the Additional Sessions Judge, which the Public Prosecutor has not challenged before me, the accused are entitled to claim the benefit of the right of private defence. I would, therefore, accept their appeals, set aside their convictions and sentences and order that they be released forthwith.

R.M./R.K.

*Appeal allowed.***1930 Cr. Cases 111**

(Lahore)

FFORDE AND TEK CHAND, JJ.

Mahla—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 783 of 1929, Decided on 30th October, 1929, against order of Sess. Judge, Hissar, D/- 5th August 1929.

(a) Criminal P. C., S. 337 (2) — Approver must be examined as witness in committal and subsequent proceedings of every person tried for same offence—Only death of approver can absolve Court from complying

with this provision — Non-compliance renders trial illegal.

Section 337 (2) means that any person who has accepted a tender of pardon under the provisions of S. 337 must be examined as a witness in the Court of Committing Magistrate and the subsequent trial of every person tried for the same offence, provided of course that it is physically possible for the Crown to produce the approver. Non-compliance with this provision renders the trial illegal. If the approver dies after giving evidence before the committing Magistrate it is not imperative that the provision should be complied with but the facts that the approver appears to the Court to be an untrustworthy witness or that Court has come to the conclusion that he had not taken any part in the crime and his evidence of participation in it was a complete fabrication does not absolve the Court from complying with the statutory provisions. [P 112 C 1, 2]

(b) Criminal P. C., S. 337 (2)—Failure to comply with is not mere irregularity.

Failure to comply with provisions of S. 337 (2) is an illegality and not a mere irregularity in procedure and makes a trial void. [P 112 C 2]

B. A. Cooper,—for Appellant.

M. Sleem for the Government Advocate—for the Crown.

Fforde, J.—The appellant Mahla has been convicted by the learned Sessions Judge of Hissar of having murdered Jalal Din on the evening of 11th September 1927, and has been sentenced to death.

Three persons, Mukhtara, Dhanna and Bakhatarwar, were tried for this crime in February 1928, and at that trial one Harnam Singh, who declared himself to be an accomplice was granted a conditional pardon on turning approver. The result of that trial was that these three accused were acquitted, the trial Judge, who is the same Judge who tried the case now before us, having come to the conclusion that none of these persons, nor the approver, was present at the murder.

That more than one person took part in the crime is obvious as the victim was not only severely injured by gunshot wounds but was hacked about the head, neck and shoulder with some heavy incised weapon. In the present trial the prosecution case was that the appellant Mahla fired the gun which caused certain of the injuries and one Khema, who was tried with him, inflicted the incised wounds. Khema was acquitted.

After we had been taken through the whole of the evidence by Mr. Cooper

who appeared for the appellant. Mr. Sleem, who appeared on behalf of the Crown, very properly drew our attention to the fact that the approver, who had given his evidence at the trial of the other persons who were charged with having participated in this crime was not produced as a witness in the case against the present appellant either before the Committing Magistrate or before the Sessions Judge. The question that arises for determination is whether the present proceedings under those circumstances are not vitiated.

Section 337 (2), Criminal P. C., provides that every person accepting a tender of pardon under that section shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any. This statutory provision is imperative, and it seems to me clear that non-compliance with the mandatory directions renders the trial illegal. It was suggested in the course of arguments that if there has already been a trial in respect of a particular crime resulting in conviction or acquittal at which an approver has given evidence at the conclusion of that trial the approver's obligations as a witness are concluded and he need not appear at any subsequent trial of other persons charged with having participated in the same offence.

This argument appears to me to be entirely fallacious. There is no reason why the approver should be required to give evidence at the trial of one of several individuals accused of an offence, and not at the trial of the others merely because the others are brought to justice at different intervals of time. Take for instance the case of two persons charged with having committed an offence where the Crown thinks fit to try them separately. One is tried one week and the other the next week. At the first trial the approver is called to give evidence. Can it be suggested that the Crown need not produce him at the trial of the other accused the following week?

The section obviously means that any person who has accepted a tender of pardon under the provisions of S. 337, Criminal P. C., must be examined as a witness in the Court of the Committing Magistrate and at the subsequent trial of every person tried for the same offence,

provided of course that it is physically possible for the Crown to produce the approver. It is quite possible that an approver may die after giving his evidence before the Committing Magistrate in which case of course the provisions of the Act cannot be complied with.

In the present case, it was possible to produce the approver as he was available at the time this case was before the Committing Magistrate and also when it was before the Sessions Judge, and the only reason that he was not produced was because the learned Sessions Judge had come to the conclusion that he had not taken any part in the crime and his evidence of participation in it, therefore, was a complete fabrication. The fact however, that an approver appears to the Court to be an untrustworthy witness does not absolve the Court from complying with the statutory provisions. The conditional pardon granted to the approver has not been withdrawn and he has not been proceeded against for the offence in respect of which he was given that pardon for the simple reason that the learned Sessions Judge came to the conclusion, as I have already observed that the man took no part whatsoever in the crime. The learned Sessions Judge's view, however, of the evidence is not conclusive, and the appellant in the present case is entitled to have an unsatisfactory witness put into the witness box when there is an unqualified statutory provision that such a witness shall be produced. As the failure to comply with the provisions of sub- S. 2, S. 337, Criminal, P. C., is an illegality and not a mere irregularity in procedure, the trial, in my judgment is void, as are the proceedings before the Committing Magistrate, and we must accordingly set aside the conviction and sentenced and leave it to the Crown, if so advised to take such further proceedings as they may think fit.

Tek Chand, J.—I concur.

V.B./R.K.

Order accordingly.

THE CRIMINAL CASES

JOURNAL SECTION

1930]

[FEBRUARY

Professional Ethics.

It is constant experience to have intelligent layman ask "is it possible you can defend a man whom you believe to be guilty, is it honourable to do so?" To such a general question no answer is really possible without the consideration of many important points of public policy. Now and then we have the question of ethics presented in a manner that is too sharply defined to be entirely agreeable. According to the French at least in early days we are told of one occasion at least where the French Bar unanimously refused to defend an accused person on the ground that he was plainly guilty and the accused was executed and it was discovered too late that he was entirely innocent. It would seem, therefore, that this rule of the French Bar, if it still exists, cannot be thoroughly a good one.

"In the first place, while the accused may have committed the acts with which he has been charged, those acts may not constitute a crime at all. It seems, therefore, that a practitioner may justly defend an accused person at least to the extent of discussing the very important question whether the established acts of the accused constitute a crime.

Again the act with which the prisoner is charged may never have been committed at all. There have been cases where during the progress of a trial for a murder the person alleged to have been killed has walked into the Court.

There have been examples where persons have confessed the commission of crime where either no crime had been committed or the person confessing was perfectly innocent. Such cases may certainly admonish the most sensible coun-

sel that he may defend a criminal in an apparently desperate predicament provided, however, that he does so by the methods that are right and proper.

Again, there is a dread disease called "insanity" which we claim to understand a little, but in regard to which we have a great deal to learn. Who shall dare to decide ex parte that an accused person who has committed some dreadful deed has really any sense? Here is an instance.

P. W. Capron writing in the "New York Tribune" recalls the interesting Freeman case. This man Freeman in the night murdered a whole family and sought a second family by name Godfrey. Excitement ran high. The cry for vengeance was strong. The late W. H. Seward then a young man satisfied that the man was insane and volunteered to conduct the defence. The defence showed that the murder was without provocation or motive. It also called the Superintendent of the Utica Insane Asylum to declare on the stand that the Negro was clearly insane. When asked in cross examination as to how he formed his opinion of insanity he replied from conversation and from the eyes and general features. When asked if he could pick out an insane person in that audience the Superintendent replied that he could if there were any. Being requested to do so the Superintendent surveyed the large audience and at length singled out an individual who he said was insane. The person indicted at once responded in oaths and frantic yells clearly showing that the Superintendent had made no mistake. Notwithstanding this strong defence the verdict was "guilty" and the sentence hanging. As the

of execution drew near Seward induced the Governor to grant a respite but before this period expired the Negro

died in prison. / An autopsy revealed an extensively diseased brain.

—Advocacy Series.

Jottings and Cuttings

(1) A lawyer brought a suit against a rich Corporation for a man of good standing in the community and of rather exceptional attainments. In the course of his arguments he declared in a loud voice for the purpose of gaining the sympathy of the jury "Gentlemen of the Jury, who are the parties to this important litigation? Why, on the one side there is a powerful Corporation with an overflowing treasury and on the other side (pointing to his client who was seated in the Bar) there is my poor, simple, uneducated client." A few days later a friend of the plaintiff enquired "Did you win your suit?" "Yes," was the reply. "Won my suit, but I shall never employ that lawyer again." He called me a fool and the jury believed it.

(2) There have been several instances recorded of cases where advocates have to get over many unpleasant situations created by dangerous and damaging admissions voluntarily made by their own clients during the trial. Here is an instance. George Washington Thomas,

an able bodied Negro appeared before a Magistrate charged with stealing chickens. The Negro was accompanied by his lawyer Col. Simons a rising white attorney. The old Judge sauntered into the dingy Court room where he had reigned for more than 20 years and after calling for order he looked around on the little company there assembled. Seeing Thomas he pointed out to him and said "Be you the defendant in this case," quick as a flash, Thomas was on his feet and notwithstanding legal terms he exclaimed politely. "No, Sir, I am not the defendant. There is the defendant over there." And saying which he pointed out to his lawyer. There was a general laugh about the room in which the queer old Judge joined heartily. The darkoy felt abashed. He was visibly embarrassed and thinking of correcting the mistake if mistake it were, he said again, pointing at his lawyer "Yes, Sir, he is the defendant," and pointing to himself he said "I am the gentleman that stole the chickens."

—Advocacy Series.

S. 27, Evidence Act, and A.I.R. 1929 Lahore 344 (F.B.).

BY

F. C. WIDGE, Advocate, Karachi.

The principles of the adjective law of Evidence in criminal cases embodied in Ss. 24 to 27, Evidence Act—in themselves very wholesome and salubrious—have in their practical working always presented difficulties in the matter of their interpretation and application. Of these S. 27 which reads:

Provided that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a Police Officer, so much of such in-

formation, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved, is the one extremely difficult and ticklish.

The principle underlying the section may be stated thus:

"The broad ground for not admitting confession made under inducement, or to a police officer, or by person whilst in custody is the danger of admitting false confessions. But the necessity for the exclusion disappears in a case provided for by this section, when the truth of the confession is guaranteed by the discovery of facts in consequence of the information given. The prisoner's statement as to his knowledge of the place where the property or other article was to be found, being thus confirmed by the fact, is shown to be true, and

not to have been fabricated in consequence of any inducement. It is this guarantee afforded by the discovery of the property, for the correctness of the accused's statement, which is the ground of the admission of the exception to the general rule. The fact discovered shows that so much of confession as immediately relates to it is true. *Queen Emperor v. Babu Lal* (1) at pp. 513, 517, 546."

"The principle that portions of a statement or confession may be admitted and others excluded is recognized in the Evidence Act S. 27. *Legal Remembrancer v. Lalit Mohan Singh* (2)."

The section has been the subject of considerable discussion at the Bar at the hands of very learned counsel, and at the Bench at those of very eminent Judges of the High Courts in India. Those who are for placing a narrow interpretation upon the language of the section do so as following the analogous rule of the English Common Law, while those who are in favour of placing a wider interpretation upon the terms of the section do so having in view solely the language of the section, for as his Lordship (Eford, J.) said in the course of his learned judgment in *Harnam Singh v. Emperor* (3):

"as S. 27, Evidence Act, has been drafted as have been almost all the provisions of that Act upon English principles of law laid down in decided cases."

His Lordship to the above remarks added:

"These principles are no doubt a very useful guide to the interpretation of the Indian Evidence Act. But in considering the effect of S. 27 it must be borne in mind that whereas in England a confession made to a police officer by a person in custody is admissible in evidence provided the prosecution first shows that it has not been obtained by any improper means such as coercion, threat or wrongful persuasion, S. 26, Evidence Act, prohibits such a confession being received in evidence at all unless it comes within the four corners of S. 27."

In the Full Bench ruling while adhering to his opinion as expressed in the earlier case qualified the remarks by relying on Lord Sinha's observations in *Ramanandi Kuer v. Kalawati Kuer* (4):

"It has often been pointed out by this Board that where there is a positive enactment of the Indian Legislature the proper course is to examine the language of that statute and to ascertain its proper meaning uninfluenced by any consideration derived from the previous state of the law or of the English Law upon which it may be founded."

His Lordship proceeded:

"I think there can be no doubt that the very restricted meaning given to S. 27, Evidence Act, has been due to the application of the English Law as it is interpreted by some of the English text books."

The one view is in accordance with analogous English law and practice, and the other is based on the interpretation of the Indian Act by itself without reference to English law upon which the Indian enactment on the subject may be supposed to be founded.

Queen Empress v. Babu Lal (1) is an

important and early
Position in Eng- standing land mark in
land. the history of the judi-

cial interpretation of this section and the position in England is thus described by his Lordship Straight, Offg. C. J. quoting Russell on Crimes and Misdemeanours:

"But the more established rule according to practice and later authorities, is that so much of the confession as relates strictly to the fact discovered by it may be given in evidence, for the reason of rejecting extorted confessions is the apprehension that the prisoner may have been induced to say what is false but the fact discovered shows that so much of the confession as immediately relates to it is true: *R. v. Butcher* (5), *Wanikshalli's case* (6)."

Thus it is proper, and is now the common practice to leave to the consideration of the jury, where a confession has been improperly obtained, the fact of the witness having been directed by the prisoner where to find the goods, and his having found them accordingly, but not the acknowledgment of the prisoner having stolen or put them there, which is to be collected or not from all the circumstances of the case: *Wanikshalli's case* (6). So when on an indictment for burglary it appeared that the prisoner had made a statement to a policeman under some particular circumstances which induced the counsel for the prosecution, with the approbation of the Court, to decline offering it in evidence; but in consequence of the statement containing some allusion to a lantern which was afterwards found in a particular place, the policeman was asked whether, in consequence of something which the prisoner had said, he made a search for the lantern, *Tindal, C. J., and Parke J.,* were both of opinion that the w

(1) [1894] 6 All. 509=(1884) A.W.N. 229(F.B.)

(2) A.L.R. 1922 Cal. 342=49 Cal. 167.

(3) A.L.R. 1928 Lah. 308=9 Lah. 626.

(4) A.L.R. 1928 P. C. ¶=7 Pat. 221=55 I. A. 18 (P.C.).

(5) 1 Leach 265 Note. (a).

(6) 2 East. P. C. Ch. 16 S. 94 P. 658.

used by the prisoner with reference to the thing found ought to be given in evidence, and the policeman accordingly stated that the prisoner told him that he had thrown a lantern into a pond in Pocock's fields. The other parts of the statement were not given in evidence: *R. v. Gould* (7). Mr. Phillips (Vol. 1) after stating this case, adds:

"But the Judge in such a case would direct the jury, and so it is understood did direct the jury in that case, that his statement must not be taken as proof that he concealed but merely as evidence that he knew or was privy to the concealment from which together with the rest of the evidence they would consider whether it was probable that he concealed it himself."

The same position is well described by his Lordship Ffiorde, J., in *Harnam Singh v. Emperor* (8):

"the rule as laid down by Eldon, C. J., in *R. v. Harvey* (4) was that whether the knowledge of a fact was obtained from a prisoner under a promise which excluded the confession itself from being given in evidence an acquittal should be directed, unless the fact itself proved would have been enough to warrant a conviction without any confession leading to it."

That rule, however, was considerably relaxed in favour of the prosecution by later decisions and the rule of the common law now is, as stated by Taylor on Evidence, Vol. 1, p. 614, in these terms:

"When in consequence of information unduly obtained from the prisoner, the property stolen or the instrument of the crime or the body of the person murdered or any other material fact has been discovered, proof is admissible that such discovery was made conformably with the information so obtained."

The prisoner's statement as to his knowledge of the place where the property or other article was to be found being thus confirmed by the fact, is shown to be true and not to have been fabricated in consequence of any inducement. It is, therefore, competent to prove that the prisoner stated that the thing would be found by searching a particular place and that it was accordingly so found; but it would not, in such a case of a confession improperly obtained, be competent to enquire whether he confessed that he had concealed it there. So much of the confession as relates distinctly to the fact discovered by it may be given in evidence, as this part at least of the statement cannot have been false. Phipson on Evidence,

Edn. 6, p. 270, expressed the same rule in this way:

"Facts and documents disclosed in consequence of inadmissible confessions are receivable if relevant. And where property has been discovered or delivered up in this way so much of the confession as strictly relates thereto will be admissible, for these portions at least cannot be untrue but independent statements not qualifying or explaining the fact though made at the same time, will be rejected."

Phipson gives the following illustration of this principle:

"A is charged with burglary, the fact that after an improper inducement A confessed to having thrown a lantern into a pond and the fact that the lantern was found there are admissible: *R. v. Gould* (5); *R. v. Harris* cited by Joy, 88; *R. v. Thirtell* Vid. 84."

The trend of rulings of the late Punjab Chief Court and its successor the High Court of Judicature at Lahore has been to

place a narrow construction upon the term of S 27, and to limit the admissible part of the accused's statement only to the portion relating distinctly to the fact thereby discovered. In *Harnam Singh v. Emperor* (8), the learned Judges (Ffiorde and Jai Lal, JJ.), thought the Chief Court had been putting a too narrow construction upon the section: vide *Santa Singh v. Emperor* (10); *Tara Singh v. Emperor* (11); *Gurdit Singh v. Emperor* (12) and *Sulakhan Singh v. Emperor* (13), and their Lordships not only followed, *Sogianmuthu Padayachi v. Emperor* (14); *Shiva Bhai Beohar Bhatti v. Emperor* (15) and *Lalji Dusadh v. Emperor* (16), and put a very wide interpretation upon it, but went a bit further and held that the information must be proved in the precise terms in which it was given and that there is no legal justification for splitting up or cutting down the statement of the prisoner so as to make it a vague and unintelligible statement and thus to defeat the very object with which S. 27 was enacted. As his Lordship Jai Lal, J., observed:

(to be continued)

(9) 2 East P. C. 658.

(10) [1913] 15 P. W. R. Cr. 1913=19 I. C. 190=171 P. L. R. 1913.

(11) [1915] 11 P. B. Cr. 1915=29 I. C. 817=16 Cr. L. J. 545.

(12) [1918] 9 P. W. R. Cr. 1918=44 I. C. 967=52 P. L. R. 1918.

(13) A. I. R. 1926 Lah. 133.

(14) A. I. R. 1926 Mad. 688=50 Mad. 274.

(15) A. I. R. 1926 Bom. 518=50 Bom. 683.

(16) A. I. R. 1928 Pat. 162=6 Pat. 747.

1930 Cr. Cases 113
(Bombay)

PATKAR AND WILD, JJ.

Emperor

v.

Ismail Hirji—Accused.

Criminal Ref. No. 74 of 1929, Decided on 4th September 1929, made by 2nd Presy. Magistrate, Bombay.

(a) **Bombay Prevention of Gambling Act, S. 6—Arrest without warrant.**

Under S. 6 the Commissioner of Police can arrest without warrant: 31 *Bom.* 438 and *A.I.R.* 1926 *Bom.* 195, *Rel. on.* [P 114 C 2]

(b) **Criminal P. C., S. 4 (f)—Meaning and scope of "under any law for the time being in force" explained.**

The words "under any law for the time being in force" S. 4 (f) are wide enough to include an express or implied provision of any law or enactment and would cover the application of the maxims *qui facit per alium facit per se* (whatever a man may do of himself, he may do by another, and *qui per alium facit per se ipsum facere videtur* (he who does an act through another is deemed in law to do it himself) to any provision of any enactment, in order to arrive at the true intention of the enactment. [P 115 C 1]

(c) **Bombay Prevention of Gambling Act, S. 6—S. 6 does not impose any limitation on power of any person to make complaint.**

Section 6 does not impose any limitation on the power of any person to make a complaint on oath to the Commissioner of Police. As a general rule any person, having knowledge of the commission of an offence, may set the law in motion by a complaint, even though he is not personally interested or affected by the offence: 13 *Bom.* 600, *Foll.*; *A. I. R.* 1929 *Bom.* 71, *Ref.* [P 115 C 2]

(d) **Bombay Prevention of Gambling Act, Ss. 3, 4 and 6—Passage surrounded by building appropriated for betting business—Passage is "place" within Ss. 3, 4 and 6.**

Where the passages are surrounded by buildings and are closed at night by doors and the accused have appropriated them for the business of betting, the business of betting is localized and this localization converts the passage into a "place," within the meaning of Ss. 3, 4 and 6: 37 *Bom.* 651, *Rel. on.*; *Powell v. Kempton Park Race Course Co.*, (1899) *A. C.* 143; *Eastwood v. Miller*, (1874) 9 *Q. B.* 440 and *Brown v. Patch*, (1899) 1 *Q. B.* 892, *Ref.* [P 118 C 2]

(e) **Bombay Prevention of Gambling Act, S. 6—Arrest by Police Officer authorized to arrest by Commissioner of Police and in his presence though not within view is not illegal.**

Where the arrests by a police officer are under the express authority of the Commissioner of Police and in the presence of the Commissioner, though not within his view, the arrests by the police officer are not illegal. [P 116 C 2]

(f) **Bombay Prevention of Gambling Act, S. 3—Betting explained.**

A bet need not be as regards the issue of a future uncertain event and may be upon a past event, e. g., whether a particular horse won a

race in a certain year. In such a case the bet is upon the accuracy of the information, belief or memory of the parties and the event is the proof that one or the other was accurate. A person may bet against what he believes the issue will be, e. g., a man may bet against a horse which he believes will win in order to secure himself against loss in either event: *Thacker v. Hardy*, (1878) 4 *Q. B. D.* 685; *Carlill v. Carbolic Smoke Ball Co.*, (1892) 2 *Q. B.* 484, *Rel. on.* [P 117 C 1]

(g) **Bombay Prevention of Gambling Act, S. 5—Date of horse race postponed—Bets were entered into irrespective of adjournment—Accused not contending that either race or particular horse should run on given particular date—Agreement to bet held to be wager amounting to offence.**

Evidence in a case showed that the race which was to be run on 29th September was adjourned to 6th October early in the morning and still in the afternoon of that day bets were entered into with regard to the meeting which had already been adjourned, and the bets were to remain good for the race that was to be run on 6th October. The accused did not intend either that the race should run on 29th September or that a particular horse should run that day, as the condition of the agreement.

Held: that even though the race was postponed, the agreement to bet would be a wager and would amount to an offence under S. 5. [P 117 C 1]

(h) **Criminal P. C., S. 432—Presidency Magistrate should not refer point of law which is covered by authority.**

It is not open to a Presidency Magistrate under S. 432 to refer a point of law which is covered by an authority binding on him. [P 118 C 1]

P. B. Shingne—for the Crown.

Velinkar and *W. B. Pradhan*—for Accused.

The trying Magistrate referred the following questions to the High Court, under S. 432, Criminal P. C.:

1. Whether offences punishable under S. 4, Bombay Gambling Act 4 of 1887, as modified up to date are cognizable offences in all cases?
2. Whether the arrests are illegal?
3. Whether the Commissioner satisfied himself that there were good grounds for the suspicion of the complainant?
4. Whether the arrests by constables or by Sub-Inspector Salaskar are illegal?
5. Whether there was any gaming at all when the meeting was postponed?

Patkar, J.—In this case the Presidency Magistrate, Second Court, Bombay, has made a reference, under S. 432, Criminal P. C., submitting for decision certain points of law arising in a case pending before him.

One Ibrahim Ismail made a complaint on oath on 27th September 1928, before the Commissioner of Police, Bombay. Instead of issuing a special wa. under S. 6, Bombay Prevention of Gambling Act, 1887, he personally raided the

premises in company with other police-officers. The Commissioner entered the main entrance and Sub-Inspector Salaskar entered the side gate and arrested accused 2 and 3. Police constable No. 714 C. T. arrested accused 4. R. B. Sabaji arrested accused 1 and Inspector Achrekar and Havaldar 932-K arrested accused 5, 6 and 8. Accused 7 was arrested by another policeman. Panch-namas were made of the articles found in the passage and on the person of the accused. 27 slips were found in the passage bearing the names of the horses, the amount of bet, win or place, and single or double. The punters got receipts for the payments made to the bookmakers in the form of printed cart chits with numbers thereon which were inserted in the slips for identification. Three cart chits were found in the passage, and four cart chit books were also found in the passages. Currency notes of the value of Rs. 145 and a money-bag dropped by accused 3 were found in the passage.

The learned Magistrate instead of making a reference to this Court ought to have decided the points involved in this case leaving the parties aggrieved to approach this Court in case they were dissatisfied with his decision.

The first question referred by the learned Magistrate is, whether offences punishable under S. 4, Bombay Prevention of Gambling Act 4 of 1887 as modified up to date are cognizable offences in all cases. In *Emperor v. Fernad* (1), it was held that as a First Class Magistrate has under S. 6, Gambling Act 4 of 1887, power to give authority, under a special warrant to certain police-officers, to make arrest and search, the legislature must be presumed to have intended that the First Class Magistrate should have authority to make the arrest and the search himself, if necessary, according to the principle of the legal maxim that : "whatever a man sui juris may do of himself, he may do by another," and its correlative that : "what is done by another is to be deemed done by the party himself."

In *Emperor v. Jaffur Mahomed* (2), the learned Judges were not prepared to base their judgment upon a view of S. 6 contrary to the view taken in *Fernad's*

case. In *Emperor v. Abasbhai* (3) it was held by Marten and Madgavkar, JJ., following the decision in *Queen-Empress v. Deodhar Singh* (4), that the offences under Ss. 4 and 5 were cognizable offences within the meaning of S. 4 (f), Criminal P. C., rather than non-cognizable offences under sub-Cl. (n) of that section. In *Emperor v. Chandri* (5) it was held by Fawcett, J. that there were serious limitations on the power of arrest under S. 10, Bombay Prevention of Prostitution Act 11 of 1923, and that any case where those conditions are not complied with cannot be described as a cognizable case. Under S. 6, Gambling Act, and on the authority of the decision in the case of *Emperor v. Fernad* (1), the Commissioner of Police could arrest without a warrant, and the words "a police-officer may arrest" in S. 4 (1) (f) do not mean every or any police-officer, and provided that a superior police-officer has power to arrest without a warrant, the offence is a cognizable offence. It was further held by Madgavkar, J. in *Emperor v. Abasbhai* (3), that the report of the police officer could have been treated in that case as a complaint. Both the learned Judges came to the conclusion that the Magistrate had jurisdiction as the offences were cognizable, and that the case fell under S. 190 (b), Criminal P. C. The learned Magistrate ought to have followed the clear ruling of this Court in *Emperor v. Abasbhai* (3).

It is urged, however, on behalf of the accused that the remarks of Chandavarkar, J., in *Fernad's* case (1) were obiter, and that, according to the definition of a cognizable offence in S. 4 (1) (f), Criminal P. C., the offences under Ss. 4 and 5, Gambling Act, would not be cognizable offences as a police officer could not arrest in accordance with Sch. 2, Criminal P. C., or under any law for the time being in force, without a warrant. It is further urged that in Sch. 2, relating to offences under other laws, an offence punishable with imprisonment for less than one year or with fine only is a non-cognizable offence, and under S. 6, Gambling Act, no express power is given to the Commissioner of Police to arrest or to make the search himself as is conferred by S. 5, Bengal Public Gam-

(1) [1907] 31 Bom. 438=9 Bom. I.R. 695.

(2) [1912] 37 Bom. 402=19 I.C. 204=15 Bom. I.R. 106.

(3) A.I.R. 1923 Bom. 195=50 Bom. 344.

(4) [1897] 27 Cal. 144.

(5) A.I.R. 1923 Bom. 131=49 Bom. 212.

bling Act 2 of 1866, and that the case of *Queen-Empress v. Deodhar Singh* (4), followed in *Emperor v. Abasbhai* (3), is based on S. 5, Bengal Act. S. 6, Gambling Act, is correctly interpreted by the decisions referred to above which are no less binding on us than on the Magistrate. The words "under any law for the time being in force" in S. 4 (f), Criminal P. C., are, however, in my opinion, wide enough to include an express or implied provision of any law or enactment and would cover the application of the maxims *qui facit per alium facit per se* (whatever a man may do of himself, he may do by another) and *qui per alium facit per seipsum facere videtur* (he who does an act through another is deemed in law to do it himself) to any provision of any enactment, in order to arrive at the true intention of the enactment. Though the Act was amended several times since the decision in *Fernad's* case (1), the legislature has not expressed its true intention to be otherwise than that determined by judicial decisions. It is to be presumed that there is no intention to prevent the application of such maxims unless there is something in the language or in the object of the statute to the contrary: see Maxwell on the Interpretation of Statutes, Edn. 6, p. 134.

Question 2 is, whether the arrests are illegal. It is contended that the arrests are illegal on the following grounds: (1) that there was no complaint on oath. (2) that the passage is not "a place" within the meaning of S. 6, Gambling Act (3), that the Commissioner did not satisfy himself that there were good grounds for the suspicion, and (4) that the Commissioner could not authorize the constables to arrest, and the arrests by Sub-Inspector Salaskar were not in the actual presence of the Commissioner.

The first point arising for decision is whether Ex. A is a legal complaint on oath before the Commissioner of Police. According to the decision in *Emperor v. Tribhovan Motiram* (6), the Commissioner of Police was competent to administer an oath to Ibrahim Ismail under S. 6, Gambling Act. It is urged, however, that though the word "complaint", in S. 6 is not to be understood in a

technical sense, Ibrahim who made the complaint to secure a reward cannot be considered to be a person who had any grievance, and, therefore, was not competent to make a complaint. S. 6. does not impose any limitation on the power of any person to make a complaint on oath to the Commissioner of Police. In *In re, Ganesh Narayan Sathe* (7) it was held that as a general rule any person, having knowledge of the commission of an offence, may set the law in motion by a complaint, even though he is not personally interested or affected by the offence. The objection, therefore, raised on this point on behalf of the accused is, in my opinion, without substance.

The second question arising for decision is, whether the passage is a "place" within the meaning of S. 6, Gambling Act. In *Emperor v. Jusub Ally* (8) it was held by Batty, J., that the machwa must be considered to have been a place within the meaning of S. 4 rather than of S. 12, being more of the nature of a house or room than of a place ejusdem generis with a street or thoroughfare. In *Emperor v. Fattoo Mahomed* (9), a small open space surrounded by house on all sides and accessible only by a narrow lane was held to be a place within the meaning of S. 4, Gambling Act, as being appropriated for the business of betting. There appears to be no conflict in the decisions in *Jusub Ally's* case (8) and *Fattoo Mahomed's* case (9) to justify a reference on this point. In *Powell v. Kempton Park Racecourse Co.* (10) Lord James of Hereford held (p. 194):

"Speaking in general terms, whilst the place mentioned in the Act, must be to some extent ejusdem generis with house, room, or office, I do not think that it need possess the same characteristics; for instance, it need not be covered in or roofed. It may be, to some extent, an open space. But certain conditions must exist in order to bring such space within the word "place." There must be a defined area so marked out that it can be found and recognized as "the place" where the business is carried on and wherein the bettor can be found."

In *Eastwood v. Miller* (11) it was held that an enclosed area, though uncovered,

(7) [1889] 18 Bom. 600.

(8) [1905] 29 Bom. 386=7 Bom. L. R. 333.

(9) [1918] 37 Bom. 651=20 I.C. 609=15 Bom. L. R. 689.

(10) [1899] A. C. 142=68 L.J.Q.B. 392=47 W. R. 385=63 J. P. 260=15 T.L.R. 366=L.T. 538.

(11) [1874] 9 Q. B. 440=43 L. J. M. C. 189=22 W.R. 799=30 L.T. 716.

(6) A. I. R. 1929 Bom. 74=58 Bom. 137.

might as well be "a place" within the Act, as a place either covered with canvas as a tent or a light structure as a building. It is a question of fact in each case whether the business of betting is localized so that people may fairly resort to the place where it is carried on. I may also refer in this connexion to the case of *Brown v. Patch* (12). It would be for the Magistrate to consider on the evidence whether the passages are "a place" within the meaning of the Act. Having regard to the decision in *Emperor v. Fattoo Mahomed* (9), there appears to be no ground for any doubt justifying a reference on this point by the Magistrate.

The third point is, whether the Commissioner satisfied himself that there were good grounds for the suspicion that any place is used as a common gaming house. It is a question of fact which the Magistrate has to decide on the evidence in the case and is not a question of law which should have been referred by him to this Court.

The fourth point is, whether the arrests by the constables or by Sub-Inspector Salaskar are illegal. Under S. 6, Gambling Act, the Commissioner of Police has the power to give authority, by special warrant under his hand, to any Inspector, or other superior officer of police, of not less rank than a Sub-Inspector:

(a) to enter, with the assistance of such persons as may be found necessary, by night or by day, and by force, if necessary, any such house, room or place, and

(b) to take into custody and bring before a Magistrate all persons whom he finds therein, whether they are then actually gaming or not.

According to the authorities to which I have already referred the Commissioner of Police had the power to enter with the assistance of such persons as may be found necessary and to arrest the persons whom he found therein. It is not possible for the Commissioner of Police alone, if he intended to raid the premises, to arrest a multitude of persons. It is, therefore, provided by the legislature that he may enter with the assistance of such persons as may be found necessary. Mr. Salaskar in his

evidence says that he was instructed to raid the premises with his men by the rear gate simultaneously with the raid from the main gate by the Commissioner of Police. The arrests, therefore, by Salaskar were under the express authority of the Commissioner of Police and in the presence of the Commissioner though not within his view. I think that the arrests by Mr. Salaskar were not illegal. It is not contended before us that arrests by any other police officer were illegal. The point loses any importance in this case as the offences are cognizable and the Magistrate has jurisdiction to investigate the case under S. 190, Cl. (b). It is not therefore necessary to go into the question urged by the learned Government Pleader that even on the assumption that the offences were not cognizable the Magistrate had jurisdiction to treat the report by the police officer as a complaint under S. 190, Cl. (a), according to the view of Madgavkar, J., in *Emperor v. Abasbhai* (3) and the decision in *Emperor v. Shivaswami* (13).

The last question is, whether there was any gaming at all when the meeting was postponed. It appears from Ex. T that the race which was to be run on 29th September was postponed to 6th October. It is urged on behalf of the accused that in a wager both the parties must contemplate the determination of the future uncertain event as the sole condition of their contract, and as in the present case the future uncertain event did not happen, there was no wager, and reliance is placed on Anson on Contract, pp. 230 and 231, and the case of *Ellesmere (Earl) v. Wallace* (14). In the present case, the charge against the accused was under Ss. 4 (a) and 4 (c) and not under S. 5, Gambling Act. The question, therefore, does not really arise in the present case. In Halsbury's Laws of England, Vol. 15, p. 267, para. 549, it is stated as follows:

"A wagering contract has been described as one by which two persons, professing to hold opposite views touching the issue of a future uncertain event, mutually agree that, dependent upon the determination of such event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake; neither of the contracting parties having any other interest in that contract than the sum or stake which he will so win or lose."

(13) A. I. R. 1927 Bom. 440 = 51 Bom. 493.

(14) [1929] 2 Ch. 1.

there being no other real consideration for the making of such contract by either of the parties."

A bet is defined in *Thacker v. Hardy* (15) and *Carlill v. Carbolite Smoke Ball Co.* (16). A bet need not be as regards the issue of a future uncertain event and may be upon a past event, e. g., whether a particular horse won a race in a certain year. In such a case the bet is upon the accuracy of the information, belief or memory of the parties and the event is the proof that one or the other was accurate. A person may bet against what he believes the issue will be e. g., a man may bet against a horse which he believes will win in order to secure himself against loss in either event. In *Ellesmere (Earl) v. Wallace* (14), the jockey club was not interested in the result of the races and the provision relating to the prizes was in no way dependent upon the result of the races as they were to be given in any event and the only event outstanding between the parties, viz., whether the defendant's horse would run in the race depended solely on the volition of the defendant and not upon the determination of any future event.

The evidence in the present case shows that the race which was to be run on 29th September was adjourned to 6th October early in the morning, and still in the afternoon of that day bets were entered into with regard to the meeting which had already been adjourned, and the bets were to remain good for the race that was to be run on 6th October. The parties did not intend either that the race should run on 29th September or that a particular horse should run that day, as the condition of the agreement. I think that even though the race was postponed the agreement to bet would be a wager and would amount to an offence under S. 5, Gambling Act. A question in the present case is, whether on the evidence accused 1 having the use of a room or place in the premises of the Akbar Manufacturing and Press Company did use the same for the purpose of a common gaming house, and accused 2 to 8 did assist accused 1 in conducting the business of the said common gaming house, and thereby accused 1 committed an offence

punishable under S. 4 (a) and accused 2 to 8 committed an offence punishable under S. 4 (c) of Act 4 of 1887, and the learned Magistrate has to find on the evidence whether the room or the place in question is a common gaming house. That question would depend on the evidence in the case and the fact that a particular race was adjourned on 29th September to 6th October does not affect the question.

I would, therefore, answer the reference, on the points referred to, as stated above.

Wild, J.—This is a reference under S. 432, Criminal P. C., by the Presidency Magistrate, second Court, in which he refers five questions for the opinion of this Court.

The prosecution out of which this reference arises was one under S. 4, Bombay Prevention of Gambling Act of 1887 and the facts are shortly these: On 27th September 1928, one Ibrahim Ismail's sworn statement was taken by the Commissioner of Police, Bombay, and he complained that the premises of the Akbar Manufacturing Co. were being used as a bucket shop or office for receiving bets on horses. On 29th September the Commissioner of Police, without issuing a warrant under S. 6, Bombay Prevention of Gambling Act to any other police officer to search the premises, himself raided the premises. He entered by the front door and Sub-Inspector Salaskar entered by the rear or side door. The premises consist of buildings with two open passages at right angles one to the other. It was found that the passages were being used for the purpose of betting on horse races that were to take place that day at Poona. Arrests were made; some of the accused were arrested by Sub-Inspector Salaskar and by one of the police constables of his party out of sight of the Commissioner of Police and others were arrested in his presence. It subsequently transpired that at the time of the raid the race meeting had been postponed.

The first question referred is, whether offences punishable under S. 4, Bombay Prevention of Gambling Act 4 of 1887 as modified up to date are cognizable offences in all cases. The learned Magistrate appears to doubt the correctness of the ruling in *Emperor v. Abasbhai* (3), though he admits that he is bound to

(15) [1878] 4 Q. B. D. 685 = 48 L. J. Q. B. 289 = 27 W. R. 158 = 39 L. T. 595.

(16) [1892] 2 Q. B. 484.

follow it. I am of opinion that it is not open to the Presidency Magistrate under S. 432, Criminal P. C., to refer a point of law which is covered by an authority binding on him nor is it clear on what ground the learned Presidency Magistrate doubts the correctness of the ruling in *Emperor v. Abasbhai* (3). He refers to the case of *Emperor v. Chandri* (5). But the facts there were completely different. In that case the arrest for an offence under the Bombay Prevention of Prostitution Act was not on a complaint or by an authorized police officer and the arrest was, therefore, held to be illegal. Here the arrest for an offence under the Bombay Prevention of Gambling Act was by an officer (the Commissioner of Police, Bombay) who could have issued a warrant of arrest. The question really is not whether the offence in this case is a cognizable one but whether the Commissioner of Police was empowered to arrest. In *Emperor v. Fernad* (1), it was held that a person who is authorized to issue a warrant under S. 6, Bombay Prevention of Gambling Act could himself arrest without a warrant and this case was followed in *Emperor v. Jaffur Mahomed* (2) and *Emperor v. Abasbhai* (3). The principle enunciated in the case of *Emperor v. Fernad* (1), is a common sense one. In the case of Magistrates it has been enacted in S. 65, Criminal P. C., that they have this power. As under the Criminal Procedure Code warrants of arrest are not issued by police officers, it was unnecessary for the Code to make a similar provision in the case of police officers. There would appear, therefore, to be no reason to suppose that the principle enunciated in the case of *Emperor v. Fernad* (1), is incorrect. My answer, therefore, to the first question would be that the Commissioner of Police of Bombay was in the circumstances of this case authorized to arrest the accused.

The second question is, whether the arrests are illegal as there was no complaint on oath and the passage is not a "place" within the meaning of S. 6, Bombay Prevention of Gambling Act. With regard to the first branch of this question it is not contended by the learned counsel for the accused that there is no statement on oath by the informer. It is, however, contended that the word "complaint" in S. 6,

should bear its ordinary meaning of "information given by a person aggrieved." That, however, is not the meaning of the word "complaint" as defined in S. 4 (1) (g), Criminal P. C., and as ruled in the case of *In re, Ganesh Narayan Sathe* (7):

"any person having knowledge of the commission of an offence, may set the law in motion by a complaint, even though he is not personally interested or affected by the offence."

The informant in this case was not interested but it is not necessary to suppose that the word "complaint" in S. 6 is to be given any other meaning than that which it bears in the Criminal Procedure Code. I hold then that there was a complaint on oath as required by S. 6.

As regards the second branch of the question whether these passages constitute a "place" within the meaning of S. 6, Bombay Prevention of Gambling Act, the facts of the present case are very similar to those of the case of *Emperor v. Fattoo Mahomed* (9). There it was held that a small area limited by metes and bounds, surrounded on all sides by buildings, and appropriated for the business of betting by the accused as a lessee was a place within the meaning of S. 4. Here the passages are surrounded by buildings and are closed at night by doors. It is true that the accused have not leased the passages for their business but they have appropriated them for the business by using them. In this way the business of betting has been localized and it would seem that this localisation converts the passages into a place as held in the case just cited. In S. 3, Bombay Prevention of Gambling Act, "common gaming" house is defined as a house, room or place in which instruments of gaming are kept, etc., and it is clear from the ruling just cited that the common factor in the expressions "house, room or place" is not that they are roofed over but that they are sufficiently definite. In this case as the passages are limited by the buildings and doors, it would appear that they are a place within the meaning of Ss. 3, 4 and 6, Bombay Prevention of Gambling Act.

The third question is, whether the Commissioner satisfied himself that there were good grounds for the suspicion of the complainant. As this is altogether a question of fact, I would leave it to

the learned Presidency Magistrate to decide.

The fourth question is, whether the arrests by constables or by Sub-Inspector Salaskar are illegal. As to this it may be presumed that, before the raid, orders were given by the Commissioner of Police to Sub-Inspector Salaskar to arrest those who might be found in the passages. It may be that the arrests were not made within sight of the Commissioner of Police but they can be considered in the circumstances to have been made in his presence. It can hardly be urged that in a case like this where a number of persons are to be dealt with, the person authorized to arrest must personally make the arrest in each case. If the arrest is made in his presence and on his order it is certainly sufficient in accordance with the maxim *qui facit per alium, facit per se*. I would, therefore, hold that the arrests by the constables and by Sub-Inspector Salaskar are not illegal.

The last question is, whether there was any gaming at all when the meeting was postponed. It is argued that as it was understood by the betters on the horses and the accused that the bets were with respect to races which were to take place that afternoon at Poona and at the time when the bets were made the races had been postponed there was no gaming in this case, that is to say, there was no wagering or betting. No authority has been cited for the proposition that if one or both parties are under a misapprehension as to the subject of the wager or bet there is no wager or bet made. All that the wagerers in a case like this demand is that they should be paid an amount of money if the horse selected by them wins or is placed at the race in which the horse is to run. When they have made their bet and it has been accepted by the taker the transaction is a complete wager or bet. It may be that in a case like the present where the race meeting is postponed or cancelled the person who has paid his money would be entitled to get the money back, but, in my opinion, it cannot be said that the bet has not been made. Similarly, the abetment of an offence is under the Penal Code punishable whether the offence abetted is or is not committed. I am, therefore, of opinion that the fact that the race

meeting was in this case postponed does not mean that there was no gaming.

V.S./R.K. *Answer accordingly.*

1930 Cr. Cases 119

(Lahore)

BROADWAY, J.

Muhammad Rafiq—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1200 of 1929, Decided on 23rd November 1929, from order of Sess. Judge, Karnal, D/- 18th July 1929.

Criminal P. C., S. 197—Municipal Commissioner moving Court to issue search warrant acts as a public servant—Provisions of S. 197 must be followed where he is accused of offence done in discharge of his duty.

R was a Municipal Commissioner as well as the Honorary Secretary of the Committee. A resolution was passed directing that *R* should conduct certain prosecution against one *K*. During the trial *R* moved the Court for search warrant which turned out to be unnecessary. As a result *K* lodged a complaint against *R* under S. 500, Penal Code :

Held: that *R* had filed the complaint under the authority of the Municipal Committee and acted in his capacity of a Municipal Commissioner when he asked for a search warrant and whatever he did, he did as a public servant. His action regarding the search warrant could not, therefore, be called in question unless and until the provisions of S. 197 were complied with. [P 120 C 1]

Shamair Chand—for Petitioner.

Kanhya Lal—for the Crown.

Judgment.—The petitioner in this case, Muhammad Rafiq, is a member of the Municipal Committee of Shahabad in the District of Karnal. Not only is he a Municipal Commissioner, but he is also the Honorary Secretary of that committee. The members of that committee found it necessary to pass a resolution for the prosecution of one Kanhya Lal on charges under S. 477 (a), I. P. C., and by the same resolution directed that the petitioner, as the Honorary Secretary, should conduct the prosecution. On 16th March 1929 the petitioner filed the necessary complaint and on 4th April of that year moved the Court for a search warrant which turned out to be unnecessary. As a result Kanhya Lal instituted a complaint under S. 500, I. P. C., against Muhammad Rafiq who pleaded that whatever he did, he did as a public servant and that, therefore, the complaint could not proceed until the provisions

of S. 197, Criminal P. C., had been complied with.

The trial Court, as well as the Sessions Judge, came to the conclusion that the prosecution could proceed without recourse to S. 197, Criminal P. C., as Muhammad Rafiq's action on 4th April 1929 was that of the Honorary Secretary of the committee and not that of a Municipal Commissioner. It is against that conclusion and the refusal of the learned Sessions Judge to quash the proceedings that this proceeding under S. 439 has been lodged.

Now, there can be no doubt that Muhammad Rafiq in filing the complaint did so under the authority of the Municipal Committee. He was so authorized because he was the Honorary Secretary of that committee and the fact that he held the post of Honorary Secretary did not deprive him of the responsibilities or the privileges of his Municipal Commissionership. Had he not been a Municipal Commissioner he would not have been the Honorary Secretary of this committee, and he would not, therefore, have been authorized to file the complaint against Kanhya Lal. In the present case it seems to me beyond any doubt that whatever he did, he did because he was directed to lodge this complaint and that as a matter of fact, he acted in his capacity as a Municipal Commissioner when he asked for a search warrant. His action on 4th April 1929 cannot, therefore, be called in question unless and until the provisions of S. 197, Criminal P. C., have been complied with, and I, therefore, accept this revision and quash the proceedings leaving it open to the complainant to take such action under S. 197, Criminal P. C., as he may think proper.

R.M./R.K.

Revision allowed.

1930 Cr. Cases 120

(Madras)

JACKSON, J.

Swarnammal—Petitioner.

v.

K. Muniswami Chetty — Respondent.
Criminal Revn. Case No. 117 of 1929,
and Criminal Revn. Petn. No. 99 of
1929, Decided on 11th October 1929,
against order of 2nd Presidency Mag.
George Town, Madras, D/- 30th Octo-
ber 1928.

Criminal P. C., S. 441.—Under S. 441 reasons can be supplied where no reasons are given under S. 370—Reasons already given under S. 370 cannot be contradicted by those given under S. 441.

Section 441 is not enacted to enable Presidency Magistrates to give fresh reasons for their decisions contradictory to those already given; but to enable them to supply reasons where in exercise of their privilege under S. 370, they have given no reasons at all.

[P 120 C 2]

V. L. Ethiraj and N. Somasundaram
—for Petitioner.

T. S. Anantaraman—for the Crown.

M. A. T. Coelho and C. M. J. Ernest—
for Respondent.

Order.—The procedure of the learned 2nd Presidency Magistrate cannot be supported. He dismissed a complaint and discharged the accused which he is empowered to do under S. 370, Criminal P. C., without giving any reasons. But he elected to give as his reason, that there was no legal evidence. This was taken up on revision and on the face of the record the learned Presidency Magistrate is wrong and there is legal evidence, the sworn statement of P. W. 3. But the Magistrate submits a report under S. 441, Criminal P. C., reiterating his statement that there is no legal evidence, and recording for the first time that he disbelieves P. W. 3. This argues great confusion of mind because if the evidence of P. W. 3 requires judicial consideration there evidently is legal evidence.

It seems obvious that at the time he discharged the accused the Magistrate never directed his mind to the credibility of P. W. 3, because he held that there was no legal evidence.

His subsequent argument is not of much use; in fact S. 441, Criminal P. C., is not enacted to enable Presidency Magistrates to give fresh reasons for their decisions contradictory to those already given; but to enable them to supply reasons where in exercise of their privilege under S. 370, Criminal P. C., they have given no reasons at all. This petition must be allowed and further inquiry ordered. The discharge is cancelled.

P.R.S./V.S.

Petition allowed.

* 1930 Cr. Cases 121

(Sind)

BARLEE, J. C.

Mahomed Jamal and another—Accused—Appellants.

v.

Emperor—Opposite Party.

Sessions—Criminal Appeals Nos. 72 and 70 of 1929, Decided on 10th August 1929, from order of Addl. City Mag., Karachi.

(a) Penal Code, S. 279 — No danger to public, no conviction under S. 279.

If there is no danger to the public, outside the car who are using the road no offence under S. 279 is committed. [P 121 C 2]

* (b) Penal Code, S. 107— Motor driver allowing unlicensed person to drive car— Motor driver cannot be convicted as abettor under S. 107.

Where a motor driver allows an unlicensed person to drive the motor car, who injures passengers by upsetting the car and who thereby is convicted for an offence under S. 337, the motor driver cannot be convicted as an abettor under S. 107 as it cannot be said that he intended the car should be driven rashly and negligently. [P 121 C 2]

(c) Motor Vehicles Act, S. 16 — Motor driver not specifically charged under S. 16 — He cannot be convicted under that section — Criminal P. C. S. 242.

The fact that an unlicensed person was charged with driving a motor car without a license and pleaded guilty to that charge is not sufficient to justify a Court in convicting the motor driver of having allowed him to drive, where he was not specifically charged with that offence under Motor Vehicles Act, S. 16. [P 122 C 2]

Gurdassing J. Shahani—for Appellants.

D. N. O'Sullivan—for the Crown.

Judgment.—Appellant 1 has been convicted of an offence under Ss. 279 and 337, I. P. C., and appellant 2 has been convicted of abetment.

The facts according to the judgment of the lower Court are that on 2nd April, appellant 2 started to drive a bus from Malir to Karachi at 6 p. m. After he had gone some way along the Malir Road he gave up his seat to the appellant 1 and himself sat at the back of the car. Appellant 1 who was not a licensed driver continued to drive the car and upset it, with the result that some of the passengers were injured. He was, therefore, prosecuted under the sections mentioned above and convicted. It has been contended by Mr. Shahani on his behalf that S. 279 has no application inasmuch as there was no evidence that the appellant was driving the car to

the danger of any person using the public road.

This appears to be correct, for if there was no danger to the public outside the car who were using the road no offence under S. 279 can have been committed. But it appears that the appellant has committed an offence under S. 337 because he actually caused hurt to persons in the bus by a rash and negligent act. It has been very faintly contended that his act was not rash and negligent. But there is the evidence on record of Loda, a pleader of this Court, and of another gentleman who was seated in the bus, that the appellant was driving the car at a dangerously fast speed and the speed has been described by Loda as a speed faster than the mail train. That may be an exaggeration, but it is reasonable to suppose that the speed was dangerously fast considering the character of the road. For this reason I cannot interfere with the conviction under S. 337. The sentence does not seem to be unduly severe. A motor car is a very dangerous machine in the hands of an unskilled driver and the appellant is lucky that he has not had to answer a far more serious charge.

The result is that the conviction and the sentence under S. 279 against appellant 1 Mahomed Jamal are set aside but his conviction and sentence under S. 337 are confirmed and he is directed to undergo the unexpired portion of his sentence.

The offence of abetment, however, as the learned A. P. P. admits cannot be made out. Appellant 2 certainly aided appellant 1 in driving the car but it cannot be said that he intended that it should be driven rashly and negligently. If he committed an offence it must be one under the Motor Vehicles Act, but he has not committed the offence under S. 107 with which he had been charged.

The learned A. P. P. had asked me to convict appellant 2 of an offence under S. 16, Motor Vehicles Act, that is of having allowed a person who had no license to drive a motor car of which he was himself in charge. Mr. Gurdassing in reply has urged that his client cannot be convicted of this offence since he was not charged with it.

Section 242, Criminal P. C., directs that when an accused appears before a Magistrate, the particulars of the offence of which he is accused shall be stated

to him and he shall be asked if he has any cause to show why he should not be convicted. It is clear from the record that appellant 2 was not asked to plead to a charge of an offence under the Motor Vehicles Act. He was charged with aiding and abetting accused 1 in driving rashly and negligently; and, if the offence under the Motor Vehicles Act was included in the offence with which he was charged he could be convicted of the former. But I cannot agree that the charge of allowing an unlicensed man to drive is included logically in the charge of abetting his driving rashly and negligently.

The question then is whether the fact that appellant 1 was charged with driving without a license and pleaded guilty to that charge is sufficient to justify me in convicting appellant 2 of having allowed him to drive, though he was not specifically charged with that offence.

In my opinion, it is absolutely necessary that all these rules of procedure should be very strictly followed and, therefore, as the law requires that, before a man can be convicted of an offence the particulars of that offence must be stated to him, the appellant cannot be convicted under the Motor Vehicles Act, for certainly the particulars of an offence under S. 16 were not stated to him. It makes no difference at all that in the circumstances he could have had no conceivable defence.

I am unable, therefore, to convict appellant 2 of any offence. And I do not think that I have power to remand the case so that the prosecution may have an opportunity of correcting the mistake made by the learned Magistrate. They must file a fresh complaint against appellant 2 if they wish to secure a conviction under the Motor Vehicles Act.

The conviction and sentence of appellant 2 are set aside and he is directed to be set at liberty.

v.S./R.K.

Sentences modified.

1930 Cr. Cases 122

(Sind)

RUPCHAND AND BARLEE, A. J. Cs.
Murido—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 195 of 1929, Decided on 1st October 1929, from judgment of Addl. City Magistrate, Karachi.

(a) Penal Code, S. 75—Previous conviction 18 years old is no good ground for heavy sentence.

A conviction which is at least 18 years old cannot by itself form a good ground for a heavy sentence. [P 123 C 1]

(b) Penal Code, S. 75—Enhancement of sentence should not rest on previous security bond when accused is not questioned about it.

In the trial the fact that the accused had been called upon to give security for good behaviour on no less than three occasions, was taken into consideration, from the police papers in awarding a heavy sentence. The accused was not asked whether he was bound over as a badmash.

Held, that it was not proper to rely upon that circumstance for enhancement of sentence.

[P 123 C 1]

(c) Criminal P. C., S. 32—Discretionary power of Magistrate in awarding sentence.

The law vests a discretion in the trying Magistrate to pass adequate sentence in each case and it is for him to decide after taking into consideration all the pertinent circumstances of the case, what should be the adequate sentence. No rule of thumb can be laid down by a higher tribunal as a guide for the trying Magistrate in awarding an adequate sentence. *Regina v. Thornton*, (1909) Cr. App. Rep. 315, Ref. [P 123 C 1]

(d) Criminal P. C., S. 439—For reduction unreasonableness of sentence is necessary.

A High Court should be satisfied that the sentence awarded is so unreasonable and so excessive as to require a reduction before it can interfere in revision on the question of sentence. [P 123 C 2]

W. B. Chandiramani—for Applicant.

C. M. Lobo—for the Crown.

Rupchand, A. J. C.—The accused was put on his trial before the Additional City Magistrate, Karachi, for the offence of stealing one shawl worth Rs. 8-0-0. It appears that about 5-30 a. m., while passing through the Somerset Street, the accused removed the shawl from complainant's body while he was sleeping on the public road. At that time the accused was not aware that he was being shadowed by two policemen. When he was arrested he denied possession of the shawl which he had hidden on his person, but on being searched he admitted his guilt. It was discovered by the police that the accused had six

previous convictions of theft, the last being in 1911, and that the accused had been sent up as a badmash since on three different occasions and bound over in 1916.

At the trial the accused pleaded guilty to the charge and admitted his previous convictions. For some reasons which are not apparent on the record but which may be surmised, the learned Magistrate did not ask the accused whether he had been bound over as a badmash or not. The learned trying Magistrate sentenced him to two years rigorous imprisonment, taking into consideration *inter alia* his previous convictions and made no reference to the badmashi proceedings.

In appeal, the learned Judicial Commissioner confirmed the sentence and in addition to the grounds referred to by the learned Magistrate observed that the accused had been called upon to give security for good behaviour on no less than three occasions and that his case did not merit any leniency. The accused has come to us in revision.

Now, it is no doubt true that a conviction which is at least 18 years old cannot by itself form a good ground for a heavy sentence. It is also equally true that the learned Judicial Commissioner was in error in relying upon the police papers sent to the Magistrate showing that the accused had been sent up as a badmash when the accused had not been questioned about the badmashi proceedings. In the absence of an opportunity having been afforded to him in that behalf, it was hardly proper to rely upon that circumstance, for enhancement of the sentence. But these two points to which our attention has been drawn are in our opinion not sufficient for us to warrant our interference in revision. The law vests a discretion in the trying Magistrate to pass adequate sentence in each case and it is for him to decide after taking into consideration all the pertinent circumstances of the case, what should be the adequate sentence. No rule of thumb can be laid down by a higher tribunal as a guide for the trying Magistrate in awarding an adequate sentence: see the observations of Lord Alverston in *Regina v. Thornton* (1). The maximum sentence provided for this offence was three years. It is true that

the Magistrate could only inflict a maximum sentence of two years, but there were circumstances which justified him in inflicting on the accused that sentence. The accused was not a juvenile, and the offence committed by him was such as could not be easily detected.

It is a well recognized rule of practice that the more deficient in certainty the sentence is, the severer it should be. Looking to the circumstances of this case it was within the competence of the learned Magistrate to award the maximum sentence which he could impose. It has been repeatedly laid down that before this Court would interfere in revision on the question of sentence, it should be satisfied that the sentence was so unreasonable and so excessive as to require a reduction. Sitting in revision we are not prepared to hold that the discretion exercised by the learned Magistrate in awarding a sentence of two years which has been accepted as proper by the learned Judicial Commissioner, is one which can be interfered with in revision. We accordingly dismiss the application.

Barlee, A. J. C.—I concur.

V.S., R.K. *Application dismissed.*

1930 Cr. Cases 123

(Sind)

BARLEE AND KALUMAL, A. J. Cs.

Assudomal—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 107 of 1929, Decided on 14th August 1929, from order of Addl. City Magistrate Karachi.

(a) Bombay Prevention of Gambling Act, S. 6—Special warrant must be directed to person by name.

A special warrant must be a warrant which is specially directed to a person by name and not one which can be endorsed over to any other Police Officer of similar rank : 3 S. L. R. 56 Foll. [P 124 O 2]

(b) Bombay Prevention of Gambling Act, S. 6—Extraneous evidence to prove special warrant cannot be allowed.

A warrant is not a special warrant if it is not on the face of it a special warrant ; and if it is not directed to a special officer, extraneous evidence cannot be admitted to prove that it was meant to be executed by a Special Police Officer personally and only by him. [P 124 O 2]

(c) Bombay Prevention of Gambling Act, S. 7—Special warrant not issued under S. 6—Presumption cannot be drawn.

No presumption under S. 7 can be drawn

(1) [1909] Cr. App. 315.

where the warrant is not a special warrant issued under S. 6 of the Act. [P 124 C 2]

Motiram Idanmal—for Applicant.

C. M. Lobo—for the Crown.

Judgment.—The applicants have been convicted by the Additional City Magistrate, Karachi, No. 1, under Ss. 4 and 5, Prevention of Gambling Act and Nos. 2 to 8 under S. 5, Gambling Act. They have applied to this Court for revision of the convictions and sentences.

This case was tried summarily by the Magistrate and no appeal lies against the sentences.

The facts as they appear from the judgment are that Sub-Inspector Abdul Latif learnt that applicant 1 Assudomal had started a gambling house at Keamari. He made inquiries and then obtained a search warrant under S. 6, Gambling Act, and raided Assudomal's shop after midnight on 25th March 1929. He found the eight applicants in the shop sitting on chairs round a table and playing cards. He arrested them and a pack of cards and a two anna piece which he found on the floor. Besides this evidence and that of the mashirs the prosecution called the informant Ghulam Mahomed who deposed that he had been to Assudomal's shop to gamble at 11 p. m. the same night and that he had gambled there and that Assudomal was taking "Nal." The learned Magistrate held that there was a presumption under S. 7 that the house was being used as a common gambling house and the persons found there were present for the purpose of gambling; and apart from this presumption he held on the evidence that it had been proved that the accused were gambling and that accused 1 was taking "Nal."

Mr. Motiram who has appeared for all the applicants has contended that no presumption should have been drawn from the fact that the warrant was issued because, firstly the warrant was not a special warrant issued under S. 6 of the Act, and, secondly, that the house in which the applicants had been found playing cards had not been clearly described in the warrant.

This second point does not seem to us to be one of substance. The warrant authorised the Sub-Inspector, Keamari, to search the shop "Verhomal Issardas, General Merchant, Jackson Bazar, Kea-

mari." Verhomal has three shops in that neighbourhood, a general shop, and adjoining it a flour and grain shop, and also a Pan Bini shop. And it is contended that because he had three shops the description given in the warrant is vague. But, as has been pointed out by the learned Magistrate, though he had three shops he had not got three general shops. And it is perfectly clear that the shop raided was a general shop because there was a sign board at the door of the shop. We think that the house was described with sufficient accuracy.

On the other point, we are unable to agree with the learned Magistrate. The warrant was issued to the Sub-Inspector, Harbour Police Station, Keamari. Now there are three Sub-Inspectors at the Harbour Police Station, Keamari, so prima facie this warrant was not specially directed to any one Police Officer as is required. A special warrant must be a warrant which is specially directed to a person by name and not one which can be endorsed over to any other Police Officer of similar rank: vide *Emperor v. Mithu* (1). It follows that this was not on the face of it a special warrant as it could have been executed by any of the three Sub-Inspectors.

It has been contended that inasmuch as the Sub-Inspector who obtained the warrant himself executed it, the provisions of the law have been sufficiently satisfied, that is to say, that a warrant which is given to a Police Officer personally and executed by him, is a special warrant. But we do not think that this argument is valid. In our opinion a warrant is not a special warrant if it is not on the face of it a special warrant; and if it is not directed to a special officer, extraneous evidence cannot be admitted to prove that it was meant to be executed by a Special Police Officer personally and only by him.

Since the warrant in this case was not a special warrant it follows that the learned Magistrate was not entitled to draw any of the presumptions mentioned in S. 7 of the Act. But we find that in this case there was sufficient evidence apart from the warrant to show that the house was being used as gambling house. The eight applicants were actually found gambling and there was

(1) [1909] 9 S. L. R. 56=2 I. C. 371=10 Cr. L. J. 8.

direct evidence of one witness on oath that applicant 1 who was the owner of the shop had that night been making a profit out of the gambling by taking 'Nal.' It has been urged that we should not accept this witness' evidence inasmuch as he was an informer, a bad character and unworthy of credit. But the learned Magistrate who believed him must have taken his character into consideration and it is only very rarely that this Court will, sitting as a Court of revision, go into questions of fact and reverse findings of fact of the lower Courts. We see no reason to do so in the present application and therefore we dismiss this application.

V.S./R.K. *Application dismissed.*

1930 Cr. Cases 125

(Sind)

PERCIVAL, J. C. AND ASTON, A. J. C.
Emperor

v.

Badalmal—Opponent.

Criminal Ref. No. 222 of 1929, Decided on 19th September 1929, made by the Sess. Judge, Sukkur.

Penal Code, S. 193—False evidence given on solemn oath—Retraction of false evidence on detection of fraud—Intention not to give false evidence cannot be inferred.

Where the accused retracts his false statements, made on solemn oath in a witness box, only when he discovers that his fraud has been detected, no Court can infer from the subsequent correction or retraction that there is no intention to give false evidence: 19 *Bom. L. R.* 61; 4 *S. L. R.* 255; 16 *O. C.* 81; 26 *Mad. 55* and (1864) *W. R.* 10, *Dist.* [P'126 C 1]

C. M. Lubo—for the Crown.

D. Punwani—for Opponent.

Aston, A. J. C.—This is a reference by the learned Sessions Judge, Sukkur, who has forwarded the record and proceedings in the case of *Crown v. Badalmal* who was tried by the City Magistrate, Sukkur, for an offence of perjury under S. 193, I. P. C. and sentenced to suffer rigorous imprisonment till the rising of the Court and to pay a fine of Rs. 100 or in default to three months' rigorous imprisonment.

The facts of the case briefly are that one Dostali and two others were charged under Ss. 457/380, I. P. C. with an offence relating to the theft of bullocks. The accused asked for a summons to one Kishnomal Sabhagomal as a defence witness. On 19th September 1928 the Court peon called the name of Kishnomal

Sabhagomal and in response to the call the respondent Badalmal, son of Sadhumal entered the Court, stepped into the witness-box and declared on solemn affirmation that he was Kishnomal, son of Sabhagomal and gave evidence with regard to the alleged offence. He deposed to the fact that Idoo gave Dostali a bullock and a cow with a calf, that Dostali came to him and asked for pen and ink and that after 15 minutes Dostali took him to sign the receipt and he attested the receipt, that Sher Mahomed stood surety for both Dostali and Idoo, and for the cattle and receipts were written near a Kandi tree outside the Jalpir Shrine. During the trial of the case the complainant was sent to fetch the bullocks and the further deposition of the witness was suspended. On the return of the complainant he informed the Court that the respondent Badalmal was not Kishnomal son of Sabhagomal. The respondent realizing that his fraud had been discovered confessed to the personation and admitted that the evidence which he had given was false. Complaint was filed against him under S. 193 and he was tried by the learned City Magistrate, Sukkur. The learned Sessions Judge recommends that the sentence may be enhanced and that Badalmal may be sentenced to a substantial period of imprisonment.

Several rulings have been cited on behalf of the respondent which lay down that a deposition of a witness must be regarded as whole: *Pandu v. Namgi, In re* (1). There it was held by Batchelor, J. and Heaton, J. that it was not desirable to subject an accused to a prosecution for perjury who had been deliberately making a number of false statements on oath and when subsequently confronted with the evidence of his Karkoon had retracted his former statements. In *Soni v. Emperor* (2) it was held that it was inadvisable to prosecute a man for coming to his right mind. This case was cited with approval in *Lachmi Narain v. Emperor* (3) where it was laid down that a prosecution for perjury was undesirable when the witnesses correct themselves. In *Palani Palgan,*

(1) [1917] 19 *Bom. L. R.* 61=39 *I. C.* 320=18 *Cr. L. J.* 480.

(2) [1911] 4 *S. L. R.* 255=11 *I. C.* 561=12 *Cr. L. J.* 397.

(3) [1913] 16 *O. C.* 81=19 *I. C.* 712=14 *Cr. L. J.* 280.

In re (4) the Madras High Court pointed out that a subsequent correction or retraction may negative the intention to give false evidence. In (1864) W. R. 10 it was held that witnesses should have a locus penitentiae.

It seems to me that a distinction is to be drawn between those cases where a witness either through stress of skilful cross-examination or from other circumstances while under examination in the witness box makes false statements which he soon afterwards retracts in the course of his deposition and the case of a man who deliberately, wilfully and intentionally enters the Court with the intention of giving false evidence and retracts his statement and admits that his evidence is false only when he is found out. The learned Magistrate in this case has held that the accused only retracted his false statements when he discovered that his fraud had been detected. It is clear that in a case of this kind, no Court could infer from the subsequent correction or retraction that there was no intention to give false evidence. The crime was serious and intentional and we agree with the learned Sessions Judge that a substantial period of imprisonment is necessary.

We therefore add the sentence four months rigorous imprisonment to the sentence of fine inflicted by the learned Magistrate. We set aside the sentence of one day's simple imprisonment.

V.S./R.K. *Sentence enhanced.*

(4) [1903] 26 Mad. 55.

1930 Cr. Cases. 126

(Sind)

BARLEE, J. C., AND KALUMAL,
A. J. C.

Ali Mahomed and another—Accused
—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 188 of 1929, Decided on 15th August 1929, from order of Spl. First Class Magistrate, Karachi.

(a) Criminal P. C., S. 239 (d)—*Circulation of defamatory statements about same matter by father and son*—Joint trial under S. 239 (d) is competent.

Where both the father and son associate together in circulating on different occasions the defamatory statement the object of both being to defame a person about the same matter a joint trial is competent under S. 239 (d).

[P 127 C-2]

(b) Criminal P. C., S. 233 — Charge not clear as to which distinct incident it includes—Such charge is not in compliance with S. 233.

Where there are as many as seven instances when the complainant is said to have been defamed and it is not clear from the charge as to which incident each one of the two accused was called upon to meet the accused cannot be said to have had an opportunity to meet the charge as required by law, nor can such a charge be in compliance with S. 233; 11 Cal. 106, *Rel. on*; 80 Cal. 402, *Ref.*

[P 128 C-1]

(c) Criminal P. C., S. 537 — Disregard of compliance of S. 233 cannot be remedied by S. 537.

Disregard to the provisions of S. 233 is not an irregularity that can be remedied by S. 537 but is altogether illegal: 26 All. 195 and 93 Cal. 295, *Foll.*

[P 128 C-1]

Partabrai D. Punwani — for Applicants.

C. M. Lobo—for the Crown.

Kalmual, A. J. C.—This is an application in revision asking us to set aside the convictions and sentences passed against the applicants father and son under S. 500, I. P. C., sentencing each of the applicants to a fine of Rs. 200 or in default to suffer simple imprisonment for two months, by Mr. W. M. Hassanally, Special First Class Magistrate, Karachi. An appeal was filed against the sentences in the Judicial Commissioner's Court on its Sessions Side but the same was rejected and the sentences confirmed.

Both the accused and the complainant belong to one Jamait or goldsmiths belonging to Cutch residing in Karachi. There are two factions in this Jamait the accused belonging to one faction and the complainant to the other faction. It appears that Ibrahim, son of Ali Mahomed, one of the accused lodged a complaint against the brother of the complainant in Cutch in connexion with ornaments said to have been stolen by complainant's brother from the possession of one Hirbai, a relation of the complainant, with whom the same had been deposited. The complaint was dismissed. It is said that taking advantage of that complaint the accused between 7th and 11th June 1928, circulated a story in Karachi to the effect that Ibrahim, son of Ali Mahomed, son of one of the accused had filed a complaint against a brother of the complainant and that immovable property of the brother of the complainant had been attached and that the shop of the

complainant at Karachi would soon be attached. The two complaints filed in Karachi by Muṣo the complainant one against Ali Mahomed and another against his son Ismail show that these defamatory statements were made to several people in Karachi on some occasions by Ali Mahomed and on other occasions by his son Ismail. The complainant on account of such statements circulated by the accused suffered in reputation and in business inasmuch as some of his customers withdrew from him gold deposited for making ornaments while others who had dealings with him refused to give him credit. The defence to these complaints was that one Adam was given the above said (defamatory) information by the complainant himself and that he had circulated the same in the bazar and not the accused.

The cases against both the accused as requested by their counsel were consolidated with the result that there was only one trial. This was evidently done under S. 239, Cl. (d), Criminal P. C.

After the evidence for the complainant had been recorded showing that the accused had made statements of the kind above stated to different people on different occasions sometimes by one accused and sometimes by the other between 7th and 11th June 1928, a charge was framed against both the accused to the following effect :

" That between the 7th and 11th June last at Karachi you both made or published the following imputation concerning Moosa son of Yusif to wit that you or Ibrahim son of Ali Mahomed had got the property of Moosa attached in Cutch and that you or Ibrahim had obtained an order of attachment against Moosa's property at Karachi and that his Karachi property would also be attached in 2 or 3 days' time or words to that effect intending to harm or knowing or having reason to believe that it would harm the reputation of the said Moosa Yusif and thereby committed an offence punishable under S. 500, I. P. C. "

The accused thereafter led evidence mainly to prove that they could not have made a statement defamatory of the nature above said to Adam who was not on visiting terms with them. The Magistrate convicted both the accused of the offence of defamation and sentenced each to pay a fine of Rs. 200.

The first contention raised against the

conviction and sentences is that the joint trial was bad, and that, therefore, the entire proceedings were vitiated. This contention in our opinion is unsound as S. 239, Cl. (d), Criminal P. C., one contemplates joint trial of more than one accused of the nature in question of offences committed in the course of the same transaction. The same transaction implies oneness of purpose: see *Woodward v. Emperor* (1) and this as alleged does exist in this case, the object of both the accused being to defame the complainant about the same matter. Both the father and son seem to have been associated together in circulating on different occasions the statement above referred to. This objection, therefore, on behalf of the accused must fail.

The next objection is that the charge against each of the accused lacks in necessary particulars that are required by law and that this has prejudiced the accused. There is no doubt that both the accused as disclosed in the evidence made defamatory statements to the same effect accused 1 having made it on three occasions and accused 2 on four occasions to different people. There is equally no doubt that each such statement was defamatory and if proved would constitute a distinct offence of defamation. It appears, however, that the Magistrate was under the impression that defamatory statements in effect the same though made on different occasions to different people, however, constitute one offence on the part of each of the accused. It is this wrong impression probably that is responsible for the charge framed as it was done in this case in the lower Court. The charge is silent as to the occasions when the statement complained of was made by accused 1 and is equally silent as to the occasion when it was made by the other accused. There is nothing in the charge to show (there being as many as seven occasions) which of these statements the accused were asked in the charge to meet. This must have necessarily led to the prejudice of the accused in defending the case against them. Cf. *Behari Malton v. Queen Empress* (2). There were as many as seven instances when the complainant is said

(1) A. I. R. 1925 Sind 233=18 S. L. R. 199.

(2) [1885] 11 Cal 106.

to have been defamed. It is not clear at all in the charge as to which incident was each one of the accused called upon to meet. In the absence of such information in the charge the accused could not be said to have had an opportunity to meet the same as required by law, nor can such a charge be in compliance with S. 233, Criminal P. C. The Magistrate has convicted each of the accused of one offence and not of more than one but there is nothing absolutely to show either in the charge or in the judgment to what statement each of the accused is guilty of. The judgment, in other words, is silent as to the occasion when defamatory statements of which the accused have been found guilty were made. The charge is, therefore, in the present case vague and indefinite in that respect. Reading Ss. 221 to 223, Criminal P. C., there could be no doubt that the object underlying is to enable the accused to know with accuracy and certainty and with the greatest precision possible what acts they have committed. S. 233, Criminal P. C., requires a separate charge to be framed in respect of each offence. In the present case, this has not been done. As held by the High Courts of Allahabad and Calcutta disregard of the provisions of S. 233, Criminal P. C., is not an irregularity that could be remedied by S. 537, Criminal P. C., but is altogether illegal: *Emperor v. Fattu* (3) *Pares Nath Sircar v. Emperor* (4).

In a defamation case reported in *Bishwanath Das v. Keshab Gandhabanik* (5) it was held that the charge was a proper charge inasmuch as it did not set forth the particular occasions on which defamation was said to have been committed so as to give the accused person an opportunity of defending himself with reference to each act alleged to have been committed by him. In my opinion, therefore, error in the charge has vitiated the entire trial with convictions following. Even if S. 537 applies to the present case, I have no doubt that the accused have been prejudiced as they were deprived of an opportunity of meeting specific defamatory statements complained of. Under the circumstances we set aside the conviction and sentences and direct that the accused be refunded amounts they

have paid. We send accordingly, the case back for trial according to law in view of the above remarks.

Barlee, J. C.—I agree with the proposed order.

The complainant alleged that the two accused had between them committed no less than seven offences and there was no legal obstacle to their being tried jointly for all these seven offences if they were considered to have been committed in the course of one transaction. But as a matter of fact after recording the evidence about seven offences the learned Magistrate framed a charge which reads as if it was a charge of one offence. The accused led evidence which was directed against the charge of one particular offence that one of them had published a libel to a man called Adam. The Magistrate then convicted the accused holding that even if they had not published the libel to Adam, there was evidence that they had published it to others. It seems to me that it is very difficult to say in these circumstances that the accused have been convicted of the offence with which they were charged.

I agree that this case should go back to the Magistrate who should frame a clear and a specific charge or charges of the offences for which in his opinion there is a prima facie evidence and should give them an opportunity of defending themselves as regards each charge.

V.S./R.K.

Case sent back.

(3) [1903] 24 All. 195=(1903) A. W. N. 231.

(4) [1906] 33 Cal. 295=2 C. L. J. 516.

(5) [1903] 30 Cal. 402=7 C. W. N. 74.

1930 Cr. Cases 129.

(Labore)

BHIDE, J.

Arjan Singh—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 821 of 1929, Decided on 11th November 1929.

Penal Code, S. 124-A—Writer can discuss policy of Government but attributing base motives to Government amounts to offence.

It is of course open to a writer to criticize any policy of the Government as permitted by Explanations to S. 124-A but if he proceeds to attribute base motives to Government of having deliberately ruined the subjects etc., he will be liable to be punished under S. 124-A.

Where the article as a whole is calculated to bring the British Imperialists, whose policy is criticised, into hatred and contempt and there are clearly references to the acts of Government of India leading to the inference that the Government of India is included among the Imperialists an offence under S. 124-A is committed. [P 129 C 2]

Mazhar Ali Azhar—for Appellant.

Ram Lal—for the Crown.

Judgment.—The appellant Arjan Singh, editor, printer and publisher of an Urdu Journal named "Kirti" has been convicted in this case under S. 124-A, I. P. C., in respect of an article beginning with the words, "We are going to witness the spectacle of a Great War," which appeared in the issue of that paper of January last and has been sentenced to rigorous imprisonment for a year.

The writer discusses the situation on the Indo-Afghan Frontier in these days and tries to show that a Great War is likely to be the outcome of the British Imperialist policy. He accuses the British Imperialists of having incited and helped the tribesmen on the Frontier against their King and warns Indians against helping the British in the forthcoming war as the British rule in India has ruined them and as they only got bullets in the Jallianwala Bagh, in return for the services rendered by them during the Great War.

Taking the article as a whole there seems no doubt that it is calculated to bring the British Imperialists, whose policy is criticised into hatred and contempt. The only point which needs consideration is whether the "Imperialists" as referred to in the article may be taken to include the "Government established by law in British India". The learned counsel for the appellant

has argued that the article only refers to the policy of the British Cabinet and not of the Government of India and hence it cannot fall within the provisions of S. 124-A, I. P. C. But, on a careful perusal of the article, I am unable to accept this contention. The language of the article is somewhat guarded, but there are clear references in the article to the acts of the Government in India which leave no doubt that the Government of India is included by the writer amongst the Imperialists whose policy he is criticising. At the very outset, the writer says that the war, which is about to break out on the Frontier is merely for safeguarding the British Imperialism "which is destroying and ruling us and which is making us poor and penniless every day". In the second paragraph he refers to the tragedy of Jallianwala Bagh which could not in any sense be considered to be an act of the British Cabinet. Further on, the writer refers to the bomb thrown on the occasion of the Dusohra festival at Lahore, and suggests that it was thrown merely to incite Hindus and Mahomedans to fight with one another. This also appears to refer clearly to the policy of the Government of India and not of the Cabinet in England. In the end the writer refers to the slow recruitment for the impending war referring again apparently to the recruitment in India.

The above references seem to me to leave no doubt that the Government established by law in British India is as much the object of the attack as the Imperialists in England. It is, of course open to a writer to criticise any policy of the Government as permitted by the explanations to S. 124-A, but if he proceeds to attribute base motives to Government and accuses Government of having deliberately ruined the subjects etc., he will be liable to be punished under S. 124-A, I. P. C.: cf. *Queen Empress v. Ramchandra Narayan* (1). In the present instance the writer warns Indians not to help the Imperialists, not because Imperialism itself is objectionable, but because British Imperialism has destroyed and ruined Indians and is rendering them poor and destitute every day, and because the Indians got no reward for their services during the Great War, except the bullets at Jallian-

(1) [1898] 22 Bom. 152.

wala." The passages in which the writer refers to the policy of "Divide and Rule" and suggests that a bomb was deliberately thrown on the occasion of the Dusehra at Lahore, to create dissensions between Hindus and Musalmans are equally mischievous. These passages are clearly calculated to excite disaffection towards the Government established by law in British India and come within the scope of S. 124-A, I. P. C.

Taking the article as a whole, however, the sentence appears to be rather severe. I accept the appeal to the extent of reducing the sentence to rigorous imprisonment for the period already undergone.

R.M./R.K.

Order accordingly.

* 1930 Cr. Cases 130

(Calcutta)

RANKIN, C. J., AND C. C. GUOSE, J.

Osman Gani Mistry and others—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 191 of 1929, Decided on 23rd August 1929.

* (a) Criminal P. C., S. 154—Person of accused's party going first to Police Station and giving information of offence—Real complaint though lodged later on cannot be kept aside and only made use of under Criminal P. C., S. 162.

The proposition that, because a person of the party of the accused goes first to the Police Station and says that some of the complainant's party has committed an offence, the real complaint lodged later on under S. 154 against the accused must be kept off the record save on terms under S. 162, is one which cannot be judicially approved. [P 131 C 1]

(b) Criminal P. C., S. 410—Question whether statement made to police officer is under S. 162 or is made by way of complaint under S. 154, is one of fact.

It is a question of fact whether a statement made to a police officer in the course of an investigation comes under S. 162 or is made by way of complaint to commence an investigation under S. 154. [P 131 C 1]

*Suresh Chandra Talukdar—*for Appellants.

*Anil Chandra Roy Choudhury—*for the Crown.

Rankin, C. J.—In this case 11 accused were put upon their trial before the learned Sessions Judge and a jury. Eight have been found guilty by a majority of three to two and they have been convicted by the learned Judge. The case arose out of an affray which appears to have occurred in connexion

with a dispute as to who had the right of possession of certain agricultural land. The occurrence took place at three or four o'clock in the afternoon of 22nd July 1928. The learned Judge in his charge to the jury has described the occurrence which would appear to show that both the complainant party and the accused party were present. Many of them were armed and so far as the complainant's party was concerned, they were in possession of one gun and a member of the party of the accused was shot with it. The questions for the jury have been very lucidly and elaborately set forth in the charge. The learned Sessions Judge has explained most satisfactorily the importance of the question of possession. He has shown to the jury that unless they find that the complainant's party were in possession they cannot find the common object of the charge under S. 147, Criminal P. C. and also they would have to consider the serious question of private defence. Upon reading the charge as a whole it does not appear to me that any objection of a serious kind can be taken to it. In the end Mr. Talukdar for the accused persons lays stress upon the objection which he makes to the way in which the learned Judge has dealt with the question as what is the first information report.

In this case it would seem that the affray having taken place in the afternoon of 22nd July the first person to lodge a complaint within the meaning of S. 154, Criminal P. C. was one of the accused party. He made no complaint of anything having been done by his own party, but he complained that the complainants had assaulted them. The next day that is, on 23rd July, it appears that the complainant's party two of whom were badly wounded went to the hospital and before they went there they informed the constable at the police station that three people had been injured. It would appear that they went nearer to the Falta Police Station than the Diamond Harbour Police Station. At about 2 o'clock one of the party went to the former Police Station and could not find the officer-in-charge and accordingly he went back to the hospital and next morning that is, on 24th, he came to Falta Police Station to see the officer-in-charge and made a

complaint under S. 154, Criminal P. C. At the trial the learned Judge has treated this as the first information report for the purposes of the present case; the others have not been treated as the first information report. The question which has been raised by Mr. Taluqdar is whether the counter-information of 22nd July is not the first information report which would prevent that of 24th July being received in evidence, save at the instance of the defence, by reason of S. 162, Criminal P. C. In my judgment the contention of Mr. Taluqdar is not sound on the facts of this case. The first information report which is to be dealt with properly under S. 154, Criminal P. C. is a different thing from the statements made to a police officer in the course of an investigation such as are brought within S. 162, Criminal P. C. I do not assent to the proposition that because a person of the party of the accused goes first to the police station and says that some of the complainant's party has committed an offence, the real complaint against the accused must be kept off the record save on terms under S. 162, Criminal P. C. It is a question of fact whether a statement made to a police officer in the course of an investigation in such cases comes under S. 162 or is made by way of complaint to commence an investigation under S. 154. The two matters are dealt with differently in the Code. One says that even if the statement is reduced to writing, is not to be signed whereas the other statement is to be reduced to writing and is to be signed.

In my opinion the first information within the meaning of the Code which applies to this particular trial was the document of 24th July which has been properly treated as the first information. In these circumstances I am of opinion that the appeal fails and must be dismissed.

The accused must surrender to their bail and serve out the unexpired portion of their sentences.

C. C. Ghose, J.—I agree.

v.s*/r.k.

Appeal dismissed

1930 Cr. Cases 131

(Calcutta)

RANKIN, C. J. AND PATTERSON, J.
Daliruddin Mohammad and others—
Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1010 of 1929,
Decided on 15th August 1929.

(a) Criminal P. C., S. 144—Temporary orders may be made without there being real danger—It must be proved that disobedience of accused would have caused breach of peace—Penal Code, S. 188.

Section 144 makes provision for a contingency that local and temporary orders may, at times, be made without there being a real danger of breach of the peace or other reason justifying it. Accordingly under that section it has to be proved that the accused not merely disobeyed the lawful order but that the act of disobedience was such as caused or involved the risk of a breach of the peace or other danger or trouble. [P 132 C 1]

(b) Criminal P. C., S. 144—Trying Magistrate passing order under S. 144 within jurisdiction—Expiration of period of order—High Court will not send back matter for rehearing—Criminal P. C., S. 439.

Where the High Court finds that the trying Magistrate has jurisdiction to pass an order under S. 144, it will not send back the matter to the Magistrate, notwithstanding that the order has expired, so that he may begin the proceedings again, as regards the accused's showing cause against the order: 13 C. W. N. 195; 20 C. W. N. 758; 20 C. W. N. 981; 23 C. W. N. 145 and A. I. R. 1928 Cal. 446, Ref.

[P 132 C 2]

*Mirtyunjy Chatterji and Debabrata Mukherji—*for Petitioners.

Rankin, C. J.—In this case an order was made under S. 144, Criminal P. C., prohibiting the petitioners from exercising any act of possession in respect of a certain fishery. The Magistrate made this order on the basis of a police report and that police report did state that a serious breach of the peace was likely to take place unless such an order was made. Thereupon the petitioners applied to the Magistrate to show cause against the order. In the meantime a complaint had been preferred against the petitioners for a breach of the order and the Magistrate for that reason refused to proceed as he is directed by the section to do and to give the petitioners proper opportunity of showing cause against the order. The petitioners' case appears to be that they could have shown to the Magistrate's satisfaction that there was no likelihood of a breach of the peace. The petitioners went on appeal to the District Magistrate who

rejected their petition. They accordingly have come to this Court in revision and ask us to set aside the order. By the time we are dealing with it the order has expired and is now of no effect.

Mr. Chatterjee on behalf of the petitioners has referred us to certain cases in which this Court has set aside an order of this character notwithstanding that it had expired by lapse of time : see the cases of *J. A. Thomson v. Emperor* (1); *Bishessur v. Emperor* (2); *Chandra Kanta v. Emperor* (3); *Chandra Nath v. F. I. Ry. Co.* (4); *Ram Gopal v. Narayan Das* (5). So far as the actual order itself is concerned I am not of opinion that that order was without jurisdiction. It is true that one may doubt whether it would not have been better to proceed under S. 145, Criminal P. C., or to proceed under some other section. But on the plain terms of S. 144 it is impossible to hold, in my view, that the order is without jurisdiction. These petitioners have been prosecuted under S. 188, I. P. C. and the policy of the legislature with reference to section 188 is to make provision for a contingency that local and temporary orders may, at times, be made without there being a real danger of breach of the peace or other reason justifying it. Accordingly under that section it has to be proved that the accused not merely disobeyed the lawful order but that the act of disobedience was such as caused or involved the risk of a breach of the peace or other danger or trouble. It appears to me, therefore, that if the petitioners in this case are in a position to show that by fishing or by doing what they were forbidden to do no risk of a breach of the peace was occasioned they would have a complete defence to the proceeding.

We are asked to send the matter back to the Magistrate notwithstanding that the order has expired so that he may begin the proceedings again, as regards the petitioners' showing cause against the order. I cannot find that

this Court has ever made such an order as that after the time when the order under S. 144 Criminal P. C. has expired, nor do I think that, it would be a reasonable order to make. It appears to me that if it were shown that the order under S. 144, Criminal P. C. was without jurisdiction we might be justified in view of the prosecution in setting it aside. It does not appear to me that that can be made in this case. This rule must be discharged.

Patterson, J.—I agree.

V.S./R.K.

Rule discharged.

1930 Cr. Cases 132

(Calcutta)

CUMING AND LORT-WILLIAMS, JJ.

Sreehari Swarnakar — Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 96 of 1929, Decided on 2nd August 1929, from decision of Sess. Judge, Dinajpur, D/- 8th January 1929.

Evidence Act, S. 6—Statement made by girl to her mother after transaction is over—Statement is not relevant under S. 6—Evidence Act, S. 8, Illus. (j).

Where the statement of the girl to her mother does not form part of the transaction viz., the raping of the girl, or occur during it, but is made after this transaction is over, when the perpetrator had gone away and the girl came away from the scene of occurrence to her mother's house, the statement is not relevant under S. 6. [P 133 C 1]

Sachindra Kumar Ray—for Appellant.

Bireswar Chatterjee—for the Crown.

Cuming, J.—This is an appeal by one Sreehari Sawarnakar who was tried by the learned Sessions Judge of Dinajpur sitting with a jury on a charge of rape on a child of some eight or nine years old. The jury unanimously found the accused guilty and the learned Judge agreeing with verdict sentenced him to five years' rigorous imprisonment and 16 strokes. The facts are briefly these: The girl who was raped named Durgamani was living with her mother one Sailabala who is a widow. On the day of occurrence the mother of the accused came to call Durgamani to collect firewood with the accused who was also collecting firewood. Durgamani went with the accused to a place called Puranbhita where they began to collect firewood. While the girl was engaged in,

(1) [1909] 13 C. W. N. 195=4 I. C. 590=5 M. J. L. T. 96.

(2) [1916] 20 C. W. N. 758=24 I. C. 312=24 C. L. J. 272.

(3) [1916] 20 C. W. N. 981=26 I. C. 144=17 Cr. L. J. 464.

(4) [1919] 23 C. W. N. 145=47 I. C. 803=28 C. L. J. 433.

(5) A. I. R. 1928 Cal. 446=55 Cal. 1077.

collecting wood the accused Sreehari caught hold of her, placed her on the ground and proceeded to have sexual intercourse with her. Finally he let her go and the girl went back weeping to her mother to whom she told the matter. After some delay information was given to the authority and the appellant was put on his trial with the result already mentioned.

The appellant pleaded not guilty and it was suggested that the charge was the result of enmity. It was further suggested that the injury on the girl was due to the bite of a leech. The first point urged by the learned vakil for the appellant is that the learned Judge misdirected the jury by telling them that there was no evidence that the girl had been bitten by a leech beyond the doctor's statement, that it was possible that the wound on the girl was caused by the biting of a leech. The learned vakil contends that there is a statement by the girl's mother that the girl said that she had been bitten by a leech. The learned Judge was quite correct in saying that there was no evidence that the girl had been bitten by a leech beyond the doctor's statement. The statement of the girl's mother as to what the girl said is not evidence of the fact that she had been bitten by a leech. It could possibly be used to corroborate or to contradict the statement made by the girl. By itself it would not be substantive evidence of the fact that she had been so bitten. The learned vakil contends that under S. 6, Evidence Act, her statement to the mother would be a relevant fact. S. 6 provides as follows :

"Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction are relevant, whether they occurred at the same time and place or at different times and places."

It is clear that the statement of the girl to her mother, if she had made any, did not form part of the transaction by which I understand the raping of the girl or occur during it. This transaction, namely raping of girl, was over when the perpetrator had gone away and the girl came away from the scene of occurrence to her mother's house. Therefore, this statement is not relevant under S. 6. Even then it would not be evidence of the fact that she had been bitten by a leech. It could only be evidence of the fact that she made that statement to her

mother. There is therefore no misdirection by the learned Judge on this point.

The learned vakil then contends that the learned Judge did not tell the jury that the statement to the mother could be used to contradict the girl, and that the learned Judge should have specifically drawn the jury's attention to the statement. As a matter of fact the jury's attention was drawn to the fact that the mother had said that the daughter told her that she had been bitten by a leech. The jury themselves specifically questioned the girl on the point, for at the end of her cross-examination there is a note :

"To the jury. It is not true that when I came home after the occurrence I told my mother that I had been bitten by a leech. I told my mother that I had been raped by accused."

Therefore although the learned Judge did not in his charge specifically draw the attention of the jury to this point the jury's attention had been drawn to it as is clear from the girl's answer quoted above. Therefore the omission on the part of the learned Judge to draw specifically the jury's attention to the point is of no importance.

It has next been argued that the mother Sailabala admitted in her cross-examination that since a certain salis she did not allow the accused to come to her house and the learned vakil suggests that the Judge should have put to the jury whether it is likely that in such circumstances the girl would be allowed to go with the accused. The learned Judge did draw the attention of the jury to the fact that there was enmity between the parties. He did not doubt specifically suggest to the jury that they might consider the question as to whether, if there was any enmity between the parties, the girl would have gone with the accused to gather wood. No doubt the Judge might have put this point to the jury. But I do not think that the putting of this point specifically to the jury is of much importance when the jury's attention was drawn to the fact that there was enmity between the parties.

Then it is urged that the learned Judge should have drawn the attention of the jury to the contradiction between the statement of the girl that the place of occurrence was visible from other houses and the evidence of the Sub-Inspector

who investigated the case that the actual spot of occurrence was not visible from other houses.

The Sub-Inspector was shown the spot by the child. The child, no doubt, said that Puranbhita is visible from certain other places. That is not the same as saying the place of occurrence is visible. The actual place of occurrence may be somewhere inside the Puranbhita. There is no contradiction between the girl's statement and that of the Sub-Inspector. The girl was not asked whether the place on which she was, was visible from other houses.

Lastly it has been urged by the learned vakil for the appellant that the sentence is too severe. Looking at the facts of the case we are not prepared to say for one moment that the sentence is severe. The rape has been perpetrated on a child of nine. In such cases infliction of whipping is a very suitable form of punishment in addition to the sentence of imprisonment. The result is, the appeal is dismissed. The accused, if on bail, must surrender to serve out his sentences.

Lort-Williams, J.—I agree.

V.S./R.K.

Appeal dismissed.

1930 Cr. Cases 134

(Calcutta)

GRAHAM AND LORT-WILLIAMS, JJ.

Nayan Mandal and others—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 109 of 1929, Decided on 6th August 1929, from judgment of Sess. Judge, Faridpur.

(a) **Criminal Trial—Evidence**—**Examination of witnesses**—Prosecution is not obliged to examine witnesses who will not speak truth—Defence has privilege to cross-examine such witnesses which they must exercise at right time.

The prosecution is under no obligation to examine witnesses who it has reason to believe will not speak the truth. It is usual in such circumstances for the prosecution to tender such witnesses for cross-examination. The defence, however, is certainly entitled to claim that privilege but having omitted to do so they cannot be permitted to make capital of the fact that these witnesses were not cross-examined: 8 Cal. 121, *held too widely stated*. [P 185 C 1]

(b) **Criminal Trial—Evidence**—**Presumption**—Presumption of correctness attaching to finally published Record-of-Rights relates only to possession at time of its preparation—Such presumption by lapse of time (10 or 12 years) is rendered of weakest description—Record-of-Rights.

The presumption of correctness, which attaches to the finally published Record-of-Rights, relates only to possession at the time when the record is prepared; and, even if such presumption can be made in a criminal trial, it is clear that where there has been an interval of ten or 12 years between the preparation of the record and the occurrence of an offence in respect of dispute arising over possession of land, any presumption arising from the record is obviously of the weakest possible description. Indeed the probative value is practically nil since all sorts of changes may obviously take place in the course of 10 or 12 years. [P 185 C 2]

(c) **Criminal P. C., S. 540**—Court has power to admit rebutting evidence to contradict evidence of defence.

Under S. 540 Court has power to admit rebutting evidence for the purpose of contradicting evidence adduced on behalf of the defence, if the Court thinks it to be essential to the just decision of the case. [P 185 C 2]

B. C. Chatterji and Suresh Chandra Talukdar—for Applicants.

Debendra Narain Bhattacharyya—for the Crown.

Graham, J.—This is an appeal by three persons named Nayan Mandal, Panchanan Mandal and Moti Lal Mandal who have been convicted by the Sessions Judge of Faridpur on a trial with the aid of a jury and convicted under Ss. 148 and 304 (part 1) read with S. 149, I. P. C., and sentenced as follows: Nayan Mandal to rigorous imprisonment for ten years under S. 304 (part 1) read with S. 149, I. P. C., and Panchanan Mandal and Moti Lal Mandal to five years' rigorous imprisonment under S. 304 (part 1); read with S. 149, I. P. C. No sentences were inflicted under S. 148, I. P. C.

The case for the prosecution was that on the day of occurrence the complainant with a number of other persons had gone to cultivate a certain plot of land and that the accused came in numbers variously armed and ordered them to stop cultivating the land. The complainant's party refused and thereupon the accused attacked them and one Tarini was killed and one Lakhi Kanta was also injured and died afterwards. The defence was that the accused were in possession of the land and were cultivating it, and that the complainant's party came up and attacked them while they were peacefully cultivating the land and that any injuries, which were caused, were caused by the accused in the exercise of their right of private defence.

On behalf of the appellants three points were argued before us. It was first contended that the learned Sessions Judge erred in allowing the prosecution to withhold four witnesses named Abhoy Charan Shikari, Ramananda Biswas, Bonomali Biswas and Jagabandhu Biswas, who were examined in the committing Court, but were not examined in the Sessions Court, or tendered for cross-examination. It is urged that they ought at least to have been tendered for cross-examination. Two of these witnesses Abhoy and Ramananda were named in the first information. In the committing Court they were declared hostile because they did not support the prosecution. The prosecution is under no obligation to examine witnesses who it has reason to believe will not speak the truth: see *Empress v. Dhunno Kazi* (1). It is usual in such circumstances for the prosecution to tender such witnesses for cross-examination, and it is not clear whether this procedure was adopted or not. The defence, however, was certainly entitled to claim that privilege. Having omitted to do so they cannot be permitted to make capital of the fact that these witnesses were not cross-examined.

As regards the other two witnesses Banamali and Jagabandhu there does not appear to be anything to show that they were material witnesses. The prosecution was not bound to examine them. The remarks which have been made above apply to these witnesses also.

It is also urged on behalf of the appellants that the learned Judge should have told the jury that if material witnesses are not called, it may be presumed that, if they had been called, they would not have supported the prosecution. The charge does, however, contain a direction of this nature.

Secondly, it was contended for the appellants that the learned Judge misdirected the jury inasmuch as he did not clearly and explicitly tell them that the settlement record was in favour of the accused and that the presumption was that the record is correct. The learned Judge has referred to the point in his charge. It was perhaps not so clearly put as it might have been. But however that may be, it is well settled

that the presumption of correctness, which attaches to the finally published Record-of-Rights, relates only to possession at the time when the record is prepared, and, even if such presumption can be made in a criminal trial, as to which, speaking for myself, I entertain some doubt, it is clear that where there has been an interval of 10 or 12 years, as in this instance, between the preparation of the record and the occurrence, any presumption arising from the record is obviously of the weakest possible description. Indeed the probative value is practically nil since all sorts of changes may obviously take place in the course of 10 or 12 years. The material question in a case of this description is possession at the date of the occurrence. If the learned Judge had told the jury that the settlement record gave rise to a presumption in favour of the possession of the accused at the date of the occurrence he would certainly have misdirected them.

Thirdly and lastly, it was urged for the appellants that the defence was seriously handicapped by the fact that rebutting evidence was allowed to be brought on the record at the 11th hour for the purpose of contradicting the evidence adduced on behalf of the defence, and it was further contended that certain documents, which were called for from the Sadar Registration Office, were not admissible in evidence, and that the trial has been vitiated by the reception of inadmissible evidence. As regards the first part of this contention reference may be made to S. 540, Criminal P. C., and S. 135, Evidence Act. S. 540 empowers the Court at any stage to summon any person as a witness, if his evidence appears to it to be essential to the just decision of the case. S. 135, Evidence Act, lays down that the order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and in the absence of any such law by the discretion of the Court. I think, therefore, that the Court had power to admit this evidence and that the objection on this point must fail. Finally as regards the objection that the documents in question Exs. X and Y, are not admissible in evidence we think there can be

(1) [1882] 8 Cal. 121.

no doubt that these documents are public documents, and they were, therefore, rightly admitted. In the result all the points which have been urged on behalf of appellants fail, the appeal must be dismissed and the convictions and sentences are confirmed.

Lort-Williams, J.—I agree. I desire to add that, in my opinion, the statement of Wilson, J., in *Empress v. Dhunno Kazi* (1), p. 124 is too wide. The learned Judge says:

"The only legitimate object of a prosecution is to secure not a conviction, but that justice be done. The prosecutor is not, therefore, free to choose how much evidence he will bring before the Court. He is bound to produce all the evidence in his favour directly bearing upon the charge. It is prima facie his duty, accordingly, to call those witnesses who prove their connexion with the transactions in question, and also must be able to give important information. The only thing that can relieve the prosecutor from calling such witnesses is the reasonable belief that, if called, they would not speak the truth. If such witnesses are not called without sufficient reason being shown, the Court may properly draw an inference adverse to the prosecution."

It is difficult to understand what in practice would be the effect of the first part of the learned Judge's dictum, namely that the only legitimate object of a prosecution is to secure not a conviction, but that justice be done. If the evidence in the hands of the prosecution points to the conclusion that a crime has been committed, it is the legitimate object of the prosecution to see that the prisoner is convicted. If the evidence in hand does not point to the probability that he is guilty of a crime, he ought not be prosecuted at all. Consequently if the prosecution are of opinion that the evidence in their possession points to the probability that the prisoner has committed a crime, obviously in their view justice would be done by his conviction, which it should be their object, to secure. The dictum, therefore, though rhetorically and theoretically excellent, is meaningless in practice. The law in my opinion is correctly stated in Archbold's Criminal Pleadings, 27th Edn., 496:

"Although in strictness it is not necessary for the prosecutor to call every witness whose name is on the back of the indictment, (or, in India, "whose deposition has been taken"), it has been usual to do so, that the defendant may cross-examine them."

That is supported by a number of

cases, the first being *R. v. Simmonds* (2) and the last being *R. v. Barley* (3):

"If counsel will not call the witness, the Judge in his discretion may: *R. v. Simmonds* (2). . . . However the prosecutor is not bound to call them all; though he ought, it has been said, to have them in Court, that they may be called for the defence, if the prisoners choose: *R. v. Cassidy* (4)."

The latter part of the learned Judge's statement about the presumption which may be drawn, is of course correct. If the prosecution, in their discretion, do not choose to call such a witness, then the presumption may be drawn that his evidence, if given, would be unfavourable to their case.

V.S./R.K. Sentences confirmed.

(2) 1 C. & P. 84.

(3) 2 Cox. C. C. 191.

(4) 1 F. & P. 79.

1930 Cr. Cases 136

(Calcutta)

CUMING AND LORT-WILLIAMS, JJ.

Natabar Haldar — Accused — Appellant.

V.

Emperor—Opposite Party.

Criminal Appeal No. 107 of 1929, Decided on 30th July 1929, from decision of Sess. Judge, Bakarganj, D/- 14th December 1928.

(a) Criminal P. C., S. 297—Summing up of evidence—Judge should sift and analyse evidence for prosecution and draw attention of jury to defence raised.

In summing up of evidence the Judge should not confine himself to detailing chronologically the evidence given by the witnesses for the prosecution without sifting or analyzing it and without directing the jury in any way upon the value or weight which ought to be or might be attached to it. He ought also to draw the attention of the jury to the defence raised. Omission to do either makes the Judge of little assistance to jury. [P 198 C 1]

(b) Criminal P. C., S. 297—Misdirection to jury—Direction upon Ss. 302 and 304—In direction under S. 302, Judge not adhering to words of section used word "possible" for "likely" held amounted to misdirection.

A Judge after explaining Ss. 302 and 304, Penal Code, said in his charge to jury. "If, however, you find that the accused had neither the intention nor the knowledge requisite under S. 302 consider his liability under S. 304." He then read and explained that section and continued "if you hold that he intended to cause the deceased such bodily injury that death would be possible but not the most probable result you will find him guilty under S. 304, Part I, or if you hold that he had no such intention but knew as a reasonable man that the deceased's death would be a likely consequence of his act you will find him guilty under S. 304, Part 2."

Held: that there was misdirection.

[P 188 C 1, 2]

*Suresh Chandra Talukdar and Bhu-
pendra Nath Dutt Roy*—for Appellant.

Anib Chandra Roy Chowdhury—for
the Crown.

Lort-Williams, J. — The accused Natabar Haldar alias Natak was tried before the learned Sessions Judge at Barisal with a jury under S. 302, I. P. C. for causing the death of one Karim Shah. Along with the accused his brother Nandabashi was also tried under S. 302 read with S. 114, I. P. C. for abetting him. He was acquitted. The case of the prosecution was that the two accused brothers, Nandabashi and Natabar, lived together and were tenants of Abdul Kader Talukdar of Chatra. Narendra Nath Bose was the landlord's Tahsildar and Karim Shah was his Mridha. In the afternoon of Tuesday 27th March 1928 Narendra (with Karim) had gone to the Bari of the two brothers where he found them and also Mahommad Shah and Abdul Karim Bari.

There was some conversation and Narendra demanded the rent due from the brothers. Nandabasi said that they were unable to pay them and the Tahsildar and Karim were about to depart when Nandabasi invited them to the inner hut at the north Viti of the Bari to say something to them. Thereupon they went to the north Viti hut, Natabar also accompanying them and there they sat down. An altercation then arose between the two brothers and Karim Shah with regard to a Jaisudi Bari which apparently the latter had taken possession of, but the possession of which was claimed by the brothers. They complained that he did not pay any rent for this Bari. His answer was that various people held mortgages on the property and he did not know to whom to pay the rent. When the altercation had been going on for about 20 minutes, Natabar who had gone inside the hut suddenly appeared with a leja and speared Karim as he sat on the verandah. He attempted to get up and Nandabasi then got up and helped Natabar to press the leja home. Karim rolled over and died within a few minutes. Narendra got up and ran out of the Bari for help. Mohammad Shah who had been left at the Baithak-khana heard his brother Karim cry out and

ran to the north Vita hut and saw his brother lying in front of the door of the hut and Natabar standing on the verandah with a leja in his hand. He tried to drag the body away but Nandabasi cried to his brother to kill him if he persisted in the attempt. Mohammad then ran away from the Bari. On his way he passed a number of people who had been called as witnesses and he told them all that his brother had been killed by Natabar. Various witnesses came to the Bari and were threatened by Natabar who said that he would kill anybody who came near or tried to take the body away. Some of the witnesses alleged that he had said that he would kill them as he had killed Karim. The wound upon Karim when examined afterwards by the doctor were found to be consistent with having been done with a leja. The chest was slashed open and the wound perforated the upper lobe of the left lung, the left varticle of the heart in two places and the stomach in two places. It is obvious therefore that considerable force must have been used.

Natabar's defence was that he had had a quarrel with a neighbour on account of the neighbour's son interfering with his Panbaroj, that somebody suggested that he should go to his landlord to have the matter decided, and that the landlord instead of helping him had fined him Rs. 25 apparently on three separate occasions making the fine Rs. 75 in all. He also sentenced him to be slapped with a shoe but this part of the sentence was remitted. He says further that in consequence of his inability to pay the fine imposed the landlord had sent his servants for the purpose of collecting the fine and that they with a number of other persons had attacked him when he was attending to his Panbaroj and that he had ran away towards his Bari when a leja had been thrown at him but missed him. He managed to get into his Bari and when he tried to shut the door another leja was thrown at him which grazed him on the thigh and in turn he picked up the leja which had been thrown on him and either threw it back or used it in his defence with the result that, during the fight which ensued, Karim was struck. These shortly are the facts.

The sole witness of actual striking of Karim was Narendra but Mahomed saw the body almost immediately afterwards, and as I have said certain witnesses deposed that Natabar threatened them that he would kill them as he had killed Karim. It will be observed that a considerable part of the evidence of the persons who say that they saw Mahomed running and heard his news is as consistent with the case for the defence as it is with that of the prosecution. It would fit in with either story. Uday Chandra Roy, prosecution witness 11, said in his cross-examination that the men he had seen were running with something like lathis in their hands and that from within the Basabari he heard Natabar cry out that he was being murdered.

Mr. Taluqdar on behalf of the appellant has complained first of all that the learned Judge has not properly put the case of the defence to the jury. He has also raised a point of law with regard to the learned Judge's direction upon S. 304, I. P. C. In view of the opinion which we have formed as to the learned Judge's direction in law it is not necessary to deal at length with the first point taken on behalf of the accused. But reading the charge as a whole I am of opinion that it does not sufficiently draw the attention of the jury to the defence raised, nor does it show the importance of the evidence of Uday Roy in his cross-examination. The learned Judge, as so many learned Judges in the mofussil seem to do, simply detailed chronologically the evidence given by the witnesses for the prosecution without sifting or analysing it and without directing the jury in any way upon the value or weight which ought to be or might be attached to it, and by so doing has really failed to give that help to the jury which he ought to have given. As I have already pointed out in a recent case the spirit of the Code demands that there shall be more than a bare statement of facts in the learned Judge's charge. Otherwise he can be of little assistance to the jury.

The point raised in the learned Judge's direction in law refers to the following passage in his charge. He had explained Ss. 302 and 304 and eventually said this:

"If, however, you find he had neither the

intention nor the knowledge requisite under S. 302 consider his liability under S. 304, I. P. C."

He then read and explained that section and continued

"If you hold that he intended to cause Karim Shah such bodily injury that death would be a possible but not the most probable result you will find him guilty under S. 304 part 1 or if you hold that he had no such intention but knew as a reasonable man that Karim's death would be a likely consequence of his act you will find him guilty under S. 304 part 2."

In our opinion this direction would have been quite correct if he had not used the word "possible," but had adhered to the words of the section and had used the word "likely."

It becomes clear, that the Judge's direction is wrong, if you apply it to a concrete instance. I may repeat here the example which I suggested during the discussion—If Natabar had struck a blow with the leja on Karim's skin it is clear that Karim might have died from septic poisoning arising from the wound. His death would be a possible result of what Natabar had done but not the most possible result. According to the learned Judge's direction such an act would come within S. 304 part 1. We are clearly of opinion that it would not. It might possibly come within S. 304 part 2. But it is more than likely that such an act would not come within the purview of S. 304 at all. In view of the fact that the jury have convicted the accused of an offence under S. 304, part 1, it cannot be said that this misdirection may not have misled the jury.

In these circumstances we are of opinion that the conviction and sentence must be set aside and the appellant retried.

Cuming, J.—I agree.

V.B./R.K.

Case remanded.

1930 Cr. Cases 138

(Calcutta)

RANKIN, C. J. AND PATTERSON, J.

Sunnat Mondal—Accused—Petitioner.

v.

Makar Sheikh—Complainant—Opposite Party.

Criminal Revn. No. 779 of 1929, Decided on 23rd August 1929.

Criminal P. C., S. 232—Charge under Penal Code, S. 498 alleging accused as taking away woman from complainant's custody—Evidence showing that she was taken from one B's house—Scanty evidence con-

necting accused with offence—Retrial was not ordered on amended charge.

In a charge framed under S. 498 against the accused in the trial Court, it was alleged that he had taken the woman away from the complainant's custody, but the nature of the evidence showed that the charge was intended to relate to the alleged taking away of the complainant's wife from one B's house. There was, however, no finding that B had the care of the woman on behalf of her husband, the complainant, nor was there any evidence on the record that would justify such a finding.

Held: that from the very scanty nature of the evidence connecting the accused with the offence, it would not be proper to order a retrial on an amended charge. [P 139 C 1, 2]

Mrityunjoy Chattopadhyaya and Monindra Nath Banerjee—for Petitioner.

Patterson, J.—If the evidence is believed, the complainant's wife was enticed away by a woman named Hazari Bibi, was taken away from Hazari Bibi's house by the present accused and was then detained or concealed for several days in the house of one Mujahar Fakir.

In the charge framed against the accused in the trial Court, it was alleged that he had taken the woman away from the complainant's custody and having regard to the nature of the evidence, it must be supposed (though this has not been clearly stated,) that the charge was intended to relate to the alleged taking away of the complainant's wife from Hazari Bibi's house. There is, however, no finding that Hazari Bibi had the care of the woman on behalf of her husband, the complainant, nor is there any evidence on the record that would justify such a finding. On the contrary, the evidence goes to show that the woman had already been taken away from the complainant's custody by Hazari Bibi before ever the accused appeared on the scene.

It is possible that, if the charge had been framed differently, and if the matter had been more fully investigated the accused might have been convicted in respect of the subsequent concealment or detention of the woman in Mujahar Fakir's house, but it is clear that, in the present state of the record, the conviction and sentence under S. 498, I. P. C., cannot be sustained. The Rule must therefore be made absolute, and in view of the very scanty nature of the evidence connecting the present applicant with the offence, I do

not think it would be proper to order a retrial on an amended charge.

The accused will be released and his bail bond discharged and the fine if paid will be refunded.

Rankin, C. J.—I agree.

V.S./R.K.

Conviction quashed.

* 1930 Cr. Cases 139

(Calcutta)

CUMING AND LORT-WILLIAMS, JJ.

Bikram Ali Pramanik and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 58 of 1929, Decided on 24th July 1929, against decision of Asst. Sess. Judge, Pabna, D/- 17th January 1929.

(a) **Criminal P. C., S. 236 — Alternative charges under Ss. 395 and 457, Penal Code, are not bad in law.**

Offence under S. 457 is really in some cases a minor offence to offence under S. 395 and there can be no reason why there should not be alternative charges of these two offences.

[P 140 C 1]

* (b) **Evidence Act, Ss. 149, 154**—(Per *Cuming, J.*)—Leading questions may be asked without declaring witness hostile — (*Lort-Williams, J. contra.*)

Section 154 read with S. 143 provides that the Court may allow the party to put leading questions to his own witnesses. This does not necessarily mean that he must declare the witness hostile and cross-examine him. It is only when he declares the witness hostile and cross-examines him that he cannot rely upon his evidence. Where the public prosecutor asks a witness some questions with the permission of the Court desiring to get from him not a contradiction of what he said but something in addition, he cannot be said to have cross-examined the witness. The questions are merely leading questions. [P 140 C 2, P 141 C 1]

Per *Lort-Williams, J.*, *contra.*—Ss. 143 and 154 read together do not give power to prosecution to put leading questions to their own witnesses even with the assent of the Judge. The meaning of S. 154 is that with permission of the Court they may treat a witness hostile and cross-examine him. [P 141 C 2]

(c) **Criminal P. C., S. 298—Charge to jury—Charge is defective where no direction as to weight to be attached to evidence of co-accused against accused is given.**

Where in the charge to the jury the Judge does not give any direction to the jury as to how they should treat and the weight they should give to evidence of an accused person as against his co-accused it is impossible to say how far such omission does not prejudice the accused and retrial should be ordered.

[P 141 C 1]

Dinesh Chandra Ray—for Appellants.

Debendra Narain Bhattacharjee—for the Crown.

Cuming, J.—This is an appeal by two persons *Bikram Ali Pramanik* and *Kudratulla Khan*. These two persons together with one *Samatulla* were tried by the learned Additional Sessions Judge of Pabna and a jury on charges of dacoity and house breaking by night. The jury unanimously found all the three persons guilty under S. 457, I. P. C., and not guilty under S. 395, I. P. C. The appeal of *Samatulla* has been summarily dismissed and that of the other two appellants is now before us.

The case for the prosecution briefly was that these persons together with a number of other persons broke into the house of the complainant on the night of 27th May 1928. The defence briefly was a denial of the whole occurrence; and there was a suggestion in the case of *Samatulla* of enmity.

The first point raised by the learned *vakil* for the appellants is that the alternative charges under Ss. 395 and 457, I. P. C., are bad in law. Why it is bad in law I am unable to understand. Offence under S. 457, I. P. C., is really in some cases a minor offence to offence under S. 395. There can be no reason why there should not be alternative charges of these two offences.

The next point raised is that the learned Judge has not properly dealt with or has misdirected the jury with regard to a certain alleged confession. It is alleged that *Samatulla*, whose appeal has been rejected, on the night of the dacoity made a confession to a cousin of his one *Ketab Ali Sarkar* in which he admitted that he and the two appellants had committed dacoity in the house of the complainant. In dealing with this confession the learned Judge's charge to the jury is as follows:

"P. W. 15 *Ketab Ali*, a deed writer in the Salanga Registration Office says that the accused *Samatulla* is his cousin and that he went to him at about 3-30 a. m. on the night of occurrence and requested him to save him as his name had been mentioned in connexion with the dacoity. This person says that after pressure being put, the accused *Samatulla* stated that he with the other two accused and also two other persons had committed the dacoity. The witness admits that there was a quarrel between him and the accused *Samatulla* regarding the deduction of Rs. 10 from the price of three maunds of sweetmeats taken by *Samat* from his shop. This witness further admits that he (*Samat*) also said that his name had been falsely mentioned in the *Ejhar* at the *Thana*. P. W. 15 was not examined by the Sub-Inspector. It is for you to say whether the ac-

cused *Samatulla* went to this witness on the night of occurrence and made the confession."

With regard to the alleged confession itself it is to be found in the evidence of *Ketab Ali Sarkar* when examined before the Magistrate. There he stated that *Samatulla* on being pressed said that he, *Bikram Ali*, *Kudar Ali Khan* and two others committed dacoity in the house of *Chandulla Sarkar*. When examined in the Sessions Court he states as follows:

"Accused *Samatulla* is my co-villager. At about 3 and 3-30 a. m. the *Nanigachi mela* day I came to know of a dacoity in *Chandulla's* house. . . . Accused *Samatulla* came to me that night. He is here. He said that his name had been taken in connexion with the dacoity in *Chandulla's* house. He asked me to go to the *Prodhans* of that *Parah*. I told him to come in the morning as I could not go at that hour of the night. He did not come to me any more. He said that three names were mentioned in connexion with the dacoity, viz., those of *Bikram* and himself and the man who was a Hindu before and converted to be a Mahomedan afterwards."

It would be noticed that in that statement *Samatulla* does not say that he and the other two appellants committed the dacoity. He only says that three names had been mentioned. The Public Prosecutor was evidently not satisfied with that statement; for he asked the permission of the Court to put further questions to the witness and he then asked as follows:

"Did *Samatulla* tell you that he and *Bikram* and *Kudratulla* and two others had committed dacoity in the house of *Chandulla Sarkar*."

The answer was "yes, he said so." Mr. Roy who appears for the appellants contends that the Public Prosecutor having declared the witness hostile and cross-examined him it was not open to the prosecution to rely upon the evidence of this witness. The only effect of declaring the witness hostile and cross-examining him was to discredit the witness altogether. But it does not appear that the prosecution wished to cross-examine the witness for the purpose of discrediting his evidence. As far as can be seen what the Public Prosecutor did was to ask the permission of the Court to put questions to this witness which might be put by the adverse party. From this it cannot be said that he intended to declare the witness hostile and to cross-examine him. S. 154 read with S. 143, Evidence Act, provides that the Court may allow the party to put leading questions to his own witnesses. But that I

do not think necessarily means that he must declare the witness hostile and cross-examine him. * It is only when he declares the witness hostile and cross-examines him that he cannot rely on his evidence. It will be seen from a perusal of the evidence that what the Public Prosecutor desired to get from the witness was not a contradiction of what he had said but something in addition. He was not cross-examining his own witness but with the permission of the Court was asking him leading questions. That is not necessarily to cross-examine. This is clear from S. 154 itself which does not say that a person who calls a witness may cross-examine him in certain circumstances but that he might put questions to him which might be put in cross-examination by the adverse party. That is not the same as cross-examining him. If it were, the Code would have said so.

Be that as it may, it has further been argued by Mr. Roy that the Judge has entirely failed to direct the jury as to how they should deal with the evidence of a co-accused. Here Mr. Roy stands on firmer ground. As far as can be seen from the charge of the learned Judge he gave no direction whatever to the jury on this point. It is clear from his charge that he did not tell the jury that the statement of Samatulla that he himself, Bikram, Kudar Ali and two others were the persons who had committed the dacoity could only be used against Samatulla and therefore apparently has allowed it to be used, as in certain circumstances it can be used, against the co-accused, but he entirely neglected to draw the attention of the jury to a very important matter, namely, the way in which this evidence was extracted from the witness. The witness first of all made no mention whatever of the fact that Samatulla had made a statement to him in which he said that he, Bikram, Kudar Ali and two other persons had committed dacoity; and it is only in answer to the leading question by the Public Prosecutor which practically put into the witness's mouth the answer which he wanted that the witness stated that Samatulla had told him that he, Bikram, Kudar Ali and two others had committed the dacoity. Neither does he give any direction to the jury as to how they should treat and the weight they should give to the evidence of an accused person as against his co-

accused. It is impossible for us to say that the omission of the Judge to bring this fact to the notice of the jury has not seriously prejudiced the two accused persons.

In these circumstances we must set aside the verdict of the jury and direct that the appellants be retried.

Lort-Williams, J.—I agree with my learned brother that this conviction should be set aside and the two appellants retried.

I desire to add that in my opinion Ss. 143 and 154, Evidence Act, read together do not give power to the prosecution to put leading questions to their own witnesses even with the assent of the Judge.

The meaning of S. 154 is that they may, with the permission of this Court, treat a witness as hostile and cross-examine him. The wording of S. 154 shows that the legislature did not intend to distinguish the law in this country from the law which obtains in England.

R.M.R.K.

Retrial ordered.

1930 Cr. Cases 141

(Calcutta)

GRAHAM AND LORT-WILLIAMS, J.J.

Emperor

v.

Balai Ghose and another—Accused.

Jury Ret. No. 31 of 1929, Decided on 7th August 1929, made by Addl. Sess. Judge, Burdwan, on 17th March 1929.

(a) Criminal P. C., S. 307 (2)—High Court should not interfere with verdict of jury unless it is manifestly wrong.

The High Court has to consider the entire evidence and to decide after giving due weight to the opinion of the Sessions Judge and the jury whether the charge was made out against the accused. High Court should not interfere with the verdict of the jury unless it is shown that the verdict was manifestly wrong and that there were no sufficient materials to justify it. [P 142 C 1]

(b) Criminal Trial—Retracted confession—Independent corroboration showing that confession is true should be required.

There is nothing to prevent a confession although retracted from being given effect to as against the maker. But where the confession has been retracted the general rule is that independent corroboration of the confession should be required in order that the Court may be satisfied that the confession is true. [P 142 C 1, 2]

(c) Criminal P. C., S. 103—Object is to obtain as reliable evidence as possible of search.

The object of the section is presumably to obtain as reliable evidence as possible of the search and to exclude the possibility of any

concoction or malpractice of any kind. It is incumbent upon the police to try to comply with the provisions of the section. There is no harm in the police officer who makes the search being called as witness at the trial but such officer cannot be deemed to be an entirely satisfactory witness for the purposes of proving the search. [P 143 C 2]

Debendra Narain Bhattacharya—for the Crown.

* **Graham, J.**—This is a reference under S. 307, Criminal P. C. by the Additional Sessions Judge of Burdwan in connexion with a dacoity case which was tried by him in which the jury by a majority verdict of 4 : 1 were of opinion that the accused were entitled to the benefit of the doubt. The learned Additional Sessions Judge being of opinion that the verdict was erroneous and wholly against the weight of evidence has referred the case to this Court.

Under the provisions S. 307 of the Code we have to consider the entire evidence, and, to decide after giving due weight to the opinion of the Sessions Judge and the jury, whether the charge was made out against the accused, and whether the verdict was right or not. It has not been the practice of this Court according to the trend of decisions on the subject to interfere with the verdict of a jury unless it is shown that the verdict was manifestly wrong and that there were no sufficient materials to justify it.

The evidence which was adduced in this case by the prosecution consisted of : (1) confessions made by each of the accused Balai Ghosh and Motleb Sheikh of their guilt, these confessions having been subsequently withdrawn in the committing Court; (2) the evidence of Satya Bala Dasi and her father Fakir Jelja, who have deposed as eyewitnesses to the dacoity, and have each of them identified one of the accused, Satya Bala having identified Motleb Sheikh and her father having identified the other accused Balai Ghosh ; (3) thirdly in addition to this evidence there is as against the accused Balai Ghosh, the evidence that certain ornaments or pieces of ornaments, Exs. 9 to 12, were found on search in his house.

Now so far as the confessions are concerned there is nothing to prevent a confession although retracted from being given effect to as against the maker. But where the confession has been re-

tracted the general rule is that that independent corroboration of the confession should be required in order that the Court may be satisfied that the confession is true. In view of the fact that both these confessions were promptly withdrawn when the accused came before the committing Magistrate we think that it would not be altogether safe to rely entirely upon them in the absence of any independent evidence to corroborate them. It becomes necessary therefore to examine the evidence in order to see how far the confessions are corroborated.

A very important part of the case consists of the evidence of Satya Bala Dasi and her father Fakir Jelja, and in that connexion the crucial point is whether Fakir Jelja was in his daughter's house on the night of the dacoity. If these witnesses have spoken the truth, and if their identification of the two accused is accepted, then this would undoubtedly furnish valuable corroboration of the truth of the confessions. But the evidence in the case and the facts and circumstances seem to give rise to the considerable doubt as to whether Fakir was at the place of occurrence on the night in question, as he alleges. In the first information, which he lodged before the police at 8.30 a. m., on 19th March 1928, he stated that he was not in his daughter's house when the dacoity took place, and he gave an account of the dacoity which purported to be as described to him by his daughter ; and further he concluded by saying that he had come to his daughter's house at noon on the day following the dacoity, and having heard the details of the occurrence he had come to the Thana to give information. In view of the explicit statement by Fakir Jelja that he was not present at the time of the dacoity it is difficult to accept his statement in evidence that he was there and saw what took place. The explanation which he has given for this change in his story is that on the way to the Thana the Chowkidar told him to inform the Daroga that he (Fakir) had not been in his daughter's house at the time of the dacoity. Now the Chowkidar Moti Chandra is a man aged about eighty years and it is difficult to imagine any reason why he should have given any such instruction to the

informant. The learned Sessions Judge seems to have been of opinion that the Chowkidar was not a reliable witness and had suppressed the truth. There does not, however, seem to be any sufficient ground for such a conclusion.

There is one significant fact in connexion with the question, which as I have said is a very important question, as to whether Fakir was or was not present at the time of the dacoity, and that is the delay which took place in the lodging of the first information. The occurrence took place at midnight on 17th March and the first information was not lodged until 8-30 a. m., on 19th March, the police station being about 14 miles distant from the place of occurrence. If Fakir was present at the time of the occurrence it seems to be hardly probable that he would not have lodged the information sometime during the course of the following day, especially in view of the fact that he is not alleged to have been injured in any way. Dacoity is a serious matter, and, if he was there as alleged, the natural course would have been to lose no time in going and giving information to the police. On the other hand the delay in lodging information is consistent with the other version that Fakir was not present at the time of the occurrence, and that he came on the following day about midday after hearing of the dacoity, and then having learnt the particulars went to the Thana. There is therefore considerable doubt whether Fakir Jelia really was a witness of the occurrence, and although there is the evidence of witnesses who speak to his presence, in view of his own clear statement in the first information that he was not there, and the circumstances to which I have referred above which supports that statement, the only conclusion possible appears to be that he did not see the dacoity, and that he has been introduced as an eyewitness for obvious reasons. If that view is accepted then, of course, it materially affects the evidence of Satya Bala Dasi also, because she has throughout described her father as having been present and has given details of what he did. If those statements are untrue, no reliance can safely be attached to her evidence as a whole.

Then in connexion with the identification of the accused there is the fact

that it is mentioned in the first information that the dacoits wore Malkocha and Galpato, and that being so their identification would naturally be a matter of extreme difficulty.

As regards the accused Balai Ghose there is the further evidence as to certain ornaments and pieces of ornaments, which are alleged to have been found at his house. With regard to this part of the case it seems to me that the evidence as to the house search is not altogether satisfactory. The section of the Criminal Procedure Code relating to such searches is S. 103 which lays down that before making a search the officer about to make it shall call upon two or more respectable inhabitants of the locality to attend and witness the search. The object of the section is presumably to obtain as reliable evidence as possible of the search, and to exclude the possibility of any concoction, or malpractice of any kind.

In this instance the witnesses who have been examined to prove the search are the Sub-Inspector of Police, witness 12 for the prosecution, and a witness named Probodh Chandra Gossain, witness 11 for the prosecution, who is described as a cultivator. There can of course be no harm in the Police Officer, who made the search, being called as a witness at the trial, but an officer who is connected with the investigation cannot be deemed to be an entirely satisfactory witness for the purpose of proving the search. It was incumbent upon the police to, at any rate, make some attempt to comply with the provisions of the section. It is possible that there were no persons living near the place of occurrence who would fulfil the definition of respectable inhabitants used in the section. In that case, however, some evidence to that effect ought to have been given. Furthermore it appears that although two persons apart from the Sub-Inspector were called as witnesses to the search, and though these persons signed the search list, only one of these persons was called as a witness at the trial. No explanation appears to be forthcoming of the omission to examine the other witness and there can be no doubt that it was the duty of the prosecution to produce him as a witness at the trial.

Taking the evidence as a whole and taking into consideration all the facts and circumstances it seems to me that a reasonable doubt does arise as to the guilt of the accused, and that it cannot be said that the jury were not justified in giving the benefit of that doubt to the accused. Certainly it cannot be said that their decision was in any sense perverse.

The result, therefore is that this reference must be rejected and the accused are acquitted and released.

Lort-Williams, J.—I agree.

R.M./R.K.

Reference rejected.

1930 Cr. Cases 144

(Calcutta)

RANKIN, C. J. AND PATTERSON, J.

Dhananjoy Pal and another—Party 2
—Petitioners.

v.

Nagendra Sankar Roy and others—
Party 1—Opposite Parties.

Criminal Revn. No. 624 of 1929, Decided on 15th August 1929.

Criminal P. C., S. 139-A—In enquiry under S. 137 provisions of S. 139-A ought to be complied with.

Before proceeding to make a relevant enquiry under S. 137 the Magistrate ought to comply with the provisions of S. 139-A. The Magistrate's duty is to find whether there is reliable evidence in support of the denial. When the Magistrate does not apply his mind to the question and does not come to any finding on the point, he does not follow the correct course. [P 144 C 1, 2]

Girija P. Sanyal and Hari Das Gupta—for Petitioners.

Hemendra Ch. Sen and Satyendra Ch. Sen—for Opposite Parties.

Rankin, C. J.—In my opinion this rule must be made absolute. The Magistrate has not complied with the provisions of S. 139-A Criminal P. C., before proceeding to make relevant enquiry under S. 137. What happened was that the Magistrate having made a conditional order, the present petitioners appeared before him. It is clear that they denied the existence of any public right of way. The question is whether the Magistrate found that there was any reliable evidence in support of this denial. True, it was no part of his business to try this matter. His business was to find whether there was any reliable evidence in support of the denial. Then, what happened was that he ad-

joined the case so that the petitioners might adduce evidence in support of this denial. Then the petitioners made a suggestion that the Magistrate might go to the spot and hold his enquiry. Thereupon he ordered a local enquiry to be held and as the result of that local enquiry he got a certain report. This report was to the effect that it was a foot way and not a way for carriages and carts and so on. Then the matter came back to the Magistrate but he never applied his mind, so far as I can see, to the question whether there was any reliable evidence in support of the denial, nor has he come to any finding on that point. On the contrary he did proceed thinking that he was proceeding under S. 137 and tried himself the question whether there was a public right of way or not. He says:

"Two points require determination viz., whether the public have lawfully used the way and whether the defendants caused any obstruction therein."

Under S. 137 the first matter does not arise at all. Then he observes:

"This fact is also proved by P. Ws. 2, 3, 5, 6 and 8. P. W's. have also proved that the disputed way was 7 or 8 cubits wide."

It seems to me that in these circumstances the complaint of the petitioners is made out. If this learned Magistrate was going to try the question whether there was a public right of way or not under S. 137, then he was going to do the very thing he was told not to do. That question has got to be decided one way or the other under S. 139-A. It is clear to me that the Magistrate did not take the correct course.

This rule is made absolute and the order absolute is set aside. The case must go back to the learned Magistrate in order that he may try it again according to law.

Patterson, J.—I agree.

R.M./R.K.

Case remanded.

1930 Cr. Cases 145

(Calcutta)

GRAHAM AND LORT-WILLIAMS, JJ.

Kali Bilash Hazra—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 39 of 1929, Decided on 5th August 1929.

(a) Criminal P. C., S. 211—Accused, complying with S. 211, is entitled to have attendance of witnesses at Sessions trial enforced—Non-compliance not prejudicial to accused does not vitiate conviction.

An accused, who has complied with the requirements of S. 211 of the Code, and has put in at once his list of defence witnesses, is entitled as of right to have the attendance of those witnesses at the Sessions trial enforced in the event of their ignoring, or failing to comply with the summons. Failure to enforce such attendance when not prejudicial to accused does not vitiate conviction.

[P 145, C 2, P 146, C 1, 2]

(b) Criminal P. C., S. 211—Accused must put in his list of defence witnesses on the day of order of commitment—If accused fails, Magistrate has discretion to allow such application or not.

It is ordinarily incumbent on the accused to put in his list of defence witnesses at once, that is to say, on the day when the order of commitment is made, and that if he does not do so, the Magistrate will have a discretion to allow or not to allow any such application if it is made on any subsequent date. If, however, such an application is made and is allowed, then the application whether under sub-S. (1) or sub-S. (2) will be governed by the same principle.

[P 146, C 1]

Mrityunjoy Chattopadhyaya and Manindra Nath Banerji—for Appellant.

Debendra Narain Bhattacharya—for the Crown.

Graham, J.—This is an appeal by one Kali Bilash Hazra who has been convicted by the unanimous verdict of the jury under S. 471, I. P. C., and sentenced to two years' rigorous imprisonment. There was also a charge under S. 193, I. P. C., in respect of which the accused was found by the unanimous verdict of the jury to be not guilty.

The only point which has been taken on behalf of the appellant is that the learned Additional Sessions Judge was in error in not allowing the accused further opportunity to examine two witnesses named Hari Das Banerji and Rai Rakhal Mandal, who were alleged to have been material witnesses for the purpose of the defence, and who, though duly summoned by the Magistrate, had failed to attend the Sessions Court on the date fixed for the hearing of the case. The

relevant sections of the Code of Criminal Procedure are Ss. 211 and 291. S. 211 is as follows :

"(1) The accused shall be required at once to give in, orally or in writing, a list of the persons (if any) whom he wishes to be summoned to give evidence on his trial. (2) The Magistrate may, in his discretion, allow the accused to give in any further list of witnesses at a subsequent time etc."

Section 291 lays down :

"The accused shall be allowed to examine any witness not previously named by him, if such witness is in attendance; but he shall not, except as provided in Ss 211 and 231, be entitled of right to have any witness summoned, other than the witnesses named in the list delivered to the Magistrate by whom he was committed for trial."

Section 231 referred to herein has no application in this case.

There can be no doubt I think that, an accused, who has complied with the requirements of S. 211 of the Code, and has put in at once his list of defence witnesses, is entitled as of right to have the attendance of those witnesses at the Sessions trial enforced in the event of their ignoring, or failing to comply with the summons. When processes have been issued by the Court it is the duty of the Court to enforce them. Now in the present case the facts relating to the summoning of these witnesses are these: The commitment order was passed on 7th July. It was the duty of the defence, as required by S. 211, to at once file the list of witnesses who were required to be summoned to attend in the Sessions Court. The list of defence witnesses was, however, as the record shows, filed on 10th July and summonses were duly issued. The trial commenced in the Sessions Court on 7th January and upon that date an application was made to the Court drawing attention to the fact that two of the defence witnesses namely Hari Das Banerji and Rai Rakhal Mandal were not present and asking that they might be summoned if necessary by an urgent telegram. The Additional Sessions Judge thereupon directed the prosecution to take necessary steps in the matter and a telegram was sent. On the following day 8th January these witnesses were not in attendance, and another application was filed on behalf of the defence asking that their attendance might be enforced and alleging that the accused would otherwise be prejudiced. It appears that two other

witnesses were present on that day and the Additional Sessions Judge directed that the accused might examine those two witnesses, but they were not examined by the defence and the trial was concluded without any evidence for the defence being recorded.

On behalf of the Crown it is contended in the first place that the list which was filed by the accused on 10th July was not a list in respect of which he was entitled as of right to ask the Court to enforce the attendance of the witnesses; and secondly it is urged that these two witnesses, upon whose attendance so much stress has been laid, were not material witnesses, and that therefore the appeal ought not to be entertained.

With regard to the first point it seems clear from S. 211 that it is ordinarily incumbent on the accused to put in his list of defence witnesses at once, that is to say on the day when the order of commitment is made and that if he does not do so the Magistrate will have a discretion to allow or not to allow any such application if it is made on any subsequent date. If, however, such an application is made and is allowed, then the application whether under sub-S. (1) or sub-S. (2) will be governed by the same principle. The learned Additional Sessions Judge having exercised his discretion and issued summonses on the defence witnesses mentioned in the list of 10th July was in my judgment bound to enforce the attendance of these witnesses who were in contempt. I do not therefore think that there is any substance in the first contention.

The second ground, however, is to my mind of greater importance. The question is whether these two witnesses Hari Das Banerji and Rai Rakhai were really witnesses of material importance in the case, whether the accused has been prejudiced by the omission to examine them, and whether the appeal should be allowed on that ground. It is very difficult to ascertain anything definite or tangible from the record to show that these witnesses were in any sense important witnesses for the purpose of the defence. The accused in his statement in the committing Court said nothing about them. Speaking for myself I do not attach much importance to that fact because I do not consider that

the accused is under any obligation to indicate the nature of the defence which he is going to make in the Sessions Court. Indeed there may be very good reasons why he should prefer not to do so. But when we come to the Sessions Court the position is somewhat different. He there again made a statement and again there was no reference whatever to these two witnesses. It might perhaps be reasonably expected that he would then say that he had paid the money to the complainant, and that he had done so in the presence of these two persons.

But there is another circumstance even more important in connexion with this aspect of the case, and it is this—that in the previous civil suit the accused made a definite statement, which has been proved in this case and has been marked as Ex. 5, in which he stated that he paid this sum of Rs. 135 to the decree-holder, that is to say the complainant in this case and obtained a receipt, and in cross-examination he further stated that when he paid the money to the decree-holder, the decree-holder, his brother, and son were present. No mention whatever was made in that statement of these two persons Hari Das and Rai Rakhai, and if these two persons were present when the money was paid it seems to be inconceivable that no mention would be made of the fact. If therefore we allow this appeal and send the case back for retrial, the accused would be confronted with the statement which he made at the trial of the civil suit and it would necessarily be very difficult to accept the evidence of these witnesses even if it supported the accused in the face of that statement previously made by the accused himself. Having regard to all these facts we are not satisfied that these two persons are material witnesses and that we should be justified in setting aside the conviction and sentence upon the ground which has been urged before us.

The appeal therefore fails and the conviction and sentence are affirmed, appellant will surrender to his bail and serve out the remainder of his sentence.

Lort-Williams, J.—I agree.

V.S./R.K.

Appeal dismissed.

1930 Cr. Cases 147 (1)

(Nagpur)

SUBHEDAR, A. J. C.

Punnuswamy—Applicant.

v.

Mt. Almelu Bai—Non-Applicant.

Criminal Revn. No. 17 of 1929, Decided on 18th March 1929, from order of Sess. Judge, Raipur, D/- 7th January 1929, in Criminal Revn. No. 28 of 1928.

Criminal P. C., S. 488 — Application by wife for maintenance — Both husband and wife examined — Case closed for orders — Pleader for husband appearing and wishing to argue case and file documents — Court ruling him out and passing judgment against husband — Proper enquiry held not made — Case ordered to be retried.

The wife applied for maintenance allowance and both the wife and husband were examined and the case was closed for orders to be pronounced on a certain date. When the pleader for the husband appeared and wished to argue the case and file some documents, the Court, however, ruled him out and passed orders against the husband. It was contended that the Court's action was justified inasmuch as the husband did not intimate his desire to adduce evidence on the date when the case was closed.

Held: that it was immaterial that the husband did not do so as the Court was bound to ask him if he wished to adduce evidence before closing the case and so there being no proper enquiry the case required to be retried.

[P 147 C 2]

N. B. Bhavalkar — for Applicant.

R. K. Manohar — for Non-Applicant.

Order.—Almelubai is the wife of a Punnuswami. This lady presented an application on 10th August 1928 in the Court of Mr. Rizve, Sub-Divisional Magistrate, Dhamtari, claiming maintenance allowance from her husband. She was examined on affirmation on the same day and a notice issued to the husband to show cause against the application. At the next hearing on 3rd September 1928 (carelessly put down in the order sheet as 3rd August 1928), the husband appeared and filed a written statement. Both the husband and wife were further examined on this date and the case was closed for orders to be pronounced on 4th September 1928. When the pleader for the husband appeared and wished to argue the case and file some documents but the learned Sub-Divisional Magistrate ruled him out and passed an order under S. 488, Criminal P. C., against the husband to pay Rs. 15 per month to the wife.

The husband filed a revision against the aforesaid order in the Court of the

Sessions Judge, Raipur, who has referred the case under S. 438, Criminal P. C., with a recommendation that the procedure adopted by the Sub-Divisional Magistrate being highly irregular, it has prejudiced the husband seriously and that a retrial should, therefore, be ordered by this Court.

The learned pleader for the lady argued that because the husband did not on 3rd September 1928 intimate to the Magistrate his desire to adduce evidence the Court was justified in closing the case for orders and even in refusing to receive documents at the adjourned hearing before the order was passed. In my opinion the Court was bound to ask the husband if he wished to adduce evidence before it closed the case. The result is that there has been no proper enquiry in the case. I, therefore, accept the reference and the recommendation made by the learned Sessions Judge and setting aside the order of the trying Magistrate, send the case back for retrial according to law.

P.N./R.K.

Case remanded.

1930 Cr. Cases 147 (2)

(Nagpur)

SUBHEDAR, A. J. C.

Emperor

v.

J. B. Sane and others—Accused.

Criminal Revn. No. 201-B of 1929, Decided on 5th November 1929, referred by Sess. Judge, Akola.

Criminal P. C., S. 350—Discretion given to a Magistrate to act or not to act upon evidence recorded by his predecessor is controlled by proviso 1 to S. 350—Option is given to accused and it can be exercised only once when second Magistrate commences proceedings.

The discretion given to a Magistrate by S. 350 (1), to act or not to act upon the evidence recorded by his predecessor is not absolute but is controlled by proviso 1 to that section and it is solely left to the accused whether to claim the right to have the witnesses already examined by the previous Magistrate recalled and re-examined by the succeeding Magistrate. This right, however, has to be exercised by the accused only once, that is at the time "when the second Magistrate commences his proceedings."

[P 148 C 2]

G. P. Dick—for the Crown.

M. B. Niyogi—for Accused.

Order.—The facts leading to this reference under S. 438, Criminal P. C., are very clearly stated by the learned Sessions Judge, Akola, in these words:

"Criminal Case No. 50 of 1927 of the First Class Magistrate, Basim, was owing to a defect in procedure, remanded by the Judicial Commissioner's Court. It is now proceeding as case No. 86 of 1929 in the Court of the Sub-Divisional Magistrate, Basim. Owing to transfer of the Magistrate who first tried the case, S. 350, Criminal P. C., applied. Four accused said that they wanted all the prosecution witnesses and all the Court witnesses to be resummoned and reheard, while the remaining 8 said that there should be a de novo trial from the beginning (पुनः पौष्ट्यापस्तुन चालवात्र) See applications dated 14th March 1929. In the original case there were witnesses for the prosecution, for defence and for Court. On 19th August 1929 when called upon to enter upon their defence, all the accused prayed that the defence evidence recorded in the previous case and the evidence of Court-witnesses 2, 3, 4 and 5 should be taken as evidence in the present case, and that the original defence witnesses should not be reheard, but that they wanted to give some additional defence evidence. The Magistrate rejected this application."

One more important fact has also to be noted. In para. 21 of this Court's order in Criminal Revision No. 29-B of 1928, Kinkhede, A. J. C., had definitely laid down that :

"all the evidence for both parties which has gone on record between 20th October 1927 and 14th November 1927 and also thereafter must be treated as expunged therefrom and the trial resumed from the stage from which the illegality crept in, except so far as the accused may dispense with such expunction."

When the aforesaid directions were given, it was probably not known that the proceedings after remand would not be conducted before the same Magistrate who had recorded the whole of the evidence at the previous trial. Therefore, when the case came to be retried by the present Magistrate the option given to the accused by the order of this Court was further supplemented by the option expressly reserved to them by proviso. 1 to S. 350 (1), Criminal P.C. The first four accused admittedly exercised this option by naming some of the witnesses examined by the former Magistrate to be resummoned and examined afresh before the new Magistrate and impliedly agreed not to expunge the evidence of the rest of the witnesses recorded at the previous trial, while the rest of the accused wanted the whole of the trial to be conducted de novo, clearly implying that the whole of the evidence whether for the prosecution or defence recorded previously should be expunged and all the witnesses examined afresh.

None of the cases cited before the Sessions Judge or in this Court cover the point actually requiring decision in the present case. It is, however, clear that the discretion given to a Magistrate by S. 350 (1), Criminal P. C., to act or not to act upon the evidence recorded by his predecessor is not absolute but is controlled by proviso. 1 to that section and it is solely left to the accused whether to claim the right to have the witnesses already examined by the previous Magistrate recalled and re-examined by the succeeding Magistrate. But it is equally clear from the language of the proviso that this right has to be exercised by the accused only at the time "when the second Magistrate commences his proceedings."

Viewed in this light the decision of the trying Magistrate at the commencement of the proceedings to examine all the prosecution witnesses afresh was perfectly in order because all the accused wanted the whole lot of prosecution witnesses to be reheard by him but his second order, which is the subject of the present reference, is evidently wrong as it has the effect of overriding the option of the first four accused not to have their evidence in defence, already recorded at the previous trial, reheard. Since in their application dated 14th March 1929 these accused had impliedly agreed that except the prosecution witnesses and Court witnesses, whom they wished to be resummoned and reheard, the rest of the evidence should not be expunged, the trying Magistrate was, in my opinion, bound to give effect to this agreement.

The exercise of the option given to the accused both under the order of this Court and the proviso to S. 350 (1), Criminal P.C., could, however, be exercised only once and they having definitely exercised the same in a particular manner by their separate applications of 14th March last and the fresh trial having proceeded upon that basis none of the accused had any right to change the course of the trial as they wished to do by their subsequent joint application of 19th August last in which they stated that they did not desire to have certain Court witnesses and defence witnesses resummoned and re-examined. The order passed on this application by the trying Magistrate was, in my opinion, not

strictly a legal one. I, therefore, set aside the said order and direct that the trying Magistrate do retain and act on the evidence of witnesses examined by the first four accused before his predecessor and only re-summon or re-examine the Court witnesses and witnesses for the other accused. The first four accused will of course have the right to summon fresh witnesses in their defence if they so desire.

P.N./R.K.

Order set aside.

1930 Cr. Cases 149

(Nagpur)

MUNJE, A. J. C.

Mt. Sarji—Applicant.

v.

Mt. Bhimi—Non-Applicant.

Criminal Revn. No. 322 of 1929, Decided on 4th November 1929, from order of Dist. Mag., Wardha, D/- 16th August 1929, in Misc. Case No. 2 of 1929.

(a) Criminal P. C., Ss. 435 and 439—**Powers of High Court are wide and it can interfere even when certain order though legal is improper.**

The powers of High Court under Ss. 435 and 439 are wide and it can proceed in the matter even suo motu and interfere if it considers just and proper. It can call for and examine the record of any proceedings and interfere even when a certain order, though legal, is improper. [P 150 C 1]

(b) Criminal P. C., S. 205—**Summons issued in the first instance—Personal attendance of accused can be excused even if warrant of arrest is issued subsequently.**

Personal attendance of accused can be excused in all cases where a summons is issued in the first instance to him irrespective of the fact whether he appears in answer to the summons or has to be brought in by a warrant of arrest issued subsequently : *A. I. R. 1924 Pat. 46, Dist.* [P 150 C 2]

(c) Criminal P. C., S. 561-A—**High Court can excuse personal attendance of accused.**

High Court can, under its inherent powers, pass an order excusing the personal attendance of the accused and permitting him to represent himself in Court by a pleader : *14 Bom. L. R. 286 ; 17 C. W. N. 1248 ; A. I. R. 1927 Rang. 73 and A. I. R. 1926 Bom. 218, Rel. on.* [P 150 C 2]

T. J. Kedar—for Applicant.

A. V. Khare—for Non-Applicant.

Order.—This is an application to revise the order of the District Magistrate, Wardha, by which he exempted the accused *Mt. Bhimi*, the non-applicant here, from personal attendance through the trial. The applicant *Mt. Sarji* has filed a complaint against *Bhimi* for an offence under S. 323, I. P. C. and the case is being tried by the Tahsildar, Wardha. To

start with, a summons was issued to her; she was served but, instead of appearing in person, she sent her husband to represent her. The Court ordered the husband to produce the accused in person, but she did not so appear and this time sent a pleader to represent herself. The case, however, could not be taken up for some reasons for two hearings and on the adjourned hearing the Magistrate again ordered a summons to issue to the accused. No process fee was paid by the complainant and thereupon the complaint was dismissed under S. 204 (3), Criminal P. C.

The case went to the District Magistrate, who thereafter sent the case for disposal to another Magistrate. Eventually, however, the case was again sent back to the Tahsildar and the accused was again summoned. On the date of the hearing the accused again appeared through a pleader and made an application for being exempted from personal attendance. This was not allowed and, instead, a bailable warrant of arrest was issued against her. She was not found and it appeared to the Court that she was avoiding service. A proclamation under S. 87 was therefore issued and, after it was published, the trial commenced under S. 512. Another warrant of arrest was again issued against her.

In the meanwhile the accused filed an appeal before the District Magistrate and was allowed exemption from personal attendance. This order is the subject matter of this revision and runs as follows :

"Previous proceedings indicate that the girl had absconded although there is no evidence to this effect. A certificate of illness is filed and it is stated by counsel that she has been living at Amraoti. In view of the fact that the girl voluntarily appeared (through counsel) and reopened proceedings and that she is young, I allow her to appear through counsel without putting in personal appearance."

The first contention is that the order of the District Magistrate was without jurisdiction as, at that stage no appeal could lie, nor could any such order be passed in revision except by this Court. This has been conceded by the other side, but it is urged on behalf of the accused that the District Magistrate's order, though defective in this respect, could be maintained as this Court had power to pass the very same order in revision. The powers of this Court

under Ss. 435 and 439, Criminal P. C., are wide and a High Court can proceed in the matter even suo motu and interfere if it considers just and proper. A High Court can call for and examine, the record of any proceedings and interfere even when a certain order, though legal, is improper.

A perusal of the proceedings makes it clear that the accused did not altogether disobey the summons; for every time that she was served she did make arrangements to represent herself before the Court. The only particular in which she disobeyed was as regards attendance in person. I fully agree in the reasons given by the District Magistrate in the concluding portion of his order and consider that it would be improper and unnecessary to compel the personal attendance of the accused. She is a young woman of a fairly respectable class and might naturally regard personal appearance as an accused as a greater punishment than a fine. Again, there appears to be nothing in particular for which the trial Magistrate considered her personal attendance necessary. I therefore agree that the trial Magistrate's order in compelling her personal attendance, in the circumstances of the case, was not proper.

It has, however, been contended by the learned pleader for the applicant that, as a warrant of arrest had been issued against the accused, her personal attendance could not be excused under S. 205, and that therefore the whole trial would be vitiated if she were allowed to remain absent. In support of this contention I have been referred to the case of *Abdul Hamid v. Emperor* (1). In that case, however, it appears that in the first instance, a warrant of arrest was issued against the accused; again, the accused was found not to have moved in the matter of his representation in Court and the persons who appeared for him so appeared without his authority. Both these circumstances are wanting in the case before me; for, here, though the accused might subsequently have been arrested, it was only a summons that was issued against her in the first instance. I am not sure if the Patna case is an authority for the proposition, urged on behalf of the applicant, viz., that, even where, in the first instance, a

summons were issued, if subsequently during the course of the trial an accused is produced before the Court under a warrant of arrest his personal attendance cannot be exempted. If the Patna decision really goes to this length, I must say with due respect that I do not accept that view. S. 205 has to be read and construed with reference to the preceding S. 204 also with reference to the heading of the Chapter, in which both the sections occur, viz., "Of the commencement of proceedings before Magistrate." It has again to be construed with reference to the next preceding four sections occurring in Chap. 16, and has to be read as continuation of all these provisions; and, when so read, it would be clear that it applies to all cases where a summons is issued in the first instance to an accused, irrespective of the fact whether he appears in answer to the summons or has to be brought in by a warrant of arrest issued subsequently.

Even if the above contention were in order and the present case were not covered by S. 205, this Court can, under its inherent powers, as declared by S. 561-A, pass an order excusing the personal attendance of the accused and permitting him to represent himself in Court by a pleader. The inherent jurisdiction of this Court can be invoked so long as no act is done in conflict with any of the provisions of the law or the general principles of criminal jurisprudence. That such a direction does not conflict with the provisions of the Criminal Procedure Code would be clear if a reference were made to the provisions of Ss. 353 and 366 (2). These provisions clearly contemplate cases where the whole trial can take place in the absence of the accused, including the stage of delivering the judgment in cases where the sentence imposed is one of fine only.

The case-law on the subject also does not stand in the way of the exercise of such power; for, in *Emperor v. C. W. King* (2) and *Raj Rajeshwari Debi v. Emperor* (3) the High Court did pass an order dispensing with the personal attendance of the accused and allowed him to appear by a pleader throughout

(2) [1912] 14 Bom. L.R. 236=15 I. C. 96=13 Cr. L. J. 454.

(3) [1918] 17 C. W. N. 1249=23 I. C. 489=1 Cr. L. J. 281.

(1) A. I. R. 1924 Pat. 46=1 Pat. 793.

the Sessions trial. In the latter case the committal proceedings were indeed initiated with a summons; but in the former, this point has not been made clear; at any rate, no importance seems to have been attached to it. Both these cases have been followed with approval in *In re, Kandambini Devi* (4).

Ip Maung Po Fyün v. Hakasing (5), where the personal attendance of the accused was dispensed with, even his pleader's statement was considered to be his statement under S. 342. Similarly, in *Emperor v. Dorabshah* (6) it has been held that in similar circumstances there was nothing illegal in acting upon the plea given by the pleader of the accused under Ss. 242 and 243 in summons cases.

The principles of criminal jurisprudence also are not abrogated by holding a trial at the instance of the accused in his absence so long as he makes arrangements to represent himself in the trial by a pleader. The rule of holding a criminal trial in the presence of the accused is made especially for his benefit and there is nothing to prevent him from waiving the benefit if he likes. The case would certainly be different, and the trial bad, if it is held without his consent in his absence or, even in the presence of a pleader engaged for him, if the engagement has not been made by the accused: *Emperor v. Sardar* (7); *Abdul Hamid v. Emperor* (1).

In the case before me the accused has herself moved in the matter and is willing to represent herself throughout the trial by her pleader. There can therefore be no force in the contention that the trial would be bad because it would be held in her personal absence. For the reasons given above, I would not disturb the order that has been passed by the District Magistrate, though he was not competent to do so. The trying Magistrate should now proceed with the trial so long as a pleader engaged by the accused appears and need not ordinarily compel her appearance except to hear judgment under S. 366 in case he means to award a sentence heavier than that of fine. As the prosecution

witnesses have been examined in her absence and her pleader was also not present, the trial Magistrate should now start with the trial afresh. With these remarks the application is dismissed.

P.N./R K.

Revision dismissed.

1930 Cr. Cases 151

(Nagpur)

SUBHEDAR, A. J. C.

Mohammad Sarwar—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 35-B of 1929. Decided on 2nd September 1929, against judgment of First Class Magistrate, Mandla, D/- 22nd June 1929.

Penal Code, S. 84—Mere ailment before offence is not sufficient defence—Apparent motive for offence is not necessary.

A person is not entitled to claim relief under S. 84 simply for the reasons that he is ailing for some time before commission of an offence, that he does not take food for some days and that there is no apparent motive for committing the offence: 17 C. P. L. R. 113, *Appl.*

[P 152 C 1]

G. G. Hatvalne—for Appellant.

G. P. Dick—for the Crown.

Judgment.—The appellant has been convicted by Chandorkar, Magistrate First Class, Akola, exercising powers under S. 30, Criminal P. C., of an attempt to murder Mt. Amirbi and sentenced to five years rigorous imprisonment. The facts of the case are clearly proved and are briefly these: The appellant had been ailing for sometime before 12th April last and his mother Gulabbi (P. W. 2), therefore, called Amirbi (P. W. 11) to come to her house and keep her company for the night. Amirbi accordingly went there and prepared "Harira" food for the appellant and he ate it. Thereafter every inmate of the house, except probably the appellant, went to sleep in the same room in which was the appellant. Sometime after this Amirbi was roused from her sleep by the blow given to her by the appellant with a hatchet and the appellant further struck her two or three more blows after she had got up and then she fell unconscious. Gulabbi also got up hearing the cries of Amirbi and then Gote Khan (P. W. 4) and Jabbar Khan arrived upon the scene and secured the appellant and attended to the wounded woman.

The appellant in his examination pleaded ignorance of all the events that

(4) A. I. R. 1922 Mad. 79=45 Mad. 359.

(5) A. I. R. 1927 Rang. 73=4 Rang. 506.

(6) A. I. R. 1926 Bom. 218=50 Bom. 250.

(7) [1917] 86 P. R. 1917=42 I. C. 335=47 P. W. R. 1917 Cr.

happened on that eventful night. As there was no evidence to bring the case of the appellant within the purview of S. 86, Penal Code, the trying Magistrate held him guilty of an offence under S. 307, I. P. C.

Mr. Hatvalne who appeared for the appellant in this Court argued that there being evidence to show that the appellant was ailing for sometime before the occurrence and had not taken food for some days and from the absence of motive it should be presumed that the case was covered by S. 84, I. P. C. The law on the point of legal insanity to bring a case within the purview of S. 84, I. P. C., has been fully and elaborately discussed by Sir Henry Stanyon in *Emperor v. Kataya Kisan* (1) and applying the principles laid down there to the facts proved in the present case I am decidedly of opinion that the appellant has failed to make out a claim for relief under S. 84, I. P. C. But in view of the fact that the appellant was in a bad state of health when he committed the crime for which apparently no motive is even suggested by the prosecution, I consider that the ends of justice will be met if I reduce the sentence from five years passed by the trying Magistrate upon the appellant to three years rigorous imprisonment, which I hereby do. With this modification of the sentence I dismiss the appeal.

P.N./R.K. *Sentence reduced.*

(1) [1904] 17 C. P. J. R. 112.

1930 Cr. Cases 152

(Nagpur)

SUBHEDAR, A. J. C.

Emperor

v.

Santoki—Accused—Non-Applicant.

Criminal Revn. No. 274 of 1929, Do-
cided on 16th September 1929, made by
Sess. Judge, Jubbulpore, on 22nd
July 1929.

Forest Act, S. 26 (d)—Cattle grazing in the Government forest—Owner not authorizing directly nor indirectly such grazing—He cannot be convicted.

A Person's cattle were found grazing in the Government forest in charge of a boy. The person had not authorized either directly or indirectly the boy to graze the cattle in the forest.

Held: that he could not be convicted: 11
N. L. B. 76, Ref. [P 152 C 2]

S. C. Dutt Chaudhury — for Non-Applicant.

Order.—This is a reference by the Sessions Judge, Jubbulpore, recommending that the conviction of Santoki by a Magistrate First Class, Mandla, under S. 26 (d), Forest Act, be quashed as it was in conflict with the law propounded by this Court in *Saiyyad Rahim v. Emperor* (1).

The facts are that eight buffaloes belonging to the accused were found grazing in the Government forest block No. 18 in charge of one lad named Shankar. It is established by the evidence of Chhiddi (D. W. 2) that the accused had employed Shankar's father and not Shankar as grazier and it is not proved that the accused had, in any way authorized directly or indirectly Shankar to graze his cattle in the forest block No. 18. The conviction of the accused under these circumstances was, therefore, clearly illegal.

The learned District Magistrate supports the conviction on the ground that because in his examination the accused referred to the license (Ex. D-1) which he had obtained from the purchaser from whom he had purchased some of the buffaloes which were found grazing in the Government forest, it could be presumed that the accused:

"moant to graze the buffaloes in Government forest on the original license and therefore connived at the illicit grazing."

The statement of the accused as recorded by the Magistrate is as under:

"The eight buffaloes were covered by a license, hence my grazier may or may not have grazed them in Government forest. I have no personal knowledge of this."

The statement quoted above cannot surely be construed in the manner suggested by the learned District Magistrate in his explanation. The accused clearly denied all knowledge of the illicit grazing and it was, therefore, necessary for the prosecution to have established knowledge or connivance on the part of the accused to connect him with the offence. I therefore accept the reference and set aside the conviction of the accused. The fine if paid will be refunded.

P.N./R.K. *Conviction set aside.*

(1) [1915] 11 N. L. R. 76=29 I. C. 325=16
Cr. L. J. 485.

1930 Cr. Cases 153 (Oudh)

STUART, C. J. AND RAZA, J.
Bisheshwar—Accused—Appellant.
v.

Emperor—Opposite Party.

Criminal Appeal No. 198 of 1929, Decided on 3rd May 1929, from order of Third Addl. Sess. Judge, Lucknow, D/- 15th February 1929.

(a) Criminal P. C., S. 269 (3)—Failure to write separate judgment does not vitiate the trial.

Failure to write a separate judgment in a case where the procedure laid down by S. 269 (3) is followed, does not vitiate the trial.

[P 154 C 1]

An accused was tried by a jury with an offence punishable under S. 395, Penal Code, and was acquitted being found not guilty. In the same trial he was tried for an offence under S. 396, Penal Code, with the same jury sitting as assessors. The Judge stated both cases for the benefit of jury and his summing up covered both the charges.

Held: that it was not necessary for the Judge after having summed up at great length to write again another full and elaborate judgment covering exactly the same ground so far as S. 396, I. P. C. charge was concerned and failure to write a separate judgment did not vitiate the trial where nothing was gained by accused in repeating the same remarks in two separate documents: *A. I. R. 1922 Mad. 502, Ref.*

[P 153 C 2]

K. P. Misra—for Appellant.

H. K. Ghose—for the Crown.

Judgment.—The learned counsel for the appellant has taken a preliminary objection that there is no judgment such as is required by the Criminal Procedure Code in existence against his client. The circumstances are these: Under special rules laid down by the Local Government certain Sessions cases triable in the Lucknow District are tried by a Sessions Judge and a jury and other sessions cases are tried by a Sessions Judge with the aid of assessors.

Under the provisions of S. 269, Criminal P. C., when an accused in these circumstances is charged at the same trial with several offences of which some are and some are not triable by jury, he is tried by the Court of Sessions and a jury for such of those offences as are triable by jury and by the Court of Sessions with the aid of the jurors as assessors for such of them as are not triable by jury. In this particular case the above procedure was followed. The appellant was tried by a jury for an offence punishable under S. 395, I. P. C., and was found not

guilty. He was accordingly acquitted on that charge. In the same trial he was tried for an offence punishable under S. 396, I. P. C. As this offence was not triable by a jury he was tried with the same jury sitting as assessors. It was necessary for the learned Sessions Judge to state both cases for the benefit of the jury. He did so. His summing up, which was very clear and very full, covered both charges. The heads of the charge, which he dictated, covered 30 type-written pages and in his charge he has gone over the whole ground in respect of both the charges, has stated the law, has stated the facts, and has discussed the evidence for and against in respect of every one of the accused persons. As far as he possibly could, he refrained from indicating his opinion, as to the value of the evidence. He would not have been in the wrong if he had indicated his opinion, provided he had not attempted to force his opinion on the jury, but he did not indicate his opinion against any accused. He had told the jury that in his opinion there was no evidence upon which they could convict the appellant on a charge under S. 395.

The jury accepting that view acquitted the appellant. As assessors they found him guilty under S. 396. The Judge then wrote a further order in which he stated his agreement with the views of the jury as to the value of the evidence against the appellant on the charge under S. 396. He then found him guilty and proceeded to convict him. Now it is argued that this procedure was wrong and that it was necessary for the Judge, after having summed up at great length, after having stated the heads of his charge to the jury and summarized them in a type-written note of thirty pages to write again another full and elaborate judgment covering exactly the same grounds in so far as the S. 396 charge was concerned. It is suggested that his failure to write this judgment vitiates the trial. The only decision which we can find reported in the regular law reports dealing with this point is the decision of a Full Bench of the High Court of Madras in *A. T. Sankaralinga Mudaliar v. Narayana Mudaliar* (1). In that case the Full Bench decided that the failure to write a regular judgment might be considered an error in procedure.

(1) A.I.R. 1922 Mad. 502=45 Mad. 918 (F.B.).

dure but that, if it were, it was a mere irregularity cured by S. 537, Criminal P. C. There is no decision reported in the recognized law reports to the effect that the failure to write a separate judgment vitiates the trial. The learned counsel for the appellant informs us that there is a decision in "unreported criminal cases of the Bombay High Court" edited by Ratan Lal Ranchhod Das which supports that view, but we do not consider that under the law we should be justified in considering any decision other than the authorized decisions. We would go further than the Madras High Court in this respect and would look at the substance of the Criminal Procedure Code on this point. The Criminal Procedure Code lays down among the requisites of a judgment of this nature that it should be either written by the presiding officer of the Court or taken down from his dictation. Here it was taken down from his dictation. Every page if dictated has to be signed by him. Here every page is signed by him. It has to be dated and signed by the presiding officer in open Court at the time of pronouncing it. It was dated and signed by the presiding officer at the time of pronouncing it. The judgment should specify the offence (if any) of which, and the section of Indian Penal Code or other law under which the accused is convicted and the punishment to which he is sentenced. All these particulars are given. The judgment has to contain the point or points for determination. The point or points for determination are given in the charges to the jury. The judgment has to give the decision. The decision is given in the subsequent order. The judgment has to give the reasons for the decision. The reasons for the decision are given in the subsequent order. These are all the requisites.

We consider that the charge to the jury read together with the subsequent order compose a good judgment in law and we would consider it most unfortunate if they did not do so. Nothing is gained by the accused or anyone else by repeating the same remarks in two separate documents and; if it unfortunately were the law that when the Judge has already said what was requisite in one part he should have to copy it over again into another, the law would

stand in need of revision. But as we read the law the objection is not founded. We now examine the appeal on the merits. The appellant having been convicted by the Judge sitting with assessors has every right to challenge the conviction on the merits. The evidence against the appellant is that he was implicated by an approver. That in itself does not carry the case very far; but there is against him the strong evidence of one of the victims of the dacoity, a man called Prithi and of the wife of Prithi. They identified the appellant distinctly as having been one of the dacoits. Prithi did not know the appellant before but he has picked him out of a crowd as one of the men who had assaulted him. Prithi's wife had seen the appellant before and she gave a good description of his appearance. She did not previously know his name. The evidence on the other side was evidence that the appellant had quarrelled with Prithi's wife because she had taken some mangoes of his without his permission and that he had quarrelled with the approver at a fair. He further put up evidence of alibi. The learned Judge and the assessors believed the evidence of identification and disbelieved the evidence produced for the defence. After hearing the appellant's learned counsel we have arrived at the same conclusion. We do not consider the sentence passed on the appellant excessive and dismiss the appeal.

R.M./R.K.

Appeal dismissed.

1930 Cr. Cases 154

(Oudh)

STUART, C. J.

Lachhman Prasad Joshi—Appellant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 96 of 1929, Decided on 3rd October 1929, against order of Dist. Mag., Sitapur, D/- 11th September 1929.

(a) Criminal P. C., S. 478—Revenue Court is not barred from proceeding under S. 478 with regard to offence committed in mutation proceedings—U. P. Land Revenue Act (1901), S. 48.

Proceedings in mutation are proceedings within the meaning of S. 476 and the Court concerned with the proceedings is a revenue Court within the meaning of S. 48, Land Revenue Act of 1901. A revenue Court has therefore jurisdiction under S. 478 when the offence is committed before it in any proceedings even

non-judicial. Moreover mutation proceedings are judicial proceedings within the meaning of the Criminal Procedure Code though ordinarily they may not be so and there is no bar, therefore, to a revenue Court from proceeding under S. 478 with regard to an offence committed in mutation proceedings before it : A. I. R. 1926 P. C. 100, Ref. [P 155 C 2]

(b) Criminal P. C., S. 478—Code permits no appeal against order under S. 478—Magistrate passing order not as criminal Court but as revenue Court—District Magistrate cannot interfere under S. 435.

The Code permits no appeal against an order under S. 478. The powers of the District Magistrate under S. 435 and the following sections are confined to interference with criminal Courts subordinate to himself. When, therefore, a Magistrate does not pass an order as a criminal Court but as a revenue Court the District Magistrate has no jurisdiction to revise his order. [P 156 C 1,2]

R. F. Bahadurji—for Appellant.

H. K. Ghose—for the Crown.

Judgment.—The facts are as follows: A lady called Barkatunnissa, Taluqdarni of Ant taluqa died at Lucknow on 13th April 1927. Six persons Mahbub Ali and five others applied jointly for entry of names before the revenue Court. Certain other persons opposed them. Eventually Mr. Narsingh Narain Rao, Assistant Collector, First Class, Sitapur, recorded the names of Abadi Begam, Khalil Khan and Fida Ali as entitled to engage for the revenue of the Ant taluqa. In the course of the proceedings before him an alleged will was produced. Mr. Narsingh Narain Rao considering that this will was forged and that a criminal offence had been committed before him, and considering the case triable exclusively by the Court of Sessions completed an enquiry and committed certain persons to take their trial before the Sessions Court. He proceeded under S. 478, Criminal P. C. His attention was drawn to the commission of the offence by a complaint made by the police authorities before him in the course of his enquiry. As a result he committed to Sessions Rani Abadi Begam and nine others but refused to commit to Sessions Pt. Lachhman Prasad Joshi. After he had refused to commit Pandit Lachhman Prasad Joshi to Sessions, the District Magistrate of Sitapur purporting to act under the provisions of S. 437, Criminal P. C. committed Pandit Lachhman Prasad Joshi to Sessions on the same charge.

I have before me two applications, the

first is by Rani Abadi Begam and three other persons who were committed to Sessions by Mr. Narsingh Narain Rao and the second is by Pandit Lachhman Prasad Joshi. The first application was argued by Dr. Kitchlu and the second by Mr. Bahadurjee. Dr. Kitchlu took the objection that the offence, if any, had not been committed before a revenue Court in the course of the judicial proceedings, and that thus Mr. Narsingh Narain Rao had no jurisdiction under S. 478. Dr. Kitchlu suggested that Mr. Narsingh Narain Rao was not at the time presiding over a revenue Court. I do not accept that contention. Mr. Narsingh Narain Rao was concerned with proceedings in mutation, that is to say, it was his duty to record the names of some persons or others on a disputed succession under the provisions of S. 40, Local Act, 3 of 1901. He was thus acting as a Court of record and was a revenue Court within the meaning of S. 48, Local Act 3 of 1901. The proceedings in mutation were certainly proceedings within the meaning of S. 476, Criminal P. C. I am not disposed to consider that such an officer would have no jurisdiction under the provisions of S. 478, if he were conducting proceedings other than judicial proceedings when the alleged offence was committed before him. I base my view upon the wording of S. 478 which is as follows :

When any such offence is committed before any civil or revenue Court, or brought under the notice of any civil or revenue Court in the course of judicial proceedings"

The construction I place upon those words is that a revenue Court has jurisdiction when the offence is committed before it in any proceedings. When the offence is brought to its notice the Court has only jurisdiction when it is brought under its notice in the course of judicial proceedings. The argument of Dr. Kitchlu would require the section to have been drafted as follows :

"When any such offence is committed before or brought under the notice of any civil or revenue Court in the course of judicial proceedings."

But apart from this, mutation proceedings are judicial proceedings within the meaning of the Criminal Procedure Code. Ordinarily speaking, mutation proceedings are not judicial proceedings. Their Lordships of the Judicial Commit-

tee have laid down in *Nirman Singh v. Rudra Partab Narain Singh* (1) :

"that proceedings for the mutation of names are not judicial proceedings, in which the title to and the proprietary rights in immovable property are determined. They are much more in the nature of fiscal inquiries instituted in the interest of the State for the purpose of ascertaining which of the several claimants for the occupation of certain denominations of immovable property may be put into occupation of it with the greater confidence that the revenue for it will be paid."

But the judicial proceedings contemplated under S. 478 are judicial proceedings within the meaning of the Code of Criminal Procedure, as here the words have a special meaning. S. 4 (m) defines judicial proceedings to

"include any proceeding in the course of which evidence is or may be legally taken on oath."

In mutation proceedings evidence may be legally taken on oath and evidence is usually taken on oath. In this particular case evidence was taken on oath. I thus find that there was no bar to Mr. Narsingh Narain Rao proceeding under S. 478 and refuse to quash the commitment of Rani Abadi Begam and the other persons who have applied with her. I dismiss their application.

The case of Pandit Lachhman Prasad Joshi is, however, different. Mr. Narsingh Narain Rao refused to commit him to Sessions. Mr. Narsingh Narain Rao passed no order under S. 476 either making a complaint or refusing to make a complaint. If he had passed such an order an appeal would have lain under S. 476 B. He refused to commit Pandit Lachhman Prasad Joshi. In what capacity did he pass that order? He passed that order, in my opinion, as a revenue Court, although for the purpose of his enquiry he was exercising the powers of a Magistrate. Nevertheless he was not a criminal Court but a revenue Court exercising the powers of a Magistrate. The Code permits no appeal against an order under S. 478. The powers of the District Magistrate under S. 435 and the following sections are confined to interference with criminal Courts subordinate to himself. As I understand the case Mr. Narsingh Narain Rao did not pass this order as a criminal Court but as a revenue Court and as Mr. Narsingh Narain Rao was a revenue Court the District Magistrate

as District Magistrate had no jurisdiction to revise his order. In these circumstances I consider that the application of Pandit Lachhman Prasad Joshi must succeed. I allow application No. 96 and quash the commitment of Pandit Lachhman Prasad Joshi.

R.M./R.K.

Order accordingly.

* 1930 Cr. Cases 156

(Oudh)

STUART, C. J., AND RAZA, J.

Ganga—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 192 of 1929, Decided on 3rd May 1929 from order of Sess. Judge, Fyzabad, D/- 4th April 1929.

* (a) Criminal P. C., S. 162—Oral statement made by any person to police officer during investigation cannot be used for contradicting defence witness.

No oral statement made by any person to a police officer in the course of an investigation under this chapter and no record of any such oral statement can be used for any purpose in a Court of law in respect of an offence under investigation at the time when such statement was made, except for the purpose of contradicting a prosecution witness. It can only be used for that purpose under special conditions. Such a statement cannot be used for the purpose of contradicting a defence witness.

[P 158 C 2]

(b) Penal Code, S. 302—Incident on moonless night—Identification evidence of alleged eyewitnesses disbelieved—Only evidence of identification being dying deposition—Deceased not in a position to make long statement—Declaration obtained as answers to leading questions—Family of the deceased deliberately putting attack some hours back—Conviction was set aside.

Some persons were tried under S. 302 for having murdered one B. The occurrence took place on a moonless night under a thick tree. The so called eyewitnesses were disbelieved on the point of identification. The only evidence against the accused was the first report and the dying deposition of the deceased. The deceased was not able to make a long statement. The dying declaration was not an unaided effort but consisted of answers to leading questions put by the disbelieved alleged witness. The family of the deceased had deliberately chosen to put the attack back some two hours before it actually occurred.

Held: that under the above circumstances it was impossible to uphold the conviction.

[P.158 C 1]

Jagat Narayan, A. N. Mullah, Ram Nath Shargha and L. S. Misra—for Appellants.

G. H. Thomas, Govt. Advocate—for the Crown.

Judgment.—Ganga, Jaggu, Rama Shankar, and Dwarka have been convicted by the learned Sessions Judge of Fyzabad on a charge under S. 302, I. P. C., and sentenced to death subject to confirmation by this Court. They appeal. The reference in confirmation is also before us. On 10th December 1928, Nageshar, a Brahman who resided in a hamlet of Bhati had left his village early in the morning with his son Baijnath to appear in a case before an Honorary Magistrate in the village of Jajwara some eight miles away. He and his son were answering a charge of house trespass in order to commit an offence, under S. 451, I. P. C. this charge being brought against them by the police on a complaint of a chamar. Three of the appellants Ganga, Jaggu and Rama Shankar had given evidence in this case and they were at the Court of the Honorary Magistrate that day for the purposes of cross-examination. Ganga, Jaggu and Rama Shankar went away. They went away at 4 o'clock and at sunset Nageshar and Baijnath returned to the village. It is in evidence that Baijnath pressed on, leaving his father to follow him. It appears that sometime that night Nageshar was the victim of a murderous attack with knives which took place under a mahwa tree 320 yards distant from his house. He received severe injuries as a result of which he died the following day.

The case for the prosecution is that the four appellants together with a man called Janga, the brother of Ganga, were waiting for Nageshar on his way home and that they attacked him at about 9 o'clock in the night before he had reached his home. The evidence in support of this story is the evidence of Baijnath who says that while in his own house he was aroused by the cries of his father and that he came out at the time and the place already stated and saw the attack on his father. There is further the evidence of a Brahman called Achebar who says that hearing cries he ran towards the spot and met certain men running away from the spot. Both Baijnath and Achebar have named the four appellants and Janga as the men whom they saw. In addition there is what purports to be a dying deposition of the deceased man Nageshar and a mass of oral evidence that Nageshar

from the beginning named the five men in question as his assailants. The case has been tried very carefully by an experienced Judge and it is only due to him where we differ with him to explain why the evidence which he considered reliable is not considered reliable by us. The first fact which struck us very forcibly but which has not struck him as forcibly is this. The post-mortem examination of the body of the deceased showed that his stomach contained a pound and a half of dal and rice which had hardly been digested. We have emphasized in this Court that too much stress should not be laid upon the condition of the food in a deceased man's body when the question is what time has passed between his death and his last meal. The reason why one does not usually lay great stress on such evidence is that the most recent medical researches have shown that sometimes the process of digestion is very greatly delayed when the deceased is an Indian and the food is vegetable food. But here we consider that we are on firm ground in drawing certain inferences from the fact that this food had hardly been digested at all. We know for certain that the deceased man had left his own village to go to Jajwara which is eight miles away very early that morning. It is most unlikely that very early that morning he would have eaten a pound and a half of cooked rice and dal. While he and his son were at Jajwara they would very likely have eaten something but, being Brahmans, if that something had been cooked food, they would have had to cook it themselves and it was most unlikely that they would cook dal and rice by the wayside. There is no evidence that they took any vessel for the purpose. Thus the condition of this food in his stomach would appear to us to indicate clearly that he was murdered after he had returned to his village, and after he had partaken of a meal. In other words he was not murdered at 9 p. m. but probably about 11 p. m. and this one fact appears to us sufficient to discredit the evidence of Baij Nath, Achebar, and the others.

There is thus left alone the fact that the deceased man mentioned the names of the four appellants and the name of Janga as his assailants. Now we have it in the first

place that it was a moonless night. It was the night before a new moon. There may have been some light from stars but there was no other light. The deceased met his death under a tree. It is not impossible that in these circumstances he could have recognized his assailants, but there must be a distinct doubt as to whether he could have done so and this doubt is strengthened by the following circumstances: In the first place he mentions the name of Janga. Janga is Ganga's brother and it is in evidence that Janga had been absconding from the village for the last year. It is true he might have returned that night but the inclusion of Janga's name throws a further element of doubt into the case. We next come to the form of the first report and the dying deposition taken. The deceased had been very severely cut about the throat. It was possible for him to speak but it would have been very difficult for him to make a long statement and to make a detailed statement. There is no reason why he should not have been able to give the name of the person whom it is believed to be his assailants, but we are unable to believe that either the first report or the dying deposition were the deceased's unaided efforts. They appear to us to bear every sign of being recorded as answers to leading questions. Those leading questions must have been supplied by Baijnath. There is no reason to suppose that the deceased man did not give the names of the four appellants as four of those his assailants, but the anxiety to supply details does not assist towards an acceptance of the correctness of his statement. We thus have it that the only case against the appellants consists of the fact that the deceased man stated that they and Janga were the men who had attacked him. Every attempt has been made to improve upon this story by the addition of details which are not genuine details. The night was a moonless light. The star light may or may not have supplied sufficient means of recognition. The family of the deceased have deliberately chosen to put the attack back some two hours before it actually occurred and the evidence of identification given by Baijnath and Achebar does not convince us.

In these circumstances it is impossible to uphold the convictions.

Before we leave this case we have to note one point. The learned Sessions Judge permitted statement made before the police and recorded in the diaries to be brought on the record for the purpose of contradicting the witnesses for the defence. He was not right in adopting this course. S. 162, Criminal P. C. as amended is clear on the point. No oral statement made by any person to a police officer in the course of an investigation under this chapter and no record of any such oral statement can be used for any purpose in a Court of law in respect of an offence under investigation at the time when such statement was made, except for the purpose of contradicting a prosecution witness. It can only be used for that purpose under special conditions. Such a statement cannot be used for the purpose of contradicting a defence witness.

As a result the appeals succeed, the convictions are set aside and Ganga, Jaggu, Rama Shankar and Dwarka will be set at liberty.

V.B./R.K.

Appeals allowed.

* 1930 Cr. Cases 158

(Oudh)

STUART, C. J., AND RAZA, J.

Prag Datt—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 103 of 1929, Decided on 15th November 1929, from order of Addl. Sess. Judge, Bahraich, D/- 4th September 1929.

* Penal Code, S. 197—False affidavit sworn in by accused for supporting transfer application—No protection is given to the accused.

Where the law does not prohibit the administration of an oath or solemn affirmation and where in fact the practice of the Court directs that an oath or solemn affirmation must be administered before the affidavit is accepted, there cannot be any protection for an accused person who commits perjury in such a document. The fact the affidavit was made for supporting transfer application in a case in which he was an accused is immaterial: 12 *Mad.* 451, *Dist.*; 19 *All.* 200 and 23 *All.* 331, *Doubted* and not *Foll.* [P 159, C 2]

A. N. Mulla—for Applicant.

G. H. Thomas—for the Crown.

Judgment.—One of the questions raised in this criminal revision is of considerable importance. The applicant *Prag Datt* filed what purported to be an affidavit asking for the transfer of two cases one of which was a case in which

he was a complainant and the other of which was a case in which he was an accused. The cases were criminal cases pending in the Courts of two Magistrates. The learned District Magistrate of Bahraich considering that a statement in the so called affidavit was false has ordered the prosecution of Prag Datt under the provisions of S. 476, Criminal P. C., and his order has been upheld by the learned Additional Sessions Judge of Bahraich. The first point taken by the learned counsel is that as Prag Datt was an accused person in one of those cases he could not be prosecuted for giving false evidence, even if he had given false evidence. The position taken by the learned counsel is that an accused person who makes an affidavit to support a transfer application or to support an application for bail or to support any other application of the same kind can make any false statement he wishes and that he cannot be prosecuted under the law.

The learned counsel has certain decisions which support his view. The first of these was a decision of a single Judge of the Allahabad High Court *In the matter of Barkat* (1). The second was a decision which followed the rule laid down in the previous decision. It was of another Judge of the Allahabad High Court in *Emperor v. Bindeshri Sing* (2). There is further a decision of a Bench of the Madras High Court in *Queen Empress v. Subhaya* (3). But this last has no bearing on the subject. In that case an accused person had been ordered by a Court to make a statement of solemn affirmation. He was subsequently prosecuted for making a false statement. As the action of the Court in directing that person to make a statement on solemn affirmation was directly opposed to the provisions of S. 5, Oaths Act (10 of 1873) the Bench decided that the statement itself could not be taken as a statement on oath and that thus there could be no prosecution. But in the two Allahabad cases the facts are very different. Here it was a question of an affidavit made by an accused person who had a right to make an affidavit and who was not

compelled to make the affidavit on oath before it could be accepted. Mr. Justice Blair at p. 201 of the first decision said :

"For my own part, I have no doubt that the legislature intended to protect an accused person from the ordeal of examination as a witness and to render him incapable, therefore, of being punished for the making of false statements upon oath, or otherwise, so long as his case is sub judice."

His Lordship did not refer to any express provision of the law which supported this view. He appears to have considered that he was following the spirit of the law in laying down that an accused person even when under the law capable of making an affidavit who made a false statement was protected in his perjury. This view was followed by Mr. Justice Richards in the second case. The learned Judge, however, added nothing to the reasons in the first case. He stated solely that he considered himself bound by the previous decision. We are of opinion that this view cannot be accepted. S. 193, I. P. C. lays down that whosoever intentionally gives false evidence in any stage of a judicial proceeding has committed an offence. Giving false evidence is defined by S. 191 and an affidavit is evidence within the meaning of S. 191. The question of the fabrication of false evidence must also be considered. We cannot find it possible to accept the view of the learned Judges of the Allahabad High Court greatly as we respect them. When the law prohibits the administration of an oath or solemn affirmation to an accused person the matter is of course different. In those circumstances there can be no perjury. But where the law does not prohibit the administration of an oath or solemn affirmation and where in fact the practice of the Court directs that an oath or solemn affirmation must be administered before the affidavit is accepted we cannot see how there can be any protection for an accused person who commits perjury in such a document. If the case stood alone on the first point the present application would certainly fail, but the learned counsel has brought to our notice a circumstance which appears to have been overlooked by the Courts below. On an examination of the so called affidavit we find that it was never sworn at all. It was admittedly admit-

(1) [1897] 19 All. 200=(1897) A. W. N. 23.

(2) [1905] 28 All. 331=3 A. L. J. 98=(1906) A. W. N. 42.

(3) [1889] 12 Mad. 451.

ted by error although no oath or solemn affirmation had been taken as to the truth of its contents. The applicant cannot be prosecuted for giving false evidence or fabricating false evidence in the absence of an oath or a solemn affirmation and we allow the application and set his prosecution aside.

V.B./R.K. * *Application allowed.*

1930 Cr. Cases 160 (Lahore)

JOHNSTONE, J.

Jalal—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 474 of 1929, Decided on 13th July 1929, against order of Addl. Dist. Mag., Amritsar, D/- 3rd May 1929.

(a) Penal Code, S. 376 — Complainant pregnant—Medical evidence is still of help to prosecution.

It cannot be said that medical evidence cannot help the case for the prosecution, because the complainant is pregnant at the time when the rape is alleged to have been committed.

[P 160 C 2]

(b) Penal Code, S. 376 — Mere finding semen on complainant's clothing is not sufficient to prove rape.

The report of the chemical analyser regarding the presence of semen on the complainant's clothing is not sufficient to prove that the complainant is actually raped.

[P 160 C 2]

Nand Lal—for Appellant.

Diwan Ram Lal—for the Crown.

Judgment.—The appellant Jalal has been convicted under S. 376, I. P. C., and has been sentenced to a term of five years' rigorous imprisonment. The story for the prosecution is as follows :

On the day preceding the last Id Mt. Barkat Bibi the wife of a faqir, was alone in her house when the appellant Jalal and an absconder named Ghulaman entered the house, dragged her into a Kothri; and each in turn committed rape on her. She called for help and several people appeared including her mother-in-law and a man named Atma Singh. These persons saw the appellant and the absconder escaping. Shortly afterwards a sufed posh appeared on the scene and Mt. Barkat Bibi told him, as she had already told the other two, that she had been raped by the appellant and Ghulaman.

I have heard Dr. Nand Lal at considerable length on behalf of the appellant Jalal. It is urged in the first place

that there is no independent witness, but this contention is falsified by the evidence of two of the principal witnesses Atma Singh and the sufed posh, neither of whom has any connexion with the complainant. Another argument urged by Dr. Nand Lal is that the report of the occurrence was not made to the police until the following day. I have considered this question, but I am satisfied that the prosecution has given adequate reasons for the delay in making the report. It appears that the complainant set out towards the police station, but was intimidated by the friends of the appellant and she went home and managed to proceed to the thana on the following day.

A more important question has been raised. The record shows that the complainant was never examined by any medical expert. It is urged on behalf of the Crown that because the complainant is a married woman and was actually pregnant at the time, the medical evidence could not have helped the case for the prosecution. With this view I am not prepared to agree. Apart from the statement of the complainant herself there is no real evidence that penetration was actually effected. The report of the Chemical Examiner regarding the presence of semen on the complainant's clothing is not sufficient to prove that the complainant was actually raped. It is, however, quite clear from the evidence that the appellant and his companion entered the house of the complainant and committed criminal assault upon her. I accordingly accept the appeal in so far that I alter the conviction from one under S. 376 to one under S. 354, I. P. C., and I sentence the appellant to two years' rigorous imprisonment.

P.N./R.K.

Order accordingly.

*** 1930 Cr. Cases 161 (1)**
(Lahore)

DALIP SINGH, J.

Taj Muhammad — Accused — Petitioner.

v.

Emperor—Opposite Party.

Criminal Misc. Petn. No. 263 of 1929, Decided on 22nd November 1929, for transfer of criminal case.

*** Criminal P. C., S. 526—Order for re-trial from the stage of irregularity—Order for transfer was made where accused agreed not to demand fresh trial.**

Convictions of certain accused were set aside on appeal on the ground that provisions of S. 342 had not been complied with, and re-trial was ordered from the place where the irregularity had occurred. The accused prayed for transfer on the ground that as they had no further statement or evidence to offer it was a foregone conclusion that the Magistrate would convict them, again.

Held: that no general rule could be laid down for such cases but as the counsel for petitioner had said that the accused would not demand a de novo trial which otherwise they could claim, the case could be transferred to another Magistrate who was to take up the trial from the place where the irregularity had occurred. [P 161 C 1]

J. G. Sethi—for Petitioner.

Sundar Das for Government Advocate — for the Crown.

Order.—This is a transfer application which raises a somewhat novel point. The accused were convicted by the learned Magistrate. On appeal the learned Sessions Judge set aside the conviction on the ground that the provisions of S. 342, Criminal P. C., had not been complied with and he directed that the trial should be taken up from the place where the irregularity had occurred. The accused now say that they have really nothing to add to the statement which had been previously recorded and have no further evidence to offer than the evidence they have already offered, and therefore, it is a foregone conclusion that the learned Magistrate who has already convicted them, will convict them again. They, therefore, pray for a transfer.

The point raises this difficulty that if the transfer application is granted the accused can demand a de novo trial and therefore the order of the learned Sessions Judge directing that the trial should proceed from the stage where the irregularity occurred would practically be rendered nugatory. On the

1930 Cr. C. 21

other hand, it is clear that it is in all human probability but natural for the accused to apprehend that the Magistrate who had once expressed his opinion will come to the same conclusion on the evidence which has already been taken. It may also be urged that really the whole thing is a technicality and that really the accused are not suffering any substantial injustice by the same Magistrate trying the case again. I lay down no general rule for such cases though the learned counsel for the petitioners has cited a Patna ruling which is almost on all fours in which Bucknill, J., held that in such cases a transfer was desirable. The learned counsel for the petitioner tells me that the accused will not demand a de novo trial. In these circumstances I allow the petition and transfer the case to another Magistrate who will proceed to take up the trial at the stage where the original irregularity took place and then proceed to dispose of it according to law.

R.M./R.M.

Petition allowed.

1930 Cr. Cases 161 (2)

(Lahore)

BHIDE, J.

Arjan Singh—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 822 of 1929, Decided on 17th November 1929, from order of Addl. Dist. Magistrate, Amritsar. D/- 27th July 1929.

Penal Code, S. 124-A—Publication bringing British Government into hatred etc., in any form whatever amounts to offence.

If the subject matter of a publication is likely to bring Government into hatred or contempt or excite disaffection towards it and if it has been published with the intention of producing such effect, it would be immaterial for the purpose of S. 124-A whether the publication assumes the form of a life-sketch or a poem or an allegory or some other form.

[P 162 C 1]

The publishing of the life sketch of a person who was admittedly a member of a society whose avowed object was to overthrow the Government established by law in British India is an offence under S. 124 when no reasonable explanation is forthcoming as to why the author thought it fit at that particular time to publish the life sketch. The crucial point for decision in such case is the intention with which the life sketch has been published which is to be gathered from the subject-matter as well as the surrounding circumstances.

[P 162 C 1, 2]

Mazhar Ali Azhar—for Appellant.

Ram Lal—for the Crown.

Judgment. — The appellant Arjan Singh editor printer, and publisher of an Urdu journal called "Kirti" has been convicted in this case under S. 124-A, I. P. C., for publishing in the journal a life sketch of one Jiwand Singh who is described as a martyr. Jiwand Singh was a villager from the Hoshiarpur district who apparently went to America in search of livelihood in 1907. There he learnt the use of arms and later on joined the Ghadar society and took a vow along with other members of the society to destroy the "tyrannical" Government of this country. He returned to India about 1914-15. The Ghadar party decided to hold a meeting at Lahore in February 1915, at which plans for a mutiny were to be laid out. But the Police got news about the meeting and arrested many men of the party at Jiwand Singh's house, where the meeting was held. Jiwand Singh managed to escape. He decided to collect arms and shot at first a sentry on duty at a railway bridge. Two sepoy were shot later on by Jiwand Singh and his companions and their rifles with some ammunition were taken. He murdered one Chanda Singh Zaildar who had the reputation of being a great "Jholichuk" (nickname for "loyalist"), after evading pursuit for a considerable time, he was eventually arrested tried and hanged in 1917.

It has been urged on behalf of the appellant that the life-sketch referred to above is purely of a historical character and that its publication does not amount to an offence under S. 124-A, I. P. C. After carefully considering the matter, I am unable to accept this contention in the circumstances of this case. The crucial point for decision is the intention with which the life-sketch has been published. If the subject matter of a publication is likely to bring Government into hatred or contempt or excite disaffection towards it, and if it has been published with the intention of producing such an effect, it would be immaterial for the purposes of S. 124-A, I. P. C., whether the publication assumes the form of a life-sketch or a poem, or an allegory or some other form.

The intention of the writer in such cases has to be gathered from the subject matter of the publication as well

as the surrounding circumstances. In the present instance no reasonable explanation is forthcoming as to why the author has thought it fit to publish at this juncture the life-sketch of a person who was admittedly a member of society whose avowed object was the overthrow of the Government established by law in British India and who was convicted and hanged for crimes committed in pursuance of that object as long ago as 1917. This is, moreover, not the only life-sketch of its type which the author has published. In successive issues of the journal, life-sketches of several other persons convicted of similar offences against the Government have appeared. The manner in which the life sketch has been presented clearly shows the author's sympathy with the aims and aspirations of the convicted persons. In the present instance Jiwand Singh has been glorified as a martyr and the writer's intention to hold him up as an ideal worthy of imitation in the present times would seem clear from the general tenor of the life-sketch and the verses which appear at the beginning and the end.

Taking into consideration the facts stated above, I hold that the appellant has been rightly convicted. As regards the sentence, the case seems to be of a somewhat unusual type, and I think a moderate sentence will suffice in the present instance. I accept the appeal to the extent of reducing the sentence to the period of rigorous imprisonment already undergone.

R.M./R.K.

Order accordingly.

1930 Cr. Cases 162

(Lahore)

ZAFAR ALI AND BHIDE, JJ.

Bhana Mal—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 852 of 1929, Decided on 12th November 1929, from order of Sess. Judge, Delhi, D/- 30th August 1929.

Penal Code, S. 300—That assault followed sudden quarrel without premeditation and that accused comes from peaceful trading class are extenuating circumstances and extreme penalty should not be inflicted.

Where the weapon used, the part of the body aimed at and pierced, and the violence with which the blow was inflicted lead to the inference that the accused intended to cause such

bodily injury as was likely to cause death even though the accused did not intend to cause death, the accused can be rightly convicted of murder. [P 163 C 2]

But the fact that the assault followed sudden quarrel without premeditation is an extenuating circumstance as also the fact that accused belongs to a peaceful trading class and extreme penalty of law should not be inflicted and sentence should be reduced to transportation for life. [P 164 C 2]

Moti Sagar and Hem Raj Mahajan—for Appellant.

Des Raj Sawhny—for the Crown.

Judgment.—Dr. Moti Sagar, who appears for Bhana Mal appellant concedes that it was Bhana Mal who inflicted the injury to which the deceased Kallu Mal succumbed, but contends that the offence committed by him though culpable homicide, did not amount to murder, and that, even if it did, Bhana Mal deserves the lesser punishment provided by S. 302, I. P. C., and not the sentence of death that has been passed against him by the learned Sessions Judge.

Kallu Mal deceased was a prosperous commission agent of Delhi and Bhana Mal was his adopted son. The latter had a son of the name of Puran Mal aged 16 years and another son much younger. Bhana Mal married twice and had the two sons by the two wives respectively but he was at present a widower. Kallu Mal's wife was also dead, and so the family consisted of Kallu Mal, Bhana Mal and the two sons of the latter. Kallu Mal was an old man of 60 while Bhana Mal is 38 years of age.

It appears that Kallu Mal did not let Bhana Mal participate in his business. He with his grandson Puran Mal went regularly to the business premises about 11 a. m. and returned about 9 p. m. and kept the ready cash of the business locked up in his safe inside a small room of the residential house. On the fateful morning Kallu Mal handed the keys of the safe etc. to Puran Mal to take out the money to be carried to the shop as usual. At this juncture Bhana Mal came out of the room where he had been sitting alone and snatched the keys from Puran Mal to open the safe. Kallu Mal forbade him and told him that if he was in need of money he would himself give it to him. Thereupon some dispute arose as to who should open the safe, and ultimately Kallu Mal settled this by saying that his servant Sripat should do so. Bhana Mal then handed the keys to Sri-

pat, but Kallu Mal instead of directing Sripat to open the safe told him to lock the doors of the room. This annoyed Bhana Mal and he snatched the keys from Sripat, Kallu Mal then endeavoured to get the keys from Bhana Mal and thereupon the latter plunged a knife into Kallu Mal's heart causing him to fall on the ground where he expired in a few moments.

According to the medical evidence Kallu Mal bore a stab wound in the chest deep down to the heart which was cut. The pulmonary artery was also cut. The cause of death was obviously the perforation of the heart through a stab wound in the chest.

From the account of the occurrence given above, the conclusions clearly follow, (1) that Bhana Mal was not trusted by Kallu Mal, and (2) that Bhana Mal resented this, and stabbed his father in a fit of anger. He had no justification whatsoever for proceeding to take by force what his father was not willing to give him. The learned counsel argues that it could not be said that the appellant inflicted the injury with intent to cause death, and that all that could be predicated of him was that he acted with the knowledge that the injury might prove fatal. We are, on the other hand, of opinion that, the weapon used, the part of the body aimed at and pierced, and the violence with which the blow was inflicted, lead to the inference that, even if the accused did not intend to cause death, he intended to cause such bodily injury as was likely to cause death. He has, therefore, been rightly convicted of murder.

As regards the punishment there can be no manner of doubt that the assault followed a sudden quarrel without premeditation. Having regard to this extenuating circumstance and fact that the appellant belongs to a peaceful trading class it does not appear necessary to exact the extreme penalty of law. We, therefore, reduce the sentence to one of transportation for life and accept the appeal to this extent.

R.M./R.K.

Order accordingly.

1930 Cr. Cases 164

(Lahore).

BHIDE, J.

Lachhman Singh— Accused — Appellant.

v.

Emperor— Opposite Party.

Criminal Appeal No. 824 of 1929, Decided on 9th November 1929, from order of Addl. Dist. Magistrate, Amritsar, D/- 26th July 1929.

(a) Penal Code, S. 124 (A) — Allegations against Home Government do not amount to offence under S. 124 (A).

A paragraph containing following statements was printed and published by editor of a newspaper. The writer said that the English had made a fine move for taking possession of Kabul by their duplicity. On the one hand the Afghan King had been made to introduce European fashions in his country and on the other the Afghan subjects had been incited to rebel against their king.

Held: that the allegations did not fall within the scope of S. 124-A. There was no reference in the paragraph to the Government established by law in British India. The policy criticised was that of Home Government and not of Indian Government. The language also was not such as could be reasonably held to be calculated to excite disaffection towards His Majesty or the Government of British India.

[P 164 C 2]

(b) Penal Code, S. 124 (2) — Where allegations bring Government to hatred and contempt, writer is guilty.

An article in a newspaper contained following paragraph: Under their rule the English have displayed such acts of oppression, high handedness, excesses, tyranny, repression and dishonesty as are making the world civilization feel ashamed. English rule in India depends upon those bad characters of number 10 of England who have become notorious for their folly, barbarity and hard heartedness. Such cruel, unmannerly and foolish persons are sent as officers of this country as might be considered burdensome for England's soil. This is the reason why the general massacre of Jullianwala Bagh, the bloody field of Guru-ka-Bagh and the Karbalas and bloody scenes of Nankana Sahib and Jaito are being seen in India.

Held: that the object of the article was evidently to bring the Government into hatred and contempt and to threaten it with vengeance and destruction. The writer was therefore guilty of offence under S. 124 (2).

[P 165 C 1]

Mazhar Ali Azhar—for Appellant.

Ram Lal—for the Crown.

Judgment.— Criminal appeals Nos. 824 and 825 of 1929 are connected and can be disposed of together. They arise out of two case in which *Lachhman Singh*, editor, printer and publisher of *Gurmukhi* paper called "*Qaumi Babbar Shar*" was convicted under S. 124-A in respect of two articles headed "*Kabul*

da samachar" (news from Kabul) and *Naukar Sahai Zulzim da nawan daur arambh hogiya* (commencement of a new era of repression by the bureaucracy) which appeared in that paper and sentenced to rigorous imprisonment for one year and eighteen months' respectively the sentences to run concurrently.

The first article consists only of a brief paragraph in which the writer says that the English have made a fine move for taking possession of Kabul, by their duplicity. On the one hand, the Afghan King has been made to introduce European fashions in his country and on the other the Afghan subjects have been incited to rebel against their King. Whatever one may think of these allegations they do not appear to fall within the scope of S. 124-A, I. P. C. There is no reference in the paragraph to the Government established by law in British India, and it may well be argued that the policy criticised is that of the Home Government and not of the Indian Government. Nor is the language of the paragraph such as could be reasonably held to be calculated to excite disaffection towards His Majesty or the Government of British India. The learned counsel for the Crown was unable to put forward any substantial ground in support of the conviction in respect of this article and I consider the conviction to be unsustainable.

The second article, however, is clearly seditious. It is a direct attack on the personnel and the methods of the British Government in India. The following paragraph will be sufficient to indicate its general tenor and purport.

"Under their rule the English have displayed such acts of oppression, high-handedness, excesses, tyranny, repression and dishonesty as are making the world civilization feel ashamed. English rule in India depends upon those bad characters of number 10 of England who have become notorious for their folly, barbarity and hard-heartedness. Such cruel, unmannerly and foolish persons are sent as officers of this country as might be considered burdensome for England's soil. This is the reason why the general massacre of Jullianwala Bagh, the bloody field of Guru-ka-Bagh, and the Karbalas and bloody scenes of Nankana Sahib and Jaito are being seen in India."

The learned counsel for the appellant urged that that the object of the writer was simply to bring home to the Government the advisability of adopting conciliatory methods in India, but on a perusal of the article this argument

seems to me to be wholly untenable. The writer's object is evidently to bring the Government into hatred and contempt and to threaten it with vengeance and destruction.

The article is one of the worst specimens of its type and in the circumstances the sentence passed in respect of it cannot be considered to be excessive.

I accept appeal No. 824 of 1929 and set aside the conviction and sentence in respect of the article "*Kabul da sama-char*."

I reject appeal No. 825 of 1929.

R.M./R.K. Order accordingly.

1930 Cr. Cases 165

(Lahore)

BROADWAY AND JOHNSTONE, JJ.

Ilam Din - Accused - Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 562 of 1929, Decided on 17th July 1929, from order of Sess. Judge, Lahore, D/- 22nd May 1929.

Penal Code, S. 302—That murderer is 19 or 20 years of age and murder prompted by veneration for founder of religion is not extenuating circumstance.

The mere fact that the murderer is only 19 or 20 years of age and that the act was prompted by feelings of veneration for the founder of his religion and anger at one who had scurrilously attacked him, is a wholly insufficient reason for not imposing the appropriate sentence provided by law: *A. I. R. 1928 Lah. 531, Ref.*

[P 166 C 1, 2]

Mohammad Ali Jinnah and *Farrukh Hussain*—for Appellant.

Ram Lal and *J. L. Kapur*—for the Crown.

Broadway, J.—*Ilam Din*, son of Talia Mand, a Tarkhan of some 19 or 20 years of age, and a resident of Mohalla Sirianwala, Lahore City, has been convicted of having caused the death of one Rajpal on 6th April 1929, and, under S. 302, I. P. C., has been sentenced to death. He has appealed, and the case is also before us under S. 374, Criminal P. C.

The deceased was a Hindu book-seller having a shop in the Hospital Road. Some little time back he had given grave offence to the Muslim community by the publication of a pamphlet entitled "*Rangila Rasul*." He had been proceeded against under S. 153-A, I. P. C. in connexion with this publication, and after a protracted trial, had been convicted in January 1927. His conviction was, however, set aside by the High

Court in May 1927.* The pamphlet was a scurrilous production and had wounded the susceptibilities of certain members of the Muslim community to such an extent that his acquittal was followed by two abortive attempts to murder the author, with the result that it was found advisable to afford him police protection.

It seems that he had recently gone on a visit to Hardwar and, during his absence, the guard was removed. He returned from Hardwar on 4th April and whether the guard had not yet been restored or had temporarily absented himself (the point is immaterial) he was murderously attacked in his shop at about 2 p. m. on 6th April.

That his assailant intended to cause death is established by the medical evidence which shows that he received no less than eight wounds, seven being incised and one a punctured one. The nature of these injuries also show that Rajpal endeavoured to defend himself, for four of the incised wounds were on his hands. He received a wound on the top of his head that cracked the right parietal bone, two incised wounds above the spine of the left scapula and a punctured wound in his chest. This last pierced the heart cutting the fourth rib and caused almost instantaneous death.

The case for the prosecution is that the appellant purchased a knife from Atma Ram (P. W. 8) on the morning of 6th April, proceeded to the shop of the deceased at about 2 p. m. and attacked him as he was sitting on the gaddi in the outer verandha writing letters. The assault was witnessed by Kidar Nath (P. W. No. 2) and Bhagat Ram (P. W. No. 3) employees of the deceased who were in the shop at the time, the former sitting at work in the inner verandah and the latter standing on a ladder in the outer verandah or room arranging books on the shelves. They raised an alarm, threw books at the appellant who dropped his knife and ran out. He was pursued by Kidar Nath and Bhagat Ram who were joined outside by Nanak Chand (P. W. No. 4) and Parma Nand (P. W. No. 5). The appellant turned into a woodyard belonging to Vidya Rattan, who had seen the pursuit from his office door and who hastened into the woodyard and seized the appellant, being assisted by the pursuers

*[Rajpal v. Emperor, A. I. R. 1927 Lah. 500]

who were on his heels. The appellant is then stated to have repeatedly and loudly proclaimed that he was neither a thief nor a dacoit but had "taken revenge for the prophet." Ilam Din was taken to the deceased's shop, the police were notified and took over the appellant and the investigation.

A very brief report was made by Kidar Nath who said nothing of the assertion made by Ilam Din when he was captured, and did not mention the name of his fellow servant.

On the following day as a result of a statement made by Ilam Din to the Police the shop of Atma Ram was discovered, and on 9th this Atma Ram picked out the appellant at an identification parade held under the supervision of a Magistrate as the man to whom he had sold the knife found in Rajpal's shop.

There can be no doubt that Atma Ram could have sold the knife as he had several of identically the same make and pattern, two of which have been produced as exhibits. He stated that he bought these knives at an auction sale of Medical Stores.

M. Jinha has attacked the prosecution story on various grounds. He urged that Kidar Nath was not a reliable witness because (1) he was an employee of the deceased and, therefore, "interested;" (2) he had not stated in the First Information Report (a) that Bhagat Ram was with him, and (b) that the appellant had stated that he had avenged the Prophet. As to Bhagat Ram it was contended he, as an employee, was interested, and as to the rest that there were variations in some of the details.

Objection was taken to the admissibility of the statements made to the police which led to the discovery of Atma Ram, and Atma Ram's identification of Ilam Din and his testimony regarding the sale of the knife to Ilam Din were characterised as untrue and improbable. (His Lordship after discussing the evidence held that the guilt had been established and proceeded as follows.) Mr. Jinnah finally contended that the sentence of death was not called for and urged as extenuating circumstances, that the appellant is only 19 or 20 years of age and that his act was prompted by feelings of veneration for the founder of his religion and anger at one who had scurrilously attacked him.

As was pointed out in *Amir v. Emperor* (1):

"the mere fact that the murderer is 19 or 20 years of age, * * * is a wholly insufficient reason for not imposing the appropriate sentence provided by law."

The fact that Ilam Din is 19 or 20 years of age is not, therefore, a sufficient reason for not imposing the extreme penalty and I am unable to see that the other reasons advanced by Mr. Jinnah can be regarded as affording any excuse for a deliberate and cold blooded murder of this type.

I would, therefore, dismiss the appeal and confirm the sentence of death

Johnstone, J.—I concur.

V.B./R.K.

Appeal dismissed.

(1) A. I. R. 1928 Lah. 531.

1930 Cr. Cases 166

(Lahore)

BROADWAY J.

Hakim Singh and others—Petitioners.

v.

Lal Singh—Respondent.

Criminal Revn. Petn. No. 1300 of 1929, Decided on 25th November 1929, from order of Dist. Mag., Sialkot, D/- 10th July 1929.

Criminal P. C., S. 253—Magistrate can discharge accused before entire case is complete—But District Magistrate is justified in directing further inquiry when it is incomplete.

Where a Magistrate discharges the accused without allowing the complainant to adduce all his evidence, it cannot be said that there is a full and complete inquiry in the case, and the order of the District Magistrate directing full inquiry should not be interfered with. S. 253 no doubt gives a Magistrate power to discharge before entire case is complete and such order is legal, but when the inquiry has been incomplete the District Magistrate acts with equal legality in directing further inquiry.

[P 167 C 1]

Mool Chand—for Petitioners.

Gulam Mohyuddin—for Respondent.

Judgment.—In this case an order of discharge has been set aside by the District Magistrate, Sialkot, and the petitioners have come up to this Court under S. 439, Criminal P. C. through Mr. Mool Chand who has urged that the Magistrate's order was a legal one and that, therefore, the learned District Magistrate ought not to have set it aside. That the order of the Magistrate was legal and fell within his powers, as defined in S. 253, Criminal P. C., is perfectly clear. It is also a fact that that the order shows that the Magis-

trate had carefully considered the evidence that had been led. Unfortunately it also shows that the complainant was not allowed to adduce all his evidence. On 24th November 1923, the case was adjourned to 4th December 1928, for the "rest" of the witnesses. Mr Ghulam Mohyuddin, who appears for the respondent before me, stated that, on 4th December 1928, his client was present with the remaining witnesses but that, instead of recording their statements, the learned Magistrate discharged the accused and announced his order to that effect. That there was evidence present, as alleged by Mr. Ghulam Mohyuddin, appears to be correct from the fact that, at the conclusion of his order, the learned Magistrate says that "it is needless to examine further evidence." In these circumstances it cannot be said that there has been a full and complete enquiry in this case. That S. 253, Criminal P. C. gives the Magistrate power of discharge before the entire case is complete is evident, and, therefore, the order is legal; but the Court of the District Magistrate acted with equal legality in directing further enquiry, inasmuch as the enquiry had not been a complete one. I am aware that this Court expects a very careful use of revisional powers by Courts below in matters of this kind; but, when there has not been a complete enquiry into a charge and a Court, having jurisdiction, directs that a full enquiry be made, I do not think I should be justified in interfering. I, therefore, dismiss this petition.

R.M./R.K. *Petition dismissed.*

* 1930 Cr. Cases 167 (Lahore)

TEK CHAND, J.

Nathu Mal—Complainant—Petitioner.
v.

Abdul Haq—Accused—Respondent.

Criminal Revn. No. 817 of 1929, Decided on 18th December 1929, on report by Sess. Judge, Karnal, on 6th May 1929.

* (a) Criminal P. C., S. 439—Improper order of acquittal can be set aside by High Court on appeal by Local Government or on reference by Sessions Judge.

An improper order of acquittal can be set aside by the High Court either on a regular appeal by the Local Government when ordinarily moved by the District Magistrate or in revision ordinarily on a reference by the Sessions Judge. Where the first alternative is

not available, there can be no legal bar to the adoption of the second alternative. But the power is to be exercised in exceptional cases only where there has been either denial of the right of a fair trial or a flagrant failure of justice: *A. I. R. 1924 Lah. 451*; *24 All. 846*; *25 All. 128*; *A. I. R. 1922 Mad. 502 (F. B.)*; and *42 Cal. 612, Ref.*; *A. I. R. 1928 Lah. 844, Rel. on.* [P 169 C 1]

* (b) Criminal P. C., S. 439—S. 439 need not be read subject to S. 417.

Section 439 need not be read subject to S. 417 and reference can be entertained when the Local Government has been moved to prefer an appeal or having been moved has declined to prefer such appeal: *A. I. R. 1926 Pat. 176*; and *A. I. R. 1929 Pat. 139, Rel. on.* [P 168 C 2]

(c) Penal Code, S. 218—Sub-Inspector of Police making incorrect report with intent to cause injury to complainant is guilty under S. 218

Where a Sub-Inspector of Police makes a report knowing it to be incorrect and with intent to cause injury to the complainant his act is clearly covered by S. 218. The word "charged" in S. 218 is not restricted to the narrow meaning of enjoined by a special provision of the law: *27 Cal. 144, Rel. on.* [P 171 C 2]

* (d) Criminal Trial—Evidence in case of defamation woman alleged to have illicit pregnancy cannot be compelled to submit to medical examination—Her refusal is no evidence against her—Penal Code S. 500.

It is well settled that in a defamation case based on an allegation that a woman has had illicit pregnancy she cannot be compelled to submit to a medical examination against her consent and her refusal to do so is not evidence against her: *Agnew v. Jobson*, 18 Cox. Cr. C. 625; and *Latter v. Braddede*, 50 L.J.Q.B. 448, *Rel. on.* [P 171 C 1, 2]

Mehr Chand Mahajan—for Petitioner.

Nand Lal—for Respondent.

Order.—This is a reference under S. 438, Criminal P. C., by the Sessions Judge, Karnal, recommending that the order of Mr. S. K. Kirpalani, District Magistrate, Karnal, acquitting the respondent, Abdul Haq, Sub-Inspector of Police, Asandh, of offences under Ss. 218 and 500, I. P. C., be set aside.

At the commencement of the hearing Dr. Nand Lal for the respondent raised a preliminary objection that the reference was not competent and that this Court had no jurisdiction to entertain it. In support of this objection the learned counsel cited *Emperor v. Achhar Singh* (1). In the matter of *Aminuddin* (2), *Emperor v. Madar Bakhsh* (3), *Sankaralinga Mudaliar v. Narayana Mudaliar* (4) and *Faujdar Thakur v. Kasi Chowd-*

(1) *A. I. R. 1924 Lah. 451=5 Lah. 16.*

(2) [1902] 24 All. 346=(1902) A. W. N. 89.

(3) [1902] 25 All. 128=(1902) A. W. N. 200.

(4) *A. I. R. 1922 Mad. 502=45 Mad. 913 (F.B.).*

Jury (5). None of these cases, however, lays down that the Sessions Judge has no power under S. 438 to make a reference to the High Court to set aside an order of acquittal or that this Court cannot entertain the reference. On the other hand, all these rulings presume that this Court does possess such jurisdiction, though they lay down that it must be exercised most sparingly and only in exceptional cases, where there has been a grave and flagrant miscarriage of justice.

Taking these cases in the order in which they were cited, we find that all that was laid down in *Emperor v. Athar Singh* (1) was that :

"ordinarily the High Court should not entertain a reference under S. 438 made by a Sessions Judge against an order of acquittal and that there were no special reasons in that particular case to do so."

In the matter of *Aminuddin* (2) as well as in *Emperor v. Madar Bakhsh* (3) the references had been made by the District Magistrate and it was held that such a reference ought not, as a general rule, be entertained. In *Sankaralinga Mudaliar v. Narayana Mudaliar* (4) there was no reference by a Subordinate Court but the matter came up before the High Court on a revision petition filed by the relations of the deceased person against an order acquitting the accused of offences under S. 302, I. P. C., and the High Court held that it will not ordinarily act at the instance of private parties except "when it is urgently demanded in the interests of public justice." *Faujdar Thakur v. Kasi Chowdhury* (5) was also a revision petition directly presented in the High Court, and it was definitely ruled that the High Court possessed jurisdiction under S. 439 to set aside an order of acquittal, but it was remarked (Jenkin, C. J., and Fletcher J., Teunon, J., contra) that it had now become a settled practice not to interfere ordinarily in such cases at the instance of a private prosecutor. It will thus be seen that none of the rulings relied upon supports the broad proposition put forward on behalf of the respondents.

Dr. Nand Lal conceded that S. 439 of the Code is couched in general terms and invests the High Court with jurisdiction to set aside an order of acquittal

but he urged that this jurisdiction could be exercised only on petitions directly presented before it and not on a reference by the Sessions Judge or the District Magistrate. I can find no warrant for this extraordinary contention, which is clearly contrary to the phraseology used by the legislature. S. 439 expressly lays down that the revisional powers of the High Court may be exercised in the case :

"of any proceedings the record of which has been called for itself or which has been reported for orders or which otherwise comes within its knowledge."

In the reports, numerous cases will be found in which High Courts have interfered on such references. The latest case in this Court is *Emperor v. Data Ram* (6) where Addison, J., accepted a reference under S. 438 from the Sessions Judge, Karnal and setting aside the acquittal, directed a retrial.

Nor am I impressed by the argument that S. 439 should be read subject to S. 417 and that the reference should not be entertained where the Local Government has not been moved to prefer an appeal to this Court under the latter section, or having been moved has declined to prefer such appeal. This contention appears to have been recently raised before the Patna High Court in *Siban Rai v. Bhagwant Dass* (7) and *Wazir Kunjra v. Emperor* (8) and overruled. The question has been discussed at length by Macpherson, J., in these cases and as his reasoning and conclusions have my complete and wholehearted concurrence, I think I cannot do better than quote the following passages from his judgment :

In the former case the learned Judge observed :

"Again too much stress may easily be laid upon the remedy available under S. 417 even in police cases. An appeal against acquittal is a special weapon in its armoury which the Local Government judiciously reserves for exceptional occasions, and which is only used after most anxious consideration and in cases which are themselves of great public importance or in which a principle is involved. It cannot be expected that Government will dull the edge of that salutary provision by utilizing it freely in cases which though of importance to individual subjects, are of no or of little general interest. Actually, therefore, a remedy under S. 417 is practically non-existent in the less heinous cases whether they are private or

(6) A. I. R. 1928 Lah. 844.

(7) A. I. R. 1926 Pat. 176=5 Pat. 35.

(8) A. I. R. 1929 Pat. 132=7 Pat. 579.

(5) (1915) 42 Cal. 612=21 C. L. J. 53=27 I. C. 186=19 C. W. N. 184.

public prosecutions. Yet where justice fails in this country, it undeniably does so at least as much by erroneous acquittal as by erroneous conviction."

In the latter case the learned Judge re-affirmed the same proposition and added:

"It is obvious that the Local Government can only deal with a very small proportion of erroneous acquittals. It can, therefore, be reasonable to refuse to entertain a reference by the District Magistrate only where it is clear that the case is one of that small proportion of cases in which the Local Government would be expected to move on account of their special importance to the administration but has failed to do so. S. 438 is intended to cover all cases of irregularity and injustice including acquittals which come to the notice of the eyes and ears of the High Court. Manifestly it must cover at least cases of erroneous acquittals with which the High Court would interfere under S. 439 at the instance of a private party who comes direct to the High Court. The greatest caution must be exercised in whittling down a provision of law which is itself clear."

"Then again in many of the cases referred by a District Magistrate the circumstances were special. Here, however, is a case much more suitable for a reference than for an appeal under S. 417. Even if the reference had been made by a District Magistrate it is impossible to believe that any Court of justice having jurisdiction, as this Court admittedly has, would permit a manifestly erroneous acquittal induced by the inadvertence to stand."

"Further assuming that ordinarily the High Court will not interfere with an acquittal on a reference by a District Magistrate who has the means of communicating with the Local Government with a view to an appeal under S. 417, it does not follow that the position should be the same in respect of a reference by the Sessions Judge who has no such means, whose outlook on the matter cannot but be purely judicial and who must either act under S. 438 or not at all. Mr. Asghar is unable to cite any decisions where a reference by Sessions Judge was refused for the reasons set out in the decisions relating to a reference by the District Magistrate. It is also clear that S. 439 (5), relied on in a Madras case has no application and in numerous cases this Court has interfered with acquittals at the instance of the private prosecutor."

After giving full consideration to Dr. Nand Lal's arguments and studying the authorities cited by him, I have no doubt that this Court has jurisdiction to entertain a reference by the Sessions Judge against the order of acquittal and, if necessary, to set it aside, though such power must be exercised in exceptional cases only, where there has been either a denial of the right of a fair trial or a flagrant and glaring failure of justice.

For the foregoing reasons, I overrule the preliminary objection, and proceed to see if the present case is one as would

justify interference on the revision side, according to the principles stated above.

The circumstances which have given rise to this reference are that on 27th February 1928, a complaint was lodged in the Court of the District Magistrate, Karnal, by one Nathu Koka (P. W. 1), who is a member of the local panchayat at Asandh, and is described by the prosecution witnesses as one of the most respectable persons in the locality, paying a large sum of money as income-tax and land revenue. It was alleged that the respondent Abdul Haq who was at that time Sub-Inspector of Police at Asandh, had got annoyed with the complainant in connexion with the proposed lease of certain premises and had threatened him with serious consequences. In order to get the complainant into trouble, the respondent is said to have arranged with Mrs. Yuhanna Khan (P. W. 2), who is nurse in the local hospital and with whom he (respondent) was carrying on a love intrigue, to write out a petition (Ex. P. E.) addressed to the Superintendent of Police, containing a false recital that the complainant, Nathu, had illicit intimacy with his widowed daughter-in-law, Mt. Pankho (P. W. 12), that in consequence she had become pregnant, and that Nathu and Mt. Pankho were making attempts to cause miscarriage. In this petition it was suggested that enquiry should be made into this matter and necessary steps taken to guard the pregnant woman so that she might not commit suicide. This petition purported to have been signed by a fictitious person called Khair Din, son of Feroze Khan, Pathan, of Asandh, and was dated 10th February 1928. Though addressed to the Superintendent of Police it was not sent to that officer but was put in a cover addressed to the Sub-Inspector of Police, Asandh. The cover was posted on 16th February and delivered to the respondent on the 18th. The respondent kept this petition with him till the 22nd, when he made a report (Ex. P. F.) to the Sub-Divisional Magistrate, Kaithal. In this report he stated:

"I received this application by post on 18th February 1928. I have myself enquired secretly about the allegations made therein. I am in every way satisfied with the veracity of the contents of the application. An attempt has been made to obtain some medicine through Sub-Assistant Surgeon, Asandh, for causing

abortion. I have also learnt secretly that the dispensary nurse was taken to the woman in question for this purpose. But up till now abortion has not been caused effectively. Successive attempts in this behalf are still going on uninterruptedly. I had a private talk with the nurse about this matter She certainly found the woman pregnant. She refused to cause abortion Besides the above an attempt was made to ascertain the fact about the said woman's pregnancy through Abdul Hakim, son of Wazira, Zafarson of Allah Bakhsh and Bholu of Alya These men obtained information through women and told me that Mt. Pankho had certainly an illicit pregnancy and Nathu had been making repeated attempts to cause abortion As causing abortion in this manner constitutes an offence it is submitted by means of this report that whatever orders may be deemed proper and lawful for the safeguard of the pregnancy may be passed"

On this the Sub-Divisional Magistrate passed an order (Ex. P. L.) on 23rd February 1928, that it was necessary under the circumstances to guard the pregnancy, that Mt. Pankho's statement should be recorded and she should be got medically examined, and reasonable security taken for the guarding of the pregnancy. On receipt of this order the respondent caused the complainant to furnish security for Rs.1,000 for not allowing Mt. Pankho to go anywhere, and recorded her statement, in which she denied that she was pregnant. The complainant alleged that the respondent tried to disgrace him and his daughter-in-law and demanded a sum of Rs. 3,000 for hushing up the matter. On his refusing to pay the amount he took Mt. Pankho in custody and brought her to Karnal for medical examination. Thereupon Nathu lodged the complaint before the District Magistrate praying that Mt. Pankho be restored to him and action taken under the Penal Code, against the respondent and certain other persons.

The District Magistrate after holding an enquiry framed charges under Ss. 218, 384 and 500, I. P. C., against the respondent and one Nathu Qazi. He, however, eventually acquitted both of them. In his judgment he found: (a) that it had been proved that the respondent had got annoyed with Nathu, complainant, for the reason mentioned in the complaint and that he had threatened him with dire consequences: (b) that Mrs. Yuhanna Khan was carrying on a love intrigue with the respondent and was ready to do anything to oblige him: (c) that the petition (Ex. F. E.) was copied by Mrs. Yuhanna

Yuhaman Khan from a draft which was in the handwriting of the thana Muharrir at the request of Nathu, Qazi, and that though addressed to the Superintendent of Police, Karnal, this petition was posted to the address of the Sub-Inspector, Asandh, and received by the respondent on 18th February 1928; (d) that on receipt of this letter the respondent made a report (Ex. P. F.) dated 22nd February 1928 and the latter passed orders (Ex. P. L.) thereon; (e) that on receipt of these orders the respondent went to Nathu's house and took steps to compel Mt. Pankho to undergo medical examination against her will; (f) that S. 218, I. P. C., was inapplicable as the respondent could not be said to have been "charged" with the preparation of Ex. P. F., which is the basis of the prosecution; and (g) that no offence under S. 500 was established as Ex. P. F. could not be said to be an incorrect document so far as the factum of Pankho's pregnancy was concerned.

Now if the findings in (a) are correct there can be no doubt that S. 218 was clearly applicable. The learned District Magistrate obviously misread Ex. P. F. in assuming that it did not state that that complainant had committed or attempted to commit an offence, and that all that the report contained was a mere allegation that Mt. Pankho and Nathu were "preparing to commit an offence." Now the extracts from Ex. P. F. given above show that the respondent had clearly stated that attempts had been made to cause abortion by means of medicine obtained from the Sub-Assistant Surgeon and through the nurse but that these attempts had so far been ineffective. It was also stated that "successive attempts in this behalf are still going on uninterruptedly."

If it is hardly necessary to point out that an attempt to cause miscarriage is punishable under Ss. 312 and 511, I. P. C. It is, therefore, an "offence" within the meaning of S. 4 (O), Criminal P. C. Being a non-cognizable offence, of which information had been received by him by the petition, Ex. P. E. it was under S. 155 (1) the duty of the respondent as an officer in charge of the Police Station at Asandh, to enter it in the book kept for the purpose, and in order to enable him to investigate

the offence to obtain the order of the Sub-Divisional Magistrate under Cl. (2) of that section. Further, as pointed out by the learned Sessions Judge, the respondent had under S. 23, Police Act, a statutory duty cast upon him to take steps to prevent the commission of the offence, and for that purpose also to report the matter to the Magistrate. If, therefore, the respondent made the report Ex. P. F. knowing it to be incorrect and with intent to cause injury to the complainant, his act was clearly covered by S. 218, I. P. C. It should also be borne in mind that the word "charged" in the section is not restricted to the narrow meaning of "enjoined by a special provision of the law": *Queen Empress v. Deodhar* (8).

In this connexion it is also necessary to note another error in the judgment of the learned District Magistrate. In Ex. P. F. the Sub-Inspector had stated that he had made enquiries about Mt. Pankho's pregnancy from three persons named, Abdul Hakim, Bholu and Zafaroo. Now these persons gave evidence at the trial as prosecuting witnesses 13-15 and stated that the respondent had never made any enquiries from them and that so far as they knew Mt. Pankho was not pregnant. They were not cross-examined at all by the respondent on these points, and the learned counsel for the respondent has not been able to refer me to anything on the record which might throw doubts on their veracity. There was, therefore, no justification for the remark of the District Magistrate that:

"It was not difficult to think that these witnesses were not speaking the truth."

In addition to this there is the significant fact that the respondent made no enquiries whatever from Khairuddin, the alleged writer of P.E. Indeed it has been shown that any such person was in existence at Asandha at the time.

Lastly the learned District Magistrate has erred in law in drawing an inference adverse to the prosecution from the refusal of Mt. Pankho to have herself medically examined. It is well settled that in a defamation case, based on an allegation that a woman has had illicit pregnancy, she cannot be compelled to submit to medical ex-

amination against her consent and her refusal to do so is not evidence against her: see *Queen Empress v. Pudman* (9); cf. *Agnew v. Jobson* (10) and *Latter v. Braddele* (11). If, therefore, the learned District Magistrate's findings in (a) to (e) above are correct, there is no doubt that his ultimate conclusions are not only erroneous but have resulted in a gross miscarriage of justice. In my opinion the case is an exceptional one and the only course open to me is to accept the recommendation of the Sessions Judge, set aside the order of acquittal and order that the respondent be re-tried under Ss. 218 and 500, I. P. C., by the District Magistrate, Karnal.

I wish, however, to make it clear, that the District Magistrate, who will now try the case should come to his own conclusions on the evidence which will be produced before him, and should not be influenced by the fact that I have set aside the order of acquittal by his predecessor.

The Deputy Registrar will see that the records are transmitted to the lower Court forthwith.

R.M./R.K. *Order set aside.*

(9) *Rat. Lal's Unrep. Cr. C.* 474.

(10) [1875] 13 Cox. C. C. 625.

(11) [1881] 50 L. J. Q. B. 448=45 J. P. 520
=29 W. R. 366=44 L. T. 369.

* 1930 Cr. Cases 171

(Lahore)

TAPP, J.

Jowaya and others—Convicts—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 634 of 1929, Decided on 11th November 1929, against order of First Class Magistrate, Gujrat, D/- 7th June 1929.

* (a) **Penal Code, S. 366—Presumption**
—When woman is kidnapped it is with one or other intents mentioned in S. 366.

It is practically impossible for the prosecution in cases of kidnapping and abduction to establish affirmatively the intention with which a woman is abducted. But it is a fair and justifiable presumption that when any woman is kidnapped or abducted it is undoubtedly with one or other of the intents specified in S. 366. The intention is more or less a matter of inference though there may be cases where the matter is capable of direct proof. It is for the accused to explain away incriminating circumstances. [P 173 C 2]

(b) Criminal Trial — Mere accessory is not punishable under Indian Law.

A person whose tonga is used for the purpose of abducting a girl is an accessory after fact according to English Law but as such is not punishable under Indian Law when there is nothing in the evidence to show that he conspired with or abetted the person abducting the girl. [P 174 C 1]

(c) Evidence Act, S. 114, Illus. (g)—Scope.

Non-production of witnesses cited by prosecution when their evidence was unnecessary cannot justify adverse inference when there is nothing else on record to justify it. [P 173 C 1]

Din Muhammad—for Appellants.

W. B. O'Connor for the Government Advocate—for the Crown.

Judgment. — The five appellants in this appeal have been convicted under S. 147, I. P. C., of rioting and under S. 366/149, I. P. C., of the abduction of Mt. Ghulam Fatima (20), the wife of one MerajudDin, an Arain, of Gujranwala, on 6th March 1929.

Each of them has been sentenced to concurrent sentences of five years' and one year's rigorous imprisonment in respect of both offences.

The case for the prosecution was that Mt. Ghulam Fatima being an accused in a case under S. 406, I. P. C., pending before the Bench of Honorary Magistrates at Gujrat was proceeding to the Court from the town on the morning in question accompanied by her father, Nabi Bakhsh and Miran Bakhsh with whom the woman, her father and her surety one Mushtaq Hussain, stayed during the night. On reaching the Circular Road Miran Bakhsh separated going on to his well and at this juncture the appellants, except Allah Ditta, son of Imam Din, and three other persons said to be absconding, pounced upon the girl and her father and while some held the latter the other seized the girl and forcibly placed her in the tonga of the appellant Allah Ditta, son of Imam Din, which was standing by and which, it was alleged, had been previously hired for the purpose. The girl managed to get out of the tonga whereupon she was again seized and put into the back seat by the appellant Abdullah and one of the absconders.

Jowaya and Barkat appellants seated themselves on either side of her keeping her down in her seat while Allah Ditta son of Jamal Din sat down beside the driver, and the tonga was then rapidly driven away in the direction of the Grand Trunk Road. This commotion

appears to have attracted the attention of several persons who getting into two tongas followed the abductors of Mt. Ghulam Fatima. Mohammad Amin, Supervisor of Arboriculture in the District Board, Gujrat was cycling from the Courts towards his house and on seeing what was taking place he also followed the tonga on his bicycle. Near the bauli on the Grand Trunk Road the pursuers overtook the tonga containing the girl, and the appellant Jowaya on seeing this was alleged to have pushed Mt. Ghulam Fatima out of the tonga and he, Barkat and Allah Ditta son of Jamal Din jumped out and ran in the direction of the fields, while Allah Ditta, the driver, drove on in the direction of Wazirabad. Jowaya, Barkat and Allah Ditta, son of Jamal Din were pursued and captured and taken to the City Police Station along with Mt. Ghulam Fatima, her father and several other persons, Mt. Ghulam Fatima made the first report at 1.30 p. m. the same day.

The above account is supported by the evidence of several witnesses, including that of Dr. Mrs. Narinjan Singh, Sub-Assistant Surgeon in charge of the female Hospital at Gujrat, who examined Mt. Ghulam Fatima the same evening and found five simple injuries on her person.

The appellant Jowaya admitted having been captured near the bauli, as alleged by the prosecution, but denied having abducted Mt. Ghulam Fatima or having pushed her out of the tonga. He stated that he would file a written statement, but there is none on the record.

Barkat denied having had any hand in the abduction of Mt. Ghulam Fatima or that he was arrested near the bauli, but stated he was caught near the City Police Station while returning from Jalalpur Jattan where he had gone to purchase a horse. He attributed his implication to enmity.

Allah Ditta, son of Jamal Din, also denied having been captured near the bauli or having had any hand in the abduction of Mt. Ghulam Fatima.

Allah Ditta the tonga driver stated that Mushtaq Hussain hired his tonga and put Jowaya appellant and Mt. Ghulam Fatima in it. Near the bauli his tonga was overtaken and he stopped on being asked to do so. Jowaya and Mt. Ghulam Fatima were taken away and

he thereupon returned to the tonga stand.

Abdullah appellant denied having participated in the affair.

The appellants produced 23 witnesses in their defence; two of these deposed that no such occurrence as alleged by the prosecution, took place. Ghulam Mohammad (D. W. 5) gave evidence in support of the story of Allah Ditta the tonga driver, while D. Ws. 6 and 7 deposed to having seen the girl, Mt. Ghulam Fatima, quietly driving away in the tonga of Allah Ditta with another man. D. Ws. 15-17 testified to Barkat and Allah Ditta son of Jamal Din having been at Jalalpur Jattan on 6th March in connexion with the purchase of a house. In this connexion it may be noted that Allah Ditta son of Jamal Din did not plead an alibi when examined.

The appellant Abdullah produced certain evidence to show that he was suffering from malaria at the time and that from the 5th to 8th March he was under the treatment of Hakim Hakam Shah (D. W. 13).

The learned counsel for the appellant has urged that six witnesses and Mush-taq Hussain, who according to the first information report was an eyewitness and all of whom were cited as witnesses, were not produced by the prosecution. He contended that these witnesses had been purposely withheld by the prosecution and in the circumstances it should be presumed under illustration (g) to S. 114, Evidence Act, that their testimony would have been unfavourable to the prosecution. I am not prepared to draw this inference as there is nothing on the record which would tend to show that these witnesses were withheld for any such reason. It seems to me that the prosecution, as stated, considered their evidence unnecessary and this is in view of the ample evidence on the record as to what had occurred seems to have been a correct view.

Counsel then submitted that there was no mention in the first information report as to Muhammad Amin (P. W. 13) having followed the tonga of the abductors. Now this man admittedly did not go to the police station when the first information report was recorded. He went there in the evening and himself informed the police that he had witnessed the occurrence whereupon his

statement was taken down by the Sub-Inspector.

Certain evidence was produced on behalf of the appellant Abdullah to show that there was a love affair or intimacy between him and Mt. Ghulam Fatima. She denied this, but I agree with the learned Magistrate that there was something of this nature between the two and it is possible that this supplied the motive for the abduction. In my opinion the evidence for the prosecution is clear and convincing. The witnesses particularly Mohammad Amin (P. W. 13) seem to be entirely disinterested and have no motive whatever for falsely implicating the appellants. Moreover three of the appellants were actually captured when trying to escape from their pursuers, and the evidence in support of the alibis of Abdullah, Barkat and Allah Ditta son of Jamal Din is utterly worthless and has been rightly rejected by the learned Magistrate. The fact that Mt. Ghulam Fatima also bore certain injuries on her person supports the case for the prosecution as these injuries could only have been caused owing to her being forcibly seized and partly to her being pushed out of the tonga, when her abductors were overtaken.

Finally learned counsel for the appellants submitted that there was nothing to show with what intention Mt. Ghulam Fatima had been abducted and as abduction per se was not punishable the appellants were not guilty of having committed any offence. Obviously it is practically impossible for the prosecution in cases of this nature to establish affirmatively the intention with which a woman is kidnapped or abducted, but in my opinion it is a fair and justifiable presumption that when any woman is kidnapped or abducted, it is undoubtedly with one or other of the intents specified in S. 366. I really cannot see what other intention the abductor or abductors of a woman can have in a case of this nature except that she should be forced to marry some person against her will or forced or seduced to illicit intercourse. In the present case, as has been shown above, this presumption is strengthened by the fact that there was an intimacy between Mt. Ghulam Fatima and the appellant Abdullah.

I fully agree with the view taken by Moti Sagar, J. in *Chandu Singh v. Em-*

peror (1), that the intent with which a woman is abducted or kidnapped is more or less a matter of inference though there may be cases where the matter is capable of direct proof, but very generally one has to infer from the circumstances of the case and the subsequent conduct of the accused as to what was the intention with which the kidnapping or abduction had been brought about. As pointed out by the learned Judge in that case the circumstances though incriminating to outward appearances may yet be capable of a perfectly good and reasonable explanation and may be fully compatible with the innocence of the accused. In such cases it would be for the accused to explain away the incriminating circumstances and to prove that he or they had no improper or sinister object in view. In the present case no such explanation is forthcoming.

For the above reasons I would hold that the prosecution established their case and there is no doubt that, except the appellant Allah Ditta son of Imam Din, the others have been rightly found guilty of having abducted Mt. Ghulam Fatima with one or other of the intents mentioned in S. 366, I. P. C. I am not satisfied that the appellant Allah Ditta son of Imam Din was a party to this affair at its inception. His tonga was undoubtedly used for the purpose of taking away the girl, but there is nothing in the evidence to show that he conspired with or abetted the other appellants in the matter. He was clearly an accessory after the fact according to English Law but as such is not punishable under the Indian Law. I would, therefore, give him the benefit of the doubt and hold that his guilt has not been proved, and accepting the appeal so far as he is concerned, I set aside his conviction and sentence, acquit him and direct that he be set at liberty forthwith. I affirm the conviction of the other four appellants, but taking into consideration all the attendant circumstances I would reduce the sentence under S. 366, I. P. C., in the case of each of these four appellants to three years' rigorous imprisonment. The appeal is accepted pro tanto in their cases.

R.M./R.K.

Order accordingly.

1930 Cr. Cases 174 (Lahore)

TEK CHAND, J.

Faqir Singh—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Misc. Petn. No. 284 of 1929, Decided on 14th December 1929 for transfer of case from Court of First Class Magistrate, Lahore, to some other Court.

Criminal P. C., S. 526—Under S. 342 Court alone has power to examine accused—Magistrate acting as mouthpiece of Public Prosecutor in conducting examination of accused—It is valid ground for transfer of case from his Court.

The Court alone is authorized to examine the accused person and the counsel for the complainant or the prosecution should not be allowed to take part in the examination. Under S. 342 the questions should not be put so as to cross-examine the accused or with a view to elicit from him statements which would lead to his conviction. Further it is of the utmost importance in a criminal case that the trying Magistrate should keep himself at arm's length from both sides and should try to hold the scales even between them. He should not conduct the proceedings in such a manner as to give an impression that he is being guided by one side or the other. Where a Magistrate does not discharge these statutory functions under S. 342 in a judicial manner and acts as the mouthpiece of the Public Prosecutor in conducting the examination of the accused that is a valid ground for the transfer of the case from his Court. [P 175 C 1,2]

Abdul Rashid—for the Crown.

Order.—This is an application for transfer of a criminal case pending against the petitioner in the Court of Mr. Mehdi Hussain, Magistrate, First Class, Lahore. The grounds on which the application is based are set out in detail in the affidavit of the petitioner dated 7th October 1929. I have heard the petitioner and counsel for the Crown at length and have also examined the relevant portions of the record, and agree with Mr. Abdul Rashid that none of these grounds, except that mentioned in Cl. (b), para. 3 (if true) can justify a transfer of the case at this state. The only question for determination, therefore, is whether the allegations in this clause are correct. The learned Additional Government Advocate denies that the trial Magistrate or the Public Prosecutor acted in the manner alleged, and in support of his contention he has read to me an extract from a letter dated 13th December 1929, received by him from the Public Prosecutor. In this

letter the Public Prosecutor admits, however, that his "memory of the events in this case is not very clear." His version of the incident, recorded after seven months, cannot, therefore, be a safe guide in this respect.

It is, however, not necessary to investigate the matter further, as the application presented by the petitioner before the Magistrate on 28th May 1929, and the Magistrate's remarks thereon made on the same day leave no doubt as to the real facts. In para. 3 of this application the petitioner stated :

"That after the record of the evidence the Court asked Public Prosecutor to frame questions for examination of the applicant and his co-accused. The Public Prosecutor gave typed questions to Court and asked the Court to read out these questions and ask the applicant and his co-accused to give answers. Kindly put this application on the record and also permit me to know whether the questions given to the Court by Public Prosecutor in original are in existence or not. The Court has not placed the same on record so far. On this the Magistrate's note is "Correct." The Public Prosecutor had been asked to argue and make suggestions, and the questions after consideration and reading the file were put by me."

Now if before examining the accused under S. 342, Criminal P. C. the Magistrate really asked the Public Prosecutor to frame the questions and the latter gave to the Magistrate a typed paper containing the suggested questions and the Magistrate conducted the examination on these questions, he certainly acted in a manner which was likely to raise a reasonable apprehension in the mind of the accused that they would not have a fair trial in his Court. It is hardly necessary to point out that the Court alone is authorised to examine the accused person and the counsel for the complainant or the prosecution should not be allowed to take part in the examination. The law allows the Court and not the complainant to put questions to the accused and the object with which the examination is to be conducted, is clearly stated in the statute viz. :

"to enable the accused to explain any circumstances appearing in the evidence against him."

The questions should not be put so as to cross-examine the accused or with a view to elicit from him statements which would lead to his conviction.

The form of some of the questions put to the petitioner in this case is clearly open to objection, and it seems highly

likely that they were taken from the typed paper handed over to the Magistrate by the Public Prosecutor. It is of the utmost importance in a criminal case that the trying Magistrate should keep himself at arm's length from both sides and should try to hold the scales even between them. He should not conduct the proceedings in such a manner as to give an impression that he is being guided by one side or the other.

I am of opinion, that the action of the learned Magistrate in not discharging his statutory functions under S. 342, Criminal P. C., in a judicial manner, and in acting as the mere mouthpiece of the Public Prosecutor in conducting the examination of the accused, is a valid ground for the transfer of the case from his Court. I therefore, withdraw the case from the file of Mr. Mehdi Hussain and direct the District Magistrate to try it himself or remit it to another Magistrate of competent jurisdiction at Lahore.

The petitioner has stated before me that he does not want a de novo trial, but will continue the proceedings from the stage at which they were in Mr. Mehdi Hussain's Court, when the record was sent for by this Court. There seems to have been some dispute in the Magistrate's Court as to the prosecution witnesses who were to be re-summoned for cross-examination. The petitioner has stated before me that he wants the following six persons only to be re-summoned for this purpose :

- (1) Jaikishan Das.
- (2) Ram Nath.
- (3) Dwarka Das.
- (4) Mohammad Din.
- (5) Ali Mohammad, and
- (6) Diwan Chand.

The learned Additional Government Advocate has no objection to this being done. The Magistrate, who will now deal with the case will resubmit these witnesses, as also the witnesses for the defence, at an early date and proceed with the hearing from day to day.

P.N./R.K.

Order accordingly.

1930 Cr. Cases 176

• (Lahore)

JAI LAL, J.

Gowardhan Das Kapur—Complainant
—Petitioner.

v.

Abbas Ali—Accused—Respondent.

Criminal Misc. Petn. No. 252 of 1929,
Decided on 27th November 1929, for re-
transfer of case to First Class Magis-
trate, Lahore.

(a) Criminal P. C., S. 526—Proper appli-
cation for transfer should be insisted upon
when allegations are made against trial
Magistrate.

It is no doubt true that a District Judge can transfer a case *suo motu*, but when action is taken at the instance of a party, a proper application should as a rule be insisted upon, specially when allegations are made against the trial Magistrate. The functions of the District Magistrate under S. 528 which empowers him to transfer cases from the Courts of the Magistrates subordinate to him are judicial functions and must be exercised with due observance of the procedure and formalities which have to be followed in all other judicial matters. He must be moved by a proper application openly presented in the Court by the aggrieved party personally or through a person duly authorized by him for that purpose. Sufficient ground for transfer must be shown and notice to the other side must be issued before order for transfer is passed. The Magistrate has also to record his reasons for transferring the case. [P 177 C 1, 2]

(b) Criminal P. C., S. 526—Condition of not trying *de novo* cannot be imposed by order of transfer—Criminal P. C., S. 350 (1).

The District Magistrate cannot impose, without the consent of the accused while transferring a case, a condition that there would be no *de novo* trial, the right being recognized by S. 350 (1). [P 178 C 1]

(c) Criminal P. C., S. 528—Case should not be transferred merely on basis of general allegations regarding communal feeling.

Courts should not be influenced by general allegations regarding the so called communal feelings and cases should not be transferred on basis of such allegations for an intolerable position would arise if it were open to any accused person in a case of a communal or quasi communal nature to obtain a transfer of a case from the Court of a Hindu Magistrate merely because he, the accused, was Mohammedan or vice versa.: *A. I. R. 1928 Nag. 21, Foll.* [P 178 C 2]

Bishen Nath—for Petitioner.

Order.—It is necessary to set out at some length the facts of this case.

The petitioner Gowardhan Das is complainant in a case under Ss. 323, 509 and 341, I. P. C. The respondent, the accused, is Abbas Ali Shah, constable, who on 10th May 1929, was posted on traffic duty. It appears that Gowardhan Das was proceeding on a bicycle from the direction of the Shahalmi Gate in

Lahore where Abbas Ali Shah was on duty, and apparently there was some dispute between the two, in consequence of which it was alleged by the constable that Gowardhan Das had disobeyed his signal. The latter was consequently sent up for trial under the Motor Vehicles Act but was let off with a warning by a Magistrate. In the meantime Gowardhan Das filed a complaint under the sections mentioned above against Abbas Ali Shah in connexion with the same incident. This case was being tried by Rai Sahib Nathu Ram, a Magistrate of the First Class, Lahore, who, after recording the complainant's evidence, framed a charge against the accused. After the charge had been framed the accused, Abbas Ali Shah, made an application to the Senior Superintendent of Police, Lahore, on 22nd August 1929, requesting him to move the District Magistrate to transfer the case to some other Court. The application, it may be mentioned, has the following heading :

To

The District Magistrate, Lahore.

Through

The Senior Superintendent of Police,
Lahore,

but from the prayer it appears that it was really meant for the Senior Superintendent of Police. In this application after stating the previous history of the case, as already recited above, the constable stated that he doubted that justice would be done to him by the Court trying the case and in support of this assertion he mentioned the following facts:

“(1) The general impression which the learned Magistrate holds, in respect of which he has expressed his opinion to some persons is almost against the officials deputed to traffic duty.

“(2) The complainant Gowardhan Das is closely related to the owner of house in which the learned Magistrate resides. Although this fact is not affecting the learned Magistrate, yet it is a natural consequence of every day events that the story told by the complainant's party, who are acquainted with the Magistrate, would have much weight, more so than the statement put up in my defence.”

The Senior Superintendent of Police on 23rd August 1929, that is, the next day, sent the application to the District Magistrate with the following note:

“I have made inquiries into this case and I understand that the accused constable believes that he will not get a fair trial in this Court. I would prefer not to go into details but would request that the case be, if possible, transferred to the Court of the Additional District Magistrate.”

Thereupon the District Magistrate passed the following order on 24th August 1929 :

"I imagine the Police Constable's fears to be quite without foundation. But in the circumstances and on the understanding that de novo trial is not asked for I will transfer the case to Additional District Magistrate,"

and actually sent the case to the Additional District Magistrate on 26th August 1929, with the following order :

"See application attached. Will Additional District Magistrate decide this case please ?"

The complainant thereupon made an application to the District Magistrate, on 23rd September 1929, praying that the case be transferred to some other Magistrate than the Additional District Magistrate on the main ground that the procedure adopted by the District Magistrate in transferring the case from the Court of Rai Sahib Nathu Ram was illegal and that as the Additional District Magistrate was suggested by the Senior Superintendent of Police as the proper Magistrate to try the case, the complainant did not expect that there would be an impartial trial in his Court. The District Magistrate on 2nd of October 1929, passed the following order on this application :

"The applicant is the complainant. I can think no more suitable Court to try a case between a Khatri and a Muhammadau than Mr. Lewis who is a Christian. The apprehension that justice will not be done must be unjustifiable. Refused."

This is an application by the complainant for revision of the order of the District Magistrate and for transfer of the case from the Court of the Additional District Magistrate of Lahore.

While I have absolutely no reason to hold that the Additional District Magistrate will not try the case impartially and fairly, I consider that for reason that I will presently state this application for revision must be accepted and the case sent back for trial to Rai Sahib Nathu Ram, Magistrate, in whose Court it was originally pending when it was transferred by the District Magistrate by his order of 24th August 1929.

In the first instance, there was no proper application before the District Magistrate for the transfer of the case. It is no doubt true that a District Magistrate can transfer a case suo moto, but when action is taken at the instance of a party a proper application should as a rule be insisted upon specially when al-

legations are made against the trial Magistrate. The Senior Superintendent of Police, Lahore, therefore, had no locus standi to move the District Magistrate to transfer the case in the manner described above as the functions of the District Magistrate under S. 528, Criminal P. C., which empowers him to transfer cases from the Courts of the Magistrates subordinate to him, are judicial functions and must consequently be exercised with due observance of the procedure and formalities which have to be followed in all other judicial matters. He must be moved by a proper application openly presented in Court by the aggrieved party personally or through a person duly authorised by him for the purpose. In the present case there was no such application and it does not appear that the constable ever appeared before the District Magistrate.

Next, before the District Magistrate could pass an order transferring the case it was necessary for him to issue notice to the other side. This was not done in the present case. Though there is no express statutory provision making such notice necessary, it has been repeatedly held by this Court that ordinarily such notice should be given by the District Magistrate and that his proceedings are liable to be set aside by this Court in the absence of a notice. This was pre-eminently a case in which notice should have been given specially in view of the allegations though vague made against the Magistrate.

Thirdly, in my opinion, there was no sufficient ground disclosed in the application made by Abbas Ali Shah to the Senior Superintendent of Police for transfer of the case nor was the application supported by any affidavit, testifying to the correctness of the allegations made therein. Such an allegation that a :

"general impression which the learned Magistrate holds and in respect of which he has expressed his opinion to some persons,"

who are not even mentioned, is too vague a statement to be taken notice of by any judicial tribunal.

With regard to the next allegation the constable himself states that the fact that the complainant Gowardhan Das is closely related to the owner of the house in which the Magistrate resides

"is not affecting" the latter. In the first instance, there is no proof on the record that the Magistrate is residing in a house which is owned by a person who is closely related to the complainant Gowardhan Das. Even if it were so, that is no ground for the transfer of the case from his Court. The note by the Senior Superintendent of Police while making no definite allegation against the Magistrate appears to contain a suggestion of bias, when he says that he would prefer not to go into details, but in the absence of such details the District Magistrate was not justified in entertaining the suggestion for transfer (assuming it was properly made) and in any case the Magistrate should have been given an opportunity to explain them before the case could be transferred from his Court. This was not done in the present case.

Moreover sub-S. (5), S. 528, Criminal P. C., makes it incumbent on the District Magistrate to record his reasons before transferring the case. In this case not only no such reasons were recorded but those mentioned were reasons for not transferring the case.

With regard to the understanding that "a de novo trial was not asked for" it is to be noted that the accused was not present before the District Magistrate when the order was passed and there is no record that he agreed to this condition and it is doubtful whether the District Magistrate could impose such a condition either with or without the assent of the accused whose right to claim a de novo trial is recognized by proviso (a) to S. 350 (1), Criminal P. C.

When by means of an application for transfer of the case these irregularities were brought to his notice by the complainant the District Magistrate recorded an order which I feel compelled to disapprove. Neither party had alleged that there was a communal question involved in the case, nor do the circumstances of the case show that there was any reason to hold that the Magistrate was being influenced by any communal considerations. It seems therefore that the learned District Magistrate had no justification for making the remarks which he made on 2nd October 1929. I have no reason to think that the Magistrates in Lahore, both Hindus and Muhammadans, are not above communal

prejudices when deciding cases in which the parties belong to the different religions, otherwise they would be unfit to exercise their magisterial functions.

As remarked by Agha Haidar, J., in *Gyan Singh v. Crown* (Case No. 252 of 1927) :

"If the Courts were to be influenced by general allegations regarding the so called communal feelings, and transferred cases on the basis of such allegations, the result would be that the whole system of administration of justice upon which the fabric of the civilised society rests would be paralysed"

and :

"the party who pleads prejudice and bias in a particular Judge of Magistrate must prove affirmatively that such bias and prejudice do as a matter of fact exist."

In *Pandurang Krishna Deotale v. Emperor* (1) (*Misc. Petition No. 29 of 1927*) Mr. Findlay, Judicial Commissioner, Nagpur, observed that :

"an intolerable position would arise, if it were to be open to any accused person in a case of a communal or quasi communal nature to obtain a transfer of a case from the Court of a Hindu Magistrate merely because he, the accused was Muhammadan or vice versa."

With the above remarks I entirely agree and would add that in this case there was no question of a case of even a quasi communal nature and further that if cases were to be transferred from the Court of the Magistrates on such vague allegations as were made in this case and communicated to District Magistrates in such illegal manner, it would become impossible for the Magistrates to work with independence and sense of security from unnecessary interference which are so essential for the discharge of their judicial functions fairly and impartially. And therefore I cannot approve of the manner in which and of the reasons for which a transfer of this case was secured from the Court of Rai Sahib Nath Ram.

To sum up, there was no application before the District Magistrate made by a competent person which was, as I have stated above, necessary in the circumstances of this case, nor was an application made in open Court, as the law recognises only applications made in open Court, no definite allegations were made against the Magistrate nor were the allegations that were actually made supported by an affidavit; the District Magistrate did not give the requisite notice to the other party and

(1) A. I. R. 1928 Nag. 21.

did not record any reasons in support of his order of transfer as he was required to do and when all these irregularities were brought to his notice, he sought to support his order on grounds which were both improper and illegal.

The proper order that under the circumstances I must pass is to set aside the orders of the District Magistrate dated 24th August 1929 and 2nd October 1929, and to send the case back to Rai Sahib Nathu Ram, Magistrate of the First Class, with directions to resume the case from the stage at which it was transferred from his Court. I order accordingly.

R.M./R.K.

Order set aside.

1930 Cr. Cases 179

(Lahore)

TEK CHAND AND FFORDE, JJ.

Khanun—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 711 of 1929, Decided on 23rd October 1929, against order of Sess.-Judge, Shahpur, D/- 13th July 1929.

(a) Criminal P. C., S. 164—Confession can be recorded on holiday and in any place.

There is no provision of law which forbids a Magistrate from recording a confession on a Sunday or any other holiday and at a place other than the Court-House. [P 180 C 1]

(b) Penal Code, S. 302—Murder of wife who continues intimacy with paramour in spite of repeated reprimands—Case held to be fit one for lesser sentence than death.

The deceased was seen talking to her paramour *L.* who had been following her from place to place, and when reprimanded by the accused she replied that she did not like to live with him but would again elope with *L.* She persisted in this statement and repeated it shortly before occurrence which resulted in accused strangulating her to death.

Held: that the accused was guilty of murder but under the circumstances case was fit one for lesser penalty than death. [P 180 C 2]

M. L. Puri and *Shanti Narain Sawhney*—for Appellant

J. M. Mackay—for the Crown.

Tek Chand, J.—Khanu, son of Alu, Kalera, of Derwal in the Shahpur District, has been convicted under S. 302, I. P. C., of the murder of his wife Mt. Sardaran, and has been sentenced to death. He has appealed through Mr. M. L. Puri, and the record is also before us under S. 374, Criminal P. C., for confirmation of the sentence.

The case for the prosecution is that,

before her marriage with the appellant, Mt. Sardaran had eloped twice with one *Lalu Saggu*; that, after the marriage, she continued her intimacy with him and that he followed her wherever she went. On the day of the occurrence, the appellant and the other members of his family were encamped in Chak No. 107 S. B., and in the afternoon the appellant saw *Lalu* talking to Mt. Sardaran. He reprimanded her and advised her to mend her ways, but she replied that she would again elope with *Lalu*. Shortly after, the appellant and Mt. Sardaran went from the dera to bring fodder and on the way the appellant again advised her to give up her connexion with *Lalu Saggu*, but she did not agree. When they had gone about a mile from the dera she told him that she did not like to live with him. This enraged the appellant and he wrapped her dopatta round her neck and twisted it. She struggled for a while but he gave a violent twist to the dopatta and thereupon she fell down and died on the spot. On this the appellant took out a chhuri from his loin cloth and indicted an incised wound 7" long on her throat. Leaving the dead body on the spot, the appellant went back to his dera and returned with a bullock and a sack. He stripped the body of the dopatta and other clothes and ornaments and placed it in one of the pockets of the sack. He put a number of stones in the other pocket, and loading the sack on the bullock drove it across the jungle and threw it in a deserted well in the square of Subedar Sewan Singh (P. W. 4). On 9th March 1929, Sewa Singh servant of the Subedar, noticed sack floating in the well and informed his master, who communicated the information, to the police at Sargodha.

There is no direct evidence of the crime and the case against the appellant rests principally on the confession, which he made under S. 164, Criminal P. C. before Chaudhri Mushtaq Ahmad, Magistrate, First Class, Sargodha, on 17th March 1929. He retracted this confession before the committing Magistrate and stated that he had been tortured by the police to make it. He repeated this allegation before the learned Sessions Judge. There is, however, not a tittle of evidence on the record to suggest that the police coerced

or tortured the appellant to make the statement or that they held out any promise, inducement or threat to him. The confession appears to have been properly recorded in strict accordance with law and the evidence of Chaudhri Mushtaq Ahmad (P. W. 6), shows that he had satisfied himself that it was being freely and voluntarily made. Mr. M. L. Puri has laid great stress on the circumstances that the confession was recorded on a Sunday and in the office of the Central Co-operative Bank, Sargodha, where the Magistrate happened to be at the time, and not in the Court-House. He is, however, unable to point out any provision of the law which forbids a Magistrate from recording a confession on a Sunday or any other holiday and at a place other than the Court-House.

The narrative of events as given in the confession is very convincing and there seems to be no doubt as to its genuineness. It is true that the appellant retracted it at the trial, but we find it amply corroborated on the record. After having made the confession the appellant took the Magistrate, Chaudhri Mushtaq Ahmad to the spot in the jungle where Mt. Sardaran had been killed and picked up a number of blood-stained stones. This spot was not known to the police before. He then led the Magistrate along the zig zag route which he had taken and pointed out the dal in which the dead body had been thrown.

At his instance the investigating party proceeded to his original home in Mauza Drawi, which is situate at a distance of 50 miles from the scene of the occurrence, and then he produced from an earthen vessel the dopatta, the kurta, the loin cloth and the ornaments which Mt. Sardaran was wearing at the time of her death, and also the chhuri with which her throat had been cut. Of these the dopatta and the lungi have been proved to have been stained with human blood.

Further corroboration is afforded by the statement of Muhammad (P. W. 7) that on the evening in question he had seen the appellants and Mt. Sardaran going together with sickles in their hands to the jungle for cutting fodder that after sunset the appellant returned alone, and that when it had become

dark he went with a bullock in the direction of the jungle.

After giving the case my best consideration I am of opinion, that it has been fully established that Mt. Sardaran was killed by the appellant in the manner described in the confession. I have no doubt that in wrapping the dopatta round her neck and twisting it with great force the appellant intended to inflict such bodily injury on her as he knew was likely to cause death and that his act clearly amounts to murder as defined in the Indian Penal Code. Mr. Puri has stressed the point that in the confession he stated that in wrapping the dopatta round her neck and pulling it he merely intended to threaten her and not to kill her. His intention, however, is to be judged not by what he now says, but by the nature of the act which he himself has described in detail in his confession. It is also significant that after she had fallen down and died, he at once proceeded to cut her throat with a big knife which he had taken with him. In my judgment the appellant has been rightly held guilty of the offence of murder and I would uphold his conviction under S. 302, I. P. C.

As regards the sentence, I am of opinion, that it is a fit case in which the lesser penalty should be imposed. The deceased was seen talking to her paramour Lalu, who had been following her from place to place, and when reprimanded by the appellant she replied that she did not like to live with him but would again elope with Lalu. She persisted in this statement and repeated it shortly before occurrence.

I would, therefore, accept the appeal and while affirming the conviction would reduce the sentence to transportation for life.

Fforde, J.—I concur.

V.B./R.K.

Sentence reduced.

1930 Cr. Cases 180 (Lahore)

ZAFAR ALI AND BHIDE, JJ,
Narainjan Singh—Convict-Appellant.
v.

Emperor—Opposite Party.

Criminal Appeal No. 186 of 1929, Decided on 4th November 1929, against order of Sess. Judge, Lahore, D/- 9th August 1929.

Penal Code, S. 304 (1)—Deceased wife found with paramour—Husband trying to seize paramour struck with knife by paramour who ran away—Wife preventing husband from seizing him—Husband consequently striking wife with knife—Husband held guilty not of murder but under S. 304.

The deceased who was the wife of the accused was unchaste. One night when he came home from his field at the last watch of night he found his wife and her paramour sleeping on the same cot but hearing the footstep the paramour got up and as the accused tried to seize him he struck him with knife and then escaped by jumping over the wall but dropped the knife which the accused picked up and wanted to run after him when the deceased grappled with him to prevent him from doing so. The accused therefore attacked her with knife and inflicted many injuries. The accused bore incised wounds on palm surface of the right little finger which might have been the result of blow given by the paramour and was seen and identified while running away by many of the prosecution witnesses.

Held: that the accused acted under grave and sudden provocation. [P 181 C 1]

Nand Lal—for Appellant.

D. R. Sawhney—for the Crown.

Judgment.—The appellant Narainjan Singh has been convicted by the Additional Sessions Judge of Lahore of the murder of his wife Mt. Indar Kaur. and has been sentenced to death.

The appellant admitted that it was he who attacked the deceased at the last watch of the fateful night and inflicted upon her with a knife the injuries to which she succumbed, but he pleaded sudden and grave provocation. All the four assessors accepted this plea, but the learned Additional Sessions Judge did not. We find ample support for it in the prosecution evidence itself.

It is common ground that the deceased was unchaste and that the appellant came home from his field at the last watch of the night. His version was that he found his wife and her paramour Wasakha Singh sleeping on the same cot, but hearing his footsteps Wasakha Singh got up. As the appellant tried to seize him he struck him with a knife and then escaped by jumping over the wall but dropped the knife. The appellant picked it up and wanted to run after him when the deceased grappled with him to prevent him from doing so. It was then that he attacked her with the knife and inflicted many injuries. He bore an incised wound on the palm surface of the right little finger which might have been the result of the blow given by Wasakha Singh.

Among the persons who were attracted to the spot were Surain Singh (P. W. 9), Phulla Singh (P.W. 10) and Teja Singh (P.W. 11). All the three deposed that the woman was reputed to be unchaste and was suspected of having illicit intimacy with Wasakha Singh. Surain Singh stated:

"People were saying that Wasakha Singh, had run away."

Phulla Singh stated:

"I saw a man running away who appeared to be Wasakha Singh. The accused was saying that he had come from outside and had seen his wife and Wasakha Singh sleeping together on the same cot and for this reason he had stabbed her and Wasakha Singh had escaped. He had also stated that the woman had caught hold of him when he was going to pursue Wasakha Singh, and had thus enabled Wasakha Singh to escape."

Teja Singh stated:

"the people who were assembled there were saying that Wasakha Singh was caught sleeping with the woman and he had run away. The accused had stated that he had come from his fields at night when he saw his wife and Wasakha Singh sleeping together. On seeing him Wasakha Singh ran away. He wished to pursue him but his wife grappled with him and thus enabled Wasakha Singh to escape."

The above evidence bears out the appellant's version and shows that he acted under a grave and sudden provocation. We, therefore, accept the appeal and alter the conviction to one under S. 304, Part 1, Penal Code and sentence the appellant to rigorous imprisonment for three years.

V.P., R.K.

Sentence reduced.

1930 Cr. Cases 181

(Lahore)

ZAFAR ALI, J.

Hafizullah and others—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Misc. Petn. No. 264 of 1929, Decided on 13th December 1929, for transfer of the case from the Court of Magistrate First Class, Lahore, to some other Court.

Criminal P. C., S. 526—Where cross-examination by Magistrate on question suggested by Public Prosecutor after defence cross-examination arouses suspicion in mind of accused—Case should be transferred.

Where the Magistrate cross-examines a prosecution witness (after he is cross-examined by the defence) on question suggested by the Public Prosecutor and this arouses a reasonable apprehension in the mind of the accused that the Magistrate is taking the side of the prosecution, there is sufficient cause for transferring

the case to another Magistrate though not in another district. [P 182 C 1]

Ghulam Mohi-ud-Din and J. G. Sethi
—for Petitioners.

R. C. Soni—for the Crown.

Order.—Of all the allegations made in support of this application under S. 526, Criminal P. C., for the transfer of the petitioners' case to some other district, the most serious are those contained in para. 6 of the affidavit filed with the application. It appears that the learned Magistrate who is trying the case undertook to cross-examine a prosecution witness (after he had been cross-examined by the defence) on question suggested by the Public Prosecutor and thus cross-examined the witness at considerable length. This has quite reasonably roused an apprehension in the mind of the accused that the Magistrate is taking the side of the prosecution. I therefore consider it necessary to accept this petition for transferring the case to another Magistrate, though I find no sufficient ground for transferring it to another district. I order accordingly, that the case be transferred to Mirza Mehdi Hussain's file who is one of the senior Magistrates here.

R.M./R.K. *Order accordingly.*

1930 Cr. Cases 182

(Allahabad)

YOUNG AND SEN, JJ.

Emperor

v.

Kashi Nath and another — Respondents.

Criminal Appeal No. 520 of 1929, Decided on 10th September 1929, from an order of Addl. Sess. Judge, Cawnpore, D/ 2nd April 1929.

(a) U. P. Excise Act, S. 60 (a) — Where cocaine and weighing machines and packing material is found in a small house by one of joint brothers both must be supposed to have knowledge of dealings with cocaine.

Where in a small common house occupied by two brothers belonging to a joint Hindu family, and running a common business, there are discovered not only an enormous quantity of cocaine but all the necessary weighing machines and packing material to deal with it, it is idle to suggest that both brothers would not know of the dealings in cocaine. One brother could not possibly carry on business in cocaine without knowledge of the other when they live in small confined rooms. [P 183 C 1]

(b) U. P. Excise Act, S. 60—Onus is on persons in possession of cocaine to prove satisfactory reason.

When once the possession of cocaine with

the accused is found as a fact the onus is upon them to prove that they had sufficient reasons for being in possession of cocaine. [P 183 C 1,2]

U. S. Bajpai—for the Crown.

Saila Nath Mukherji — for Respondents.

Judgment.—This is the appeal on behalf of the Local Government. Two men, Kashi Nath and Chunni Lal, were acquitted on appeal by the learned Sessions Judge of Cawnpore of a charge of being in possession of cocaine, an excisable article, contrary to S. 60 (a), United Provinces Excise Act. In this case both the Magistrate who originally tried the case and the learned Sessions Judge were in entire agreement upon the findings of fact; but the learned Sessions Judge came to the conclusion that it was his duty to set aside the judgment of the learned Magistrate on this ground:

"I have no doubt that either both the brothers or one of them deals in cocaine, but it cannot be said that necessarily both the brothers are dealing and if one of the brothers is dealing in cocaine which of them is so dealing."

The facts are that the two accused are brothers. They are members of a joint Hindu family, and they mess together and carry on a common business. It is admitted, at any rate, that the accused occupy a portion of a house, called baithak, which consists of a room with a tin shed upon it, from which cocaine was recovered, the lower room being rented out to some other person. Opposite, on the other side of the lane, is the house of the aunt-in-law of Kashi Nath, and it is alleged by the prosecution that the dalan and kothri of that house are also in the occupation of the two accused. On 30th June 1928, on information received, the police raided the house of Kamal Devi and the baithak. They took with them search witnesses. At the time of the search the two accused were not present in either of the houses. In the dalan of the house of Kamal Devi were discovered six small packages of cocaine in a tin canister, 5 or 6 rattis, a candle and sealing wax. In the kothri which was a small room and was found locked up, there was a locked box. Both the room and the box were broken open, and in the box were discovered 47 packages of cocaine, all sealed up in one envelope in all some 73 totals of cocaine was discovered. In a niche in the kothri

was discovered a weighing scale with white powder upon it. In the baithak across the road, the staircase leading to the apartment was found locked, and the lock was broken. In the baithak a steel box was discovered, which was also locked. This was also broken open, and in it were discovered one packet of cocaine, a knife and some sealing wax. There were also in this baithak three weighing scales and some sheets of wax paper.

In our view the prosecution have satisfactorily proved that the dalan and the kothri were occupied by the two accused. But, even if we did not so find, it is at any rate admitted that the baithak was occupied by the accused. It is not suggested in this case that the cocaine had been planted by the police. Indeed, it was idle to allege that such a large quantity of cocaine could be planted. If the prosecution evidence is true that in a locked up steel box in the baithak there was a package of cocaine, on this evidence alone a conviction would be correct. The facts in this case are overwhelmingly against the accused. The only point which we have to consider is the one upon which the learned Sessions Judge acquitted the accused.

It seems to us quite clear that, where in a small common house occupied by two brothers belonging to a joint Hindu family, and running a common business, there are discovered not only an enormous quantity of cocaine but all the necessary weighing machines and packing material to deal with it, it is idle to suggest that both brothers would not know of the dealings in cocaine. One brother could not possibly carry on business of this size without the knowledge of the other living as they did in small confined rooms. This is not the case of a large house, with one brother's apartment separate from the other. We are satisfied that the evidence can point only to the fact that both brothers were implicated in this cocaine business. No other finding, in our view, is possible. We are, therefore, of opinion that this cocaine was in the possession of both of them within the meaning of S. 60 (a), United Provinces Excise Act. Having found this as a fact, the onus cast by the Act upon the brothers is to prove that they had satisfactory reason for

being in possession of the cocaine. No private person could have a satisfactory reason for keeping in possession no less than 73 tolas of cocaine. Therefore, no attempt has been made to provide a satisfactory reason. No satisfactory reason being provided, the accused are both guilty of the offence with which they are charged. We set aside the acquittal order of the learned Sessions Judge. We convict the accused. The only question that remains is one of sentence.

It is to be noted that the learned Magistrate inflicted the maximum sentence upon the accused, namely, two years' rigorous imprisonment and a fine of one thousand rupees each. Although we agree that the crime is an extremely serious one, we think that the sentence is excessive. The accused have already been punished to the extent of Rs. 2,000 the value of the cocaine discovered in their possession. Cocaine to that value is in the possession of the Government, and that expenditure the accused will never recover. The evidence in this case is that the accused started this business only recently. We are also informed that one of the houses of the accused is mortgaged. There is at least no evidence that they have made any profit out of this business. Under all the circumstances of the case, we consider that a sentence of one year's rigorous imprisonment and a fine of one hundred rupees upon each of the accused will be sufficient to meet the ends of justice. We do not think that this is a case in which the accused should be bound over for good behaviour after they have served out their terms of imprisonment in this case.

R.M./R.K.

Order accordingly.

1930 Cr. Cases 183

(Rangoon)

OTTER, J.

Ah Phone—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 151-B of 1929, Decided on 13th May 1929, against order of Sub-Divisional (Special Power) Magistrate, Henzada, in Criminal Misc. No. 35 of 1929.

Criminal Trial—Case ready for hearing—Adjournment should not be made simply for

finding out evidence existence of which is entirely problematical.

Cases may arise where evidence is difficult to procure and numerous and lengthy adjournments must be granted, but when once the case is ready for hearing adjournment should not be made in order to search for evidence, the existence of which is entirely problematical.

The Court prosecutor came to the Court intending to base his case upon the evidence of the witnesses called. These witnesses for the prosecution denied that the accused committed the offence for which he was tried. There was no intimation that further evidence was forthcoming but the prosecutor informed the Court that he would file list of additional witnesses later.

Held: that adjournment should not be made in the case and accused should not be kept under shadow of a charge. [P 184 C 2]

Hay—for Applicant.

Judgment.—This case is referred by by the Sessions Judge, Henzada, with a view to setting aside an order made by the Sub-Divisional Magistrate, Henzada. The charge was under S. 64-A, Excise Act, for earning a livelihood by the sale of illicit seinye. On 9th February 1929, the Sub-Divisional Magistrate issued notice to "all prosecution witnesses to appear on 19th February."

On this day the accused Ah Phone appeared with his advocate; no less than four witnesses were examined for the prosecution. All these persons with one exception denied categorically that the accused was reputed to earn his livelihood by selling illicit seinye. A headman, however, did say that he had heard from some one whom he did not remember and whose accuracy he was not able to vouch for that the accused did earn his livelihood in the manner suggested.

According to the diary the Court prosecutor being in this unfortunate position intimated that he would file a further list of additional witnesses later. Thus it is evident that he came to Court intending to base his case upon the evidence of the four witnesses he called. He had already in effect closed his case. In order to allow a roving commission to obtain other evidence the Sub-Divisional Magistrate adjourned the case. This he certainly should not have done. There was no intimation that further evidence was forthcoming, and it is perfectly clear that as the witnesses relied on by the prosecution would not give the evidence expected of them an endeavour was made to put matters right by mak-

ing a search in the hope of finding others who would prove more satisfactory and ordering the accused to attend whenever summoned.

It is true that at a later date three prosecution witnesses are said to have attended the Court, but this application had been filed meanwhile. The facts I have set out above are taken from the diary in the case, but the Sessions Judge was of opinion that the Magistrate on the conclusion of the hearing on 19th February said he would pass orders later in the day, but instead ordered the adjournment I have referred to; and moreover the Sessions Judge also thought that the Court prosecutor was not instructed at all. If so, of course the Magistrate is still more to blame for not disposing of the case once and for all. Cases should not be adjourned sine die for further evidence unless there is some real foundation for believing that such evidence in fact exists; and moreover accused persons should not be kept under the shadow of a charge in circumstances such as these. The action of the Magistrate was certainly oppressive.

There is no doubt of course that cases may arise where evidence is difficult to procure and numerous and lengthy adjournments must be granted, but when once the case is ready for hearing as this case apparently was, adjournments should not be made in order to search for evidence, the existence of which is entirely problematical. One further point must be referred to. I observe that the Magistrate has signed the certificate appearing upon the usual form provided for recording the statement of the accused. The certificate is of course that such statement was taken "in the presence and hearing etc. of the Magistrate." But no statement whatever is recorded. This absurd and irregular action of the Magistrate is on a par with the general conduct of the proceedings which I have already described. The order of 19th February 1929, is set aside and the proceedings instituted on 22nd January 1929 are quashed.

P.N./R.K.

Proceedings quashed.

* 1930 Cr. Cases. 185

(Madras)

CURGENVEN, J.

Public Prosecutor, Madras—Petitioner.

v.

Vedi—Respondent.

Criminal Revn. Case No. 641 of 1929 and Criminal Revn. Petn. No. 584 of 1929, Decided on 10th September 1929, against order of Sess. Judge, Salem Division, D/- 12th March 1929.

* Criminal P. C., S. 162—Before charge is framed copies of witnesses' statements to police should not be granted until stage of cross-examination is reached—If that stage is allowed to go, accused must wait for time of actual cross-examination after charge—Evidence Act, S. 145.

So far as proceedings before charge are concerned, copies of witnesses' statements made to the police should not be granted until the stage of cross examination is reached. If that stage is allowed to go by without application being made, an accused must wait until the witness is again about to be subjected to cross-examination before he can claim grant of a copy. Under S. 145, Evidence Act, until the occasion arises for putting the statement to the witness it cannot legally be used for any purpose whatsoever. It should not therefore be placed in the accused's hands until that stage in the trial has been reached when he may so use it: *A. I. R.* 1926 *Mad.* 188; *A. I. R.* 1929 *Cal.* 182 and *A. I. R.* 1923 *Bom.* 23; *Ref., A. I. R.* 1927 *Cal.* 514, *Doubted.* [P 185 C 2, P 186 C 1]

K. N. Ganpathi for *Public Prosecutor*—for the Crown.

* **Order.**—The Revision Petition is presented by the Public Prosecutor against an order passed by the Sessions Judge of Salem in the following circumstances: In C. C. No. 103 of 1928 on the file of the Sub-Divisional Magistrate of Hosur, certain of the prosecution witnesses had been examined and cross-examined. Application was then made on behalf of the accused under S. 162, Criminal P. C., for copies of the statements which these witnesses had made to the police. The learned Sub-Divisional Magistrate refused the request on the ground that the proper occasion for making it had gone by. The learned Sessions Judge, however, pointed out that the accused would have a right of further cross-examination after the framing of a charge, and in view of this circumstance ruled that copies should be given.

The point not dealt with by the learned Sessions Judge, but raised here, is
1930 Cr. C./24

whether an accused person can apply for, and be granted, such copies (where not already applied for and granted) at any time before the cross-examination after charge takes place, or whether he must wait until at least the witness is in the box and the cross-examination due to begin. Mr. Ganapathi for the learned Public Prosecutor contends that this latter condition must be satisfied.

So far as appears—and I have not had the advantage of hearing the other side—this precise point has not been dealt with in any reported case. In *Peramaswami Rayudu, in re* (1) Krishnan and Wallace, JJ. held that, since the purpose of furnishing the copy is to contradict the witness, the witness must already have made a statement which lays him open to contradiction. Accordingly, application can only be made, and a copy granted when the witness is under cross-examination. This, however, only lays down the procedure so far as the first cross-examination is concerned. The question was answered in very much the same way by a Calcutta Bench in *Madari Sikdar v. Emperor* (2). The learned Judges say not only that the witness must be under cross-examination but that

"the cross-examination must lay the foundation for the suggestion that the evidence given by the witness in Court is contradicted by his statement recorded under S. 161, Criminal P. C. and it is only then that the accused is entitled to ask the Judge to refer to the writing and grant him copies."

I find it not a little difficult to understand how a cross-examining counsel can found a suggestion of contradiction between two statements one of which he has not seen; and this part of the decision has been criticized by Rankin, C. J. in a later case (*Babarali Sardar v. Emperor, A. I. R.* 1929 *Cal.* 182). That case left it open whether the proper time to apply was when the witness appears in the box or when the cross-examination commences. In *Emperor v. Usman* (3), the later stage was deemed to be the appropriate one, having regard to the terms of S. 145, Evidence Act.

Accepting then, that so far as proceedings before charge are concerned, copies should not be granted until the stage of

(1) *A. I. R.* 1926 *Mad.* 188.(2) *A. I. R.* 1927 *Cal.* 514=54 *Cal.* 307.(3) *A. I. R.* 1928 *Bom.* 23=32 *Bom.* 195.

cross-examination is reached, I am inclined to the view that if that stage is allowed to go by without application being made, an accused must wait until the witness is again about to be subjected to cross-examination before he can claim grant of a copy. For, in the first place, until the witness so appears there is no certainty that he will be available for cross-examination, and therefore no certainty that the statement can be used for the only purpose for which the accused may possess it. But further, if the law requires that grant of the copy for use in the original cross-examination should be contingent upon that cross-examination being due to begin, the same principle would seem to apply to cross-examination after charge. Under S. 145, Evidence Act, if it is intended to contradict a witness by a writing :

"his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."

Until the occasion arises for putting the statement to the witness it cannot legally be used for any purpose whatever; and I see no reason why it should be placed in the accused's hands until that stage in the trial has been reached when he may so use it.

Whether adherence to this rule would give rise to inconvenience in practice is scarcely a relevant consideration if it is the correct rule. Equal inconvenience, if any, would attach to the application of the rule to the earlier cross-examination as to the later. Upon a request for a copy being made, the Court must necessarily afford the accused a reasonable opportunity for obtaining it before he is deprived of the opportunity to cross-examine upon it. But with a little contrivance that ought not to result in serious delay.

I allow the Criminal Revision Petition, set aside the orders of the Sessions Judge and the Sub-Divisional Magistrate and direct the Sub-Divisional Magistrate to proceed in accordance with the above observations.

P.R.S./V.S.

Orders set aside.

1930 Cr. Cases 186

(Madras)

JACKSON, J.

(Annai) Errappa and others—Accused.
v.

Emperor—Opposite Party.

Criminal Revn. Cases Nos. 643 to 646 of 1929, and *Cases Referred Nos. 31 to 34 of 1929, Decided on 4th October 1922 by Sess. Judge, Chittoor Division, D/- 6th August 1929.

(a) Criminal P. C., S. 361—Sub-Ss. (1) and (2) are not mutually exclusive—Translation of English evidence must also be made.

An accused person is often in a much better position than his pleader to follow the drift of the evidence and it is obvious that he ought to be kept informed of what is being said. Where therefore certain witnesses at the original trial give evidence in English, translation of such evidence should be made, for the first two paragraphs of S. 361 are not mutually exclusive: *A. I. R. 1923, Cal. 27, Disc. from.* [P 186C 2]

(b) Criminal P. C., S. 537—S. 537 is wide enough to cover any irregularity and retrial should not be ordered unless there is failure of justice.

Section 537 may be taken to cover any irregularity in the widest sense of that term, provided there has been no failure of justice. The appellate Court ought not to order a retrial in a case where provisions of S. 361 are overlooked without satisfying itself whether or no a failure of justice has been occasioned: *A. I. R. 1927 P. C. 44, Rel. on. 25 Mad. 61, (P. C.) Disc.* [P 187C 1]

Public Prosecutor—for the Crown.

Order.—This is a reference from the learned Sessions Judge of Chittoor. In four appeals the Joint Magistrate of Chandragiri has ordered a retrial of the appellant because certain witnesses at the original trial gave evidence in English and their evidence was not translated to the appellant as required by S. 361, Civil P. C.

The Sub-Divisional Magistrate in my opinion was right in holding that the code lays down that such translation should be made and with all respect I do not agree with the ruling in *Hari Narayan Chandra v. Emperor* (1) that paras. 1 and 2, S. 361 are mutually exclusive. An accused person is often in a much better position than his pleader to follow the drift of the evidence and it is obvious that he ought to be kept informed of what is being said. But the Sub-Divisional Magistrate misdirects himself when he observes that the irregularity cannot be cured under S. 537,

(1) *A. I. R. 1928 Cal. 27.*

Criminal P. C. No doubt after *Subramania Ayyar v. Emperor* (2) an idea prevailed that S. 537, Criminal P. C., did not apply to the mandatory provisions of the code, although there is nothing in the section itself to give it such a restricted shape. But the ruling in *Abdul Rahman v Emperor* (3) has dispelled that idea, and S. 537 may be taken to cover any irregularity in the widest sense of that term, provided there has been no failure of justice. The Sub-Divisional Magistrate ought not to have ordered retrial in those cases without satisfying himself whether or no a failure of justice had been occasioned.

With these observations his order in all four cases is set aside, and he is directed to rehear the appeals.

P.R.S./V.S.

Order set aside.

(2) [1902] 25 Mad. 61 = 28 I. A. 297 = 8 Sar. 160 (P.C.)

(3) A. I. R. 1927 P. C. 11 = 5 Rang. 52 = 54 I. A. 96 (P.C.).

1930 Cr. Cases 187

(Madras)

WALLER AND CORNISH, JJ.

T. M. A. Nathan — Accused — Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 181 of 1929 and Criminal Revn. Potn. No. 184 of 1929, Decided on 6th September 1929, from judgment of Bench Magistrates, Olacamund, D/- 18th October 1928, in Summary Trial No. 610 of 1928.

(a) Criminal P. C., Ss. 265 and 367—Judgment and record must in all cases be signed by all members present—Words “presiding officer of Court” do not show that judgment may be signed only by chairman of Bench as they are compendious description of all classes of judicial officers—All members signing register containing sentence and thus agreeing in judgment—But judgment signed only by Chairman—Omission to sign by all is mere irregularity.

The intention of S. 265 is that by whomsoever the judgment and record may have been written, they shall be signed by all the members present. The words “presiding officer of the Court” do not afford any assistance in the construction of S. 265 and do not show that the judgment may be signed only by the Chairman of the Bench; they are no more than a compendious description of all classes of judicial officers, Magistrates and Judges who have to pronounce judgments. But the failure to comply with a mandatory provision of the Code is not necessarily an illegality and thus where all the members of the Bench sign the

register, in which the sentences are embodied, and thus agree in the judgment, their omission to comply with the technical requirements of the law in the fact that the judgment is signed only by the chairman is a mere irregularity which occasions no failure of justice: A. I. R. 1928 Mad. 1172, Doubtful.

[P 187 C 2, P 188 C 1]

(b) Criminal P. C., S. 526 (8)—Rejection of application made under S. 526 (8) for adjournment on ground that it is made after trial was begun is contrary to S. 526 (8) and vitiates whole proceedings.

Where the accused in the course of a trial applies for an adjournment for the purpose of moving the High Court for transfer and the Court rejects the application on the ground that it had been made after the trial had begun, such rejection is contrary to the terms of S. 526 (1) and vitiates the whole proceedings.

[P 188 C 1]

V. L. Ethiraj—for Petitioner.

Public Prosecutor—for the Crown.

Order.—The petitioner has been convicted by a Bench of Magistrates. He comes up in revision on the ground that the judgment convicting him is illegal as it has been signed only by the Chairman of the Bench. We think that that is a perfectly good ground of objection. S. 265, Criminal P. C., is divided into three subsections. The first provides that records and judgments shall be written by the presiding officer in English or in the language of the Court or in his mother tongue. The second proscribes that, if authorised by the Local Government, a Bench may employ a clerk to prepare the record or judgment, which shall be signed by each member of the Bench present and taking part in the proceedings. The third directs that, if no such authority has been given, the record which presumably includes the judgment shall be prepared by a member of the Bench and signed “as aforesaid” and shall then be “the proper record.” The first subsection says nothing about signing the record or judgment, but deals merely with the language in which they shall be written. The intention, we think, is that by whomsoever the judgment and record may have been written they shall be signed by all the members present. We have been referred to a decision contra by Devadoss, J., in *Rama Kottia v. Subba Rao* (1), which is based on the wording of S. 367, Criminal P. C. With great respect we do not consider that that section affords any assistance in the construction of S. 265. The words “presid-

(1) A. I. R. 1928 Mad. 1172.

ing officer of the Court" are no more than a compendious description of all classes of judicial officers, Magistrates and Judges, who have to pronounce judgments.

The Public Prosecutor invites our attention to S. 537, Criminal P. C. and argues that the omission should be treated as an irregularity which has occasioned no miscarriage of justice. It has been held that the failure to comply with a mandatory provision of the Code is not necessarily an illegality. In this case all the members of the Bench signed the register in which the sentence was embodied. They obviously agreed in the judgment and we do not think that their omission to comply with the technical requirement of the law as to the signing of it was anything more than an irregularity, which occasioned no failure of justice.

There is, however, a further and fatal objection. It is founded on that disastrous provision of law, sub-S. (8), S. 526, Criminal P. C., which is absolutely imperative in its terms. The petitioner in the course of the trial, applied for an adjournment for the purpose of moving the High Court for a transfer but the Bench rejected the application on the ground that it had been made after the trial had begun. That was, of course, no ground at all. Such an application can be made in the course of a trial and must, unfortunately, be granted. To refuse it, contrary to the terms of the section, is to deny the applicant an absolute right conferred on him by the statute and vitiates the whole proceedings. We set aside the conviction, but, as the case arises out of a family dispute, do not order a retrial.

P.R.S./P.N.

Conviction set aside.

1930 Cr. Cases 188

(Madras)

CURGENVEN, J.

N. Venkadu and others—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 123 of 1929 and Criminal Revn. Petn. No. 105 of 1929, Decided on 12th September 1929, from judgment of Sub-Div. Magistrate, Ellore, in Criminal Appeal No. 47 of 1928.

Criminal P. C., S. 537—Failure to define accurately common object with which unlawful assembly acts, is curable under S. 537.

It is not a general proposition of law that a conviction under S. 147, I. P. C., cannot be supported wherever the common object, as stated in the charge, is not precisely made out. Failure to define expressly and accurately the common object with which an unlawful assembly acts is an error, omission or irregularity as may be cured by S. 537 : 36 Cal. 865 and 37 Cal. 340, *Rel. on.*; 6 M. L. J. 17 : 27 Cal. 990 and 33 Cal. 295, *Ref.* [P 189 C 1]

G. Lakshmanna and G. Chandrasekhara Sastri—for Petitioners.

A. Narasimha Ayyar for Public Prosecutor—for the Crown.

Order.—The six petitioners have presented this petition against their convictions under Ss. 147 and 328, I. P. C., and sentences of two months' rigorous imprisonment and a fine each of Rs. 25. The ground taken is with reference to the terms of the charges and a certain finding of fact of the learned Sub-Divisional Magistrate in appeal. The charge alleges that the petitioners :

"Were members of an unlawful assembly and in prosecution of the common object of such assembly, viz., in wreaking vengeance for the social dishonour done to you at the social functions of the day, proceeded to the house of P. W. 1 at Kovvali, arming yourselves with sticks, challenged P. W. 1 to come out, committed the offence of rioting and caused injuries on three of the prosecution witnesses."

The Stationary Sub-Magistrate found that the evidence established the various components of the charge, including the fact of social dishonour caused to the petitioners on the day previous to the occurrence. It appears that a woman had died and a dinner and other ceremonies were to take place. There was some unpleasantness over the invitation of the accused to this dinner and when, after the dinner a ceremony called "Suddulu" was performed they were not accorded due honours. The Sub-Divisional Magistrate, adverting to the circumstance that this affair of the "Suddulu" is not mentioned in the earlier reports, considers that it may have been a later development. He goes on to add that the evidence established ill feeling between the parties and that petty incidents due to it had taken place before the occurrence, among these incidents being the unpleasantness over the invitation to the dinner. It is at least doubtful, therefore, whether he does not find established

some part of what the charge described as social dishonour done at the functions of the day.

The error that was clearly committed in drafting the charge was to insert as the common object of the accused what was in fact nothing other than a motive. Accordingly, the phrase :

"In wreaking vengeance for the social dishonour done to you at the social functions of the day "

may be regarded as pure surplusage and in deciding what should have been the essential components of the charge may be omitted from consideration. We are left, therefore, with the allegation that the accused formed an unlawful assembly, went to the house with sticks, committed rioting and caused injuries to three witnesses. It is no doubt true that, as so revised, the charge does not explicitly recite a common object, which should properly have been to beat or injure these persons. The question is whether it was, therefore, so defective as to require that the accused should now be acquitted. Mr. Lakshmananna, for the petitioners, has showed me several decisions principally originating from the Calcutta High Court and one : *In re., Loganathaiyar* (1) (at p. 40) from Madras, the substance of them being that, where the common object recited in the charge is different from the common object found a charge of rioting cannot be sustained and the accused person should be acquitted : see for instance *Rahimuddi v. Asgar Ali* (2) and *Paresh Nath Sircar v. Emperor* (3). In the latter case, which was decided by three Judges ; Rampini, J., who wrote a dissenting judgment, was of opinion that the provisions of S. 537 cured the defect inasmuch as the accused could not have been in any way prejudiced. In a later Calcutta case *Silajit Mahto v. Emperor* (4) it was recognized that :

"It is not a general proposition of law that a conviction under S. 147, I. P. C., cannot be supported wherever the common object, as stated in the charge, is not precisely made out. The question in each case is whether the common object established agrees in essential particulars with that laid in the charge."

The same principle was given expres-

(1) [1903] 6 M. L. T. 17=4 I. C. 700=11 Cr. L. J. 80.

(2) [1900] 27 Cal. 990=5 C. W. N. 31.

(3) [1906] 33 Cal. 295=2 C. L. J. 516.

(4) [1909] 36 Cal. 865=4 I. C. 19=13 C. W. N. 801.

sion to in *Babbon Sheikh v. Emperor* (5). I have been referred to no authority for the view that failure to define expressly and accurately the common object with which an unlawful assembly acts is not such an error, omission or irregularity as may be cured by S. 537, Criminal P. C. I think, accordingly, that I should only be justified here in interfering in revision if it appears that the accused were prejudiced by the manner in which the charge was drafted. I am unable to discover any ground for this view. It must have been quite clear that the case they had to meet was, as set out in the charge, that, as an unlawful assembly, they went into the house and injured the inmates, and I think it was equally clear that the common object imputed to them was that which they put into effect. I see, therefore, no sufficient reason to revise the convictions and I dismiss the revision petition.

P.R.S./v.S. *Petition dismissed.*

(5) [1910] 37 Cal. 340=11 C. L. J. 335=5 I. C. 365=14 C. W. N. 422.

1930 Cr. Cases 189

(Madras)

JACKSON, J.

V. M. Rathnavelu Mudaliar—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 429 of 1929 and Criminal Revn. Petn. No. 388 of 1929, Decided on 18th October 1929, from order of the Sess. Judge, North Arcot, in Criminal Appeal No. 19 of 1929.

Criminal P. C., S. 423—Prosecution broken in every respect—Appellate Court cannot send case for retrial—Appellate Court orders retrial for supplying formal defects.

The appellate Court can no doubt order a retrial under S. 423, Criminal P. C., but hardly where the prosecution has hopelessly broken down in every respect, so as to enable the prosecutor to substantiate some new charge against the accused, or to produce evidence which might easily have been produced at the first trial. It is rather for supplying formal defects that an appellate Court orders retrial: 42 *Mad. 885, Rel. on.* [P 190 C 1]

K.S. Jayarama Ayyar—for Petitioner.

Public Prosecutor—for the Crown.

Order.—The petitioner was tried under S. 15, Act 8 of 1899. It is a summons case but a charge was framed that petitioner had either sold 31 cans of dangerous petroleum to an unlicensed person, or had transported the same cans

through that person without a pass, and therefore, he had committed an offence under S. 15 (2) of the Act.

The offence under S. 15 (c) is breaking any condition contained in a license under the Act. The lower Court found the accused guilty under S. 15 (c) of having sold 31 cans to an unlicensed person, which must mean that selling to an unlicensed person contravenes some condition of his license. The license was never proved, and, assuming that that could be a remediable omission, this Court has been unable to discover from the rules what condition in what license would have been contravened.

The prosecution, therefore, entirely failed to make out its case in the Court of trial.

The learned Sessions Judge came to the same conclusion, observing quite correctly that upon the essential points of the case there is neither evidence nor finding, and he could not uphold the conviction. He considered, however, that the proper course was to order a retrial. Here it must be found that the learned Judge exceeded his proper function. In certain circumstances he can no doubt order a retrial under S. 423, Criminal P. C., but hardly where the prosecution has hopelessly broken down in every respect, so as to enable the prosecutor to substantiate some new charge against the accused or to produce evidence which might easily have been produced at the first trial. It is rather for supplying formal defects that an appellate Court orders retrial: see *Varadarajulu Naidu v. Emperor* (1). The petition is allowed and the petitioner acquitted. The fine will be refunded if that has not been done. [Ed. The case adds nothing to 42 Mad. 885.]

P.R.S./v.S. *Petition allowed.*

(1) [1919, 42 Mad. 885=37 M. L. J. 81=51 I. C. 343=(1919) M. W. N. 669.]

1930 Cr. Cases 190

(Madras)

JACKSON, J.

Krishna Pannadi—Prisoner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 391 of 1929, and Criminal Revn. Petn. No. 354 of 1929, Decided on 16th October 1929 against judgment of Sess. Judge, Coimbatore Division, D/- 18th March 1929.

Criminal Trial — Counter cases should be tried by one Judge and judgment should be pronounced when both cases are finished.

Cases and counter cases should be tried in quick succession by the same Judge, who should not pronounce judgment till the hearing of both cases is finished. [P 190 C 2]

K. S. Jayarama Ayyar for *M. Krishna Bharathi*—for Petitioner.

The Public Prosecutor—for the Crown.

Order.—The petitioner has been sentenced to one year's rigorous imprisonment for stabbing a man in the neck with a spear, and six months rigorous imprisonment concurrently for hurting a man in S. C. No. 158 of 1928, Coimbatore. In S. C. No. 157 of 1928, he was the complainant, with the plea that certain of the prosecution witnesses in S. C. No. 158 had set upon him.

There is no clear law as regards the procedure in counter cases, a defect which the legislature ought to remedy.

It is a generally recognized rule that such cases should be tried in quick succession by the same Judge, who should not pronounce judgment till the hearing of both cases is finished.

This precludes the danger of an accused being convicted before his whole case is before the Court, and also prevents there being conflicting judgments upon similar facts. But at the same time the rule involves obvious difficulty. It seems to infringe the fundamental principle that the Court must not import any facts into a case which are not to be found upon the record. To take an illustration, suppose in the first of the cases the accused succeeds in showing that the prosecution has failed to prove its charge, and then in the second case the same accused as complainant goes into the witness box and breaks down in cross-examination so as to convince the Court that the truth lies with the other side. Can the Court be expected to dismiss this circumstance from its mind, and if it does not do so, what legal justification is there for importing it into the case already heard?

The only way in which such a procedure can be justified is by setting up a fiction that the case and the counter case are really one; and this fiction should be made a reality by statute. If a Court were empowered to link cases, as they link files in a secretariat there would also be the incidental advantage of a great saving of time. At present in

each case the evidence of every witness must be fully recorded, and what P.W. 1 says for the prosecution in one case must all be written out again when he repeats it as D.W. 1 in the other case.

But whether there be a statutory enactment or not the point remains that for practical purposes a case and its counter are one, and it is this that makes these general observations particularly germane to the present case.

Because the lower Courts have entirely ignored this principle, the learned Assistant Sessions Judge, when the two cases were referred to him, changed their order for some reason which the record does not divulge, and proceeded to try 158 before 157. Then when 158 was concluded he wrote his judgment upon it and the Public Prosecutor had no other course open to him than to withdraw 157 which that judgment had irrevocably discredited.

The learned Sessions Judge on appeal finds that this procedure did not prejudice the accused:

"There was no restriction regarding the manner in which he might defend himself. There was nothing to prevent him from examining in his defence all his own prosecution witnesses."

That no doubt is true; but on the other hand there was nothing to compel him to do so; and when he expected all these prosecution witnesses to be examined in his own case, he was probably well advised not to subject them to an earlier cross-examination. Was the accused ever warned that if the Judge was against him on the first case, the second would be dropped? Presumably not, and if he was not warned, it can never be said that he was not prejudiced.

There was, as the learned Judge observes, no actual illegality in taking up the case first and disposing of it before the other was heard, but it offends against the accepted practice.

He adds:

"the public prosecutor having requested that this case might be tried first, the Assistant Sessions Judge was well within his rights in acceding."

The Assistant Sessions Judge should certainly have left a note explaining on what the request was based, and why he acceded. In its absence there arises a suspicion that the Public Prosecutor suggested that he would succeed in 158 and then it would not be necessary to

try 157, and if so, the suggestion was scarcely proper.

As the accused was not given the opportunity which he expected would be given him of examining all his evidence, there must be a retrial.

There is one point upon which this Court offers no opinion, but which should be borne in mind. If it is found that the accused was going on duty (apparently the sentence was enhanced on some such consideration) what was he doing with a spear? The finding and sentence are cancelled and petitioner is ordered to be retried by the District Magistrate or any Magistrate subordinate to him having jurisdiction and no previous connexion with the case. He may remain on bail till the case is concluded.

P.R.S./V.B.

Retrial ordered.

1930 Cr. Cases 191

(Madras)

REILLY, J.

Balasundaram — Accused — Petitioner.

Criminal Revn. No. 292 of 1929 and Criminal Revn. Potn. No. 260 of 1929, Decided on 3rd April 1929, against order of Third Presy. Magistrate, Egmore.

Criminal P. C., S. 173—Form of charge sheet—Legality considered.

Section 173 does not require to be entered in charge sheet abstract of evidence given by each of the witnesses and the charge sheet prescribed by G. O. No. 3487 Law (General) dated 16th October 1928 and published in the Fort St. George Gazette dated 23rd October 1928 can be legally prescribed under S. 173 although it requires less details to be given than the form previously prescribed and is not illegal.

[P 191 C 2, P 192 C 1]

T. S. Venkataraman—for Petitioner.

Order.—The information given in the chargesheet in this case is not very full; but I cannot say that it does not comply with the provisions of S. 173, Criminal P. C. The contention that that section requires that an abstract of the evidence to be given by each of the witnesses mentioned should be entered in the report of charge sheet appears to me unsound. Nor is there in my opinion anything in the suggestion that this form of charge sheet, prescribed by G. O. No. 3487 Law (General), dated 16th October 1928, and published in the Fort St. George Gazette dated 23rd October 1928, could not legally be prescribed under S. 173, Criminal P. C., because it

requires less details to be given than were required in the form previously prescribed. This petition is dismissed.

P.R.S./V.B.

Petition dismissed.

1930 Cr. Cases 192

(Madras)

JACKSON, J.

(*Pidugu*) *Mattayya*—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 288 of 1929 and Criminal Revn. Petn. No. 256 of 1929, Decided on 18th November 1929, against judgment of Sess. Judge, Guntur Division.

(a) Criminal P. C., S. 476—Any Court seized of transferred case can complain.

If a case is transferred it is not only the Court which originally received the forged document can complain under S. 476. It is a continuing offence and any Court seized of the case can complain. [P 192 C 1]

(b) Criminal P. C., S. 476—Forging document—Document filed—Presumption is that it was one given to pleader.

In a prosecution under S. 476 for filing a forged document, there is a fair presumption that the document filed was the one given to pleader. [P 192 C 2]

V. L. Ethiraj and *N. Somasundaram*—for Petitioner.

The Public Prosecutor—for the Crown.

Judgment.—Petitioner has been sentenced to three years' rigorous imprisonment by the Assistant Sessions Judge, Guntur, under Ss. 471 and 467, I. P. C. for filing a forged receipt in a suit on a promissory note in which he was defendant.

Two points are taken in revision. Firstly, that if a case is transferred only the Court which originally received the forged document can complain under S. 476 Criminal P. C. It is a continuing offence and any Court seized of the case can complain.

Secondly, that the learned Sessions Judge misdirected himself when he observed that the burden of proof did not lie upon the prosecution to prove that the receipt filed by the pleader was the receipt given to the pleader by the accused. The observation is not happily worded because the burden is on the prosecution to make out its case. It might have been said rather, that there is a fair presumption that the document

given to a pleader is the document filed, and the accused should offer some rebuttal. I do not find that the learned Judge failed to regard the case from this aspect, or that the petitioner has been prejudiced. That ends the matter so far as revision is concerned, but there has been discussion of the merits, and I may add that on the merits I agree with the lower Courts.

The petitioner's defence is that a forged receipt was substituted for a genuine receipt by his enemies. He has done little to show that there was a genuine receipt. In the suit he cited no evidence to prove it, and gave up his plea of discharge when the plaintiff took an oath. He never summoned the attester who might corroborate the writer.

His enemies are not likely to have elaborated a plot merely to defeat his plea of discharge to the amount of Rs. 150 and the chances of getting him prosecuted for perjury were remote. If the suit had come on for trial, and he had at once said that the receipt was not the receipt he gave his vakil, the Court would not have prosecuted him. And anyone who had taken the trouble to arrange this trap, would have taken care to spring it in the suit itself. If the suit were settled without reference to the document there was great risk of the Court declining to move in the matter of a document which had not really affected the issue.

If the plaintiff himself was in the plot he certainly would not have taken an oath instead of putting the petitioner to the proof of his alleged discharge. And if the petitioner genuinely believed that he held the plaintiff's thumb-marked receipt he would never have consented to abide by an oath and lose his money. As for the futility of the fabrication, people for whom litigation is a tissue of falsehood lose all sense of truth and cannot distinguish between a good and a bad lie; just as some are colour blind they become truth blind. The petition is dismissed.

P.R.S./V.B.

Petition dismissed.

* * 1930 Cr. Cases 193

(Privy Council)

(From Lahore)

6th December 1929

VISCOUNT SUMNER, LORD THANKERTON
AND SIR BINOD MITTER.*Atta Mohammad*—Appellant.

v.

Emperor—Opposite Party.

Privy Council Appeal No. 114 of 1929.

* * Privy Council—Criminal Trial—No substantial injustice—No departure from requirements of natural justice—Privy Council does not interfere—It is not Court of Criminal appeal.

Lordships of the Privy Council do not act in criminal matters as a Court of Criminal Appeal and are not concerned to regulate procedure of Courts in India or to criticise what is mere matter of procedure and in the complete absence of any substantial injustice or in the complete absence of anything that outrages what is due to natural justice in criminal cases Privy Council does not interfere. [P 193 C 1,2]

E. C. Morey—for Appellant.*A. M. Dunne* and *W. Wallach*—for the Crown.

Viscount Sumner—As this is a capital case, and as the conviction took place so long ago as February last, their Lordships* think it best to give their reasons for the conclusion at which they have arrived, without taking further time to put them into writing.

The appellant's conviction and sentence having been confirmed on appeal, he applied to their Lordships last July for special leave to appeal. His petition was allowed, his point being in substance that he had been convicted without having had a fair opportunity of knowing what the charge was that he had to meet, and particularly of raising defences other than the one raised, or of relying on any circumstances which would have reduced the offence to a minor one. Under those circumstances their Lordships did what they rarely have occasion to do, and advised His Majesty in Council to grant special leave *ex abundanti cautela*, so that it might be discussed at length whether he had in truth been deprived of so important an opportunity.

Mr. Morey has put the case before their Lordships, as he always does, with great clearness and fairness. He complains that the charge recorded was that Atta Khan and a number of others, seven in all, were members of an unlawful assembly armed with deadly weapons and that in prosecution of a com-

mon object and in furtherance of a common intention, one of the members, Atta Mohammad, caused the death of Gulam Muhammad, and all were thereby, under Ss. 149 and 34, I. P. C., guilty of causing the death of Gulam Muhammad and thereby committed an offence punishable under Ss. 302, 149, 148 and 34, I. P. C. S. 34 was introduced by way of amendment or addition afterwards. The phraseology of the charge is common, but it is true that of these sections which are mentioned one after another, some refer to the substance of the offence, and others, or one, at any rate, of them, to the punishment of the offence.

As the result of the trial, the appellant alone was found guilty, but he was found guilty of being the intentional cause of the death of Ghulam Muhammad. He appealed, and admittedly his notice of appeal contained no suggestion whatever of the case that is now made on his behalf. He had pleaded an alibi at the trial, and in his grounds of appeal he embodied various criticisms upon the weight of the evidence, and then he added that an assault under these conditions would amount to private defence and that the offence does not amount to murder and that the sentence called for should have been much lighter.

He appeared by an advocate on the appeal and had been legally defended at the trial, and it is as clear as possible that, with full knowledge of the course which the trial had taken, neither the appellant himself nor those who represented him had any sense whatever of the injustice that is now urged or any idea of his having been deprived of the opportunity of knowing the charge on which he was tried or of raising defences appropriate to that charge. The argument is that because there was no specific mention of S. 300, I. P. C., as the section under which he was being proceeded against and because he was charged as a member of an unlawful assembly, with acting with a common object and in furtherance of a common intention, he being the person who struck the blow the acquittal of all the other persons put an end to that charge, and the possibility that he might be nevertheless convicted under S. 300 was one that had never been explained to him properly or at all, and one, which

it must be taken did him the serious injustice of misleading him as to his true position and depriving him of what might have been a successful defence.

The proceedings on the appeal, however, make it quite clear that in fact he was deprived of no proper opportunity, that the nature of the charge was quite sufficiently known to him and to the advocate who appeared for him, and that he was unconscious of having suffered any wrong of that kind until the appeal fell into able hands in this country.

It is well to add that there has been no complaint that he was not separately indicted, and no reliance has been placed on S. 233, Criminal P. C., the case has been solely put upon departure from statutory provisions as to stating and explaining the particular charge, which has been proceeded with.

Under these circumstances their Lordships think it quite plain that there has been no departure from the requirements of natural justice, and that there has been a trial which in all substance was fair and which has given the prisoner every real opportunity that he required to understand the charge and make his defence.

The practice of their Lordships' Board is so well settled with regard to such a case that it is unnecessary to cite authorities or to re-state principles. The most that is said here is that certain statutory requirements of procedure were not satisfied, and as their Lordships have so often had occasion to say India is provided by law with a complete and carefully devised Criminal Procedure Code applicable to the Courts of Criminal review, which have considered this case and the functions of which have been discharged. Their Lordships, in advising His Majesty, do not act in criminal matters as a Court of criminal appeal, and are not concerned to regulate procedure of Courts in India or to criticize what is mere matter of procedure. Accordingly, their Lordships find it unnecessary to discuss the points which have been raised as to the propriety of such a form of indictment as this, as the utility and extent of explanations such as the Code refers to and as to the validity of such sections as S. 225 as an answer to any irregularity that there may have been. They

do not desire it to be understood that they think that the contentions raised on behalf of the appellant on those points could be sustained. No opinion was expressed in the Court below as regards that and the point was never considered there. Their Lordships have, therefore, nothing to say upon these questions except that they are questions for the Indian Courts in the exercise of their criminal jurisdiction.

In the complete absence of any substantial injustice, in the complete absence of anything that outrages what is due to natural justice in criminal cases, their Lordships find it impossible to advise His Majesty to interfere. Their Lordships, therefore, will humbly advise His Majesty that for these reasons this appeal must be dismissed.

R.K. *Appeal dismissed.*

Solicitors for Appellant—*T. L. Wilson & Co.*

Solicitors for Respondent—*The Solicitor, India Office.*

1930 Cr. Cases 194

(Allahabad)

DALAL, J.

Konmal and another—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 701 of 1929, Decided on 6th December 1929.

Criminal P. C., S. 231—No duty on Court to ask accused if he wishes to recall or re-examine any witness.

There is no duty laid on the Court under S. 231 to ask the accused if he wishes to recall or resubmit prosecution or defence witnesses and so there is no breach of any provisions in S. 231 if the Court does not so enquire. It is essential that the accused should ask for permission. *A. I. R. 1924 All. 665, Ref. [P 195 O 1]*

Saila Nat'l Mukerji—for Applicants.

M. Waliullah—for the Crown.

A. Sanyal—for Opposite Party.

Judgment.—The plea is raised for a fresh trial, because it is alleged that after the trial Court altered the conviction from S. 323 to S. 325, I. P. C., the applicants were not allowed to recall or resubmit prosecution and defence witnesses and examine them with reference to the alteration of the charge and were further not allowed to call more witnesses whom the Court may think material. The reader has gone through the record and has not discovered any application of the applicants to be permitted to call witnesses.

There is no affidavit by any legal practitioner appearing in the trial Court that an oral request was made to recall previous witnesses or to summon new ones. There has, therefore, been in my opinion no breach of the provisions of S. 231. It would be instructive to compare those provisions with the provisions of S. 256 where duty is laid on the Court to ask the accused to state at a particular period of the trial whether he wishes to cross-examine any and, if so, which of the witnesses for the prosecution whose evidence has been taken. No such duty is laid on the Court under the provisions of S. 231, and so to make those provisions applicable there must be some evidence that the Court refused the request of the complainant or the accused to recall or summon witnesses. Reference was made to the case of *Mohan Lal v. Emperor* (1). In that case also the learned Judge has not stated that any duty lay on the Court to enquire of the accused whether they would recall previous witnesses or summon new ones.

Most of the injuries were simple, and the grievous hurt was not of any moment. It further appears that the complainant tried to make up a false charge of theft against the applicants. Taking these facts into consideration I reduce the substantive sentence of six months to two months, otherwise the application is dismissed. The applicants shall surrender to undergo the balance of their sentence. The fine and imprisonment in default are maintained.

V.B./R.K. *Order accordingly.*

(1) A. I. R. 1924 All. 665.

1930 Cr. Cases 195

(Bombay)

PATKAR AND WILD, JJ.
Silvester Vaz—Complainant.

v.

Louis Dias—Accused.

Criminal Reference No. 81 of 1929,
Decided on 9th October 1929.

(a) Penal Code, S. 504—S. 504 applies also to insulting words written in letter.

There is nothing in S. 504 which confines the insult to spoken words and would not cover words written in a letter. [P 195 C 2]

(b) Penal Code, S. 504—Provocation to cause other offence than breach of peace also comes within S. 504.

A person is within the ambit of S. 504 not only if the provocation offered by him is of such a character as to cause the person pro-

voked to commit a breach of peace but even if it is of such a nature as to cause him to commit any other offence: *A. I. R. 1927 Lah. 129, Foll.*; *The Queen v. Adams*, (1888) 22 Q. B. D. 66, *Rel. on*; 4 Bom. L. R. 78, *Ref.* [P 195 C 2]

(c) Penal Code, S. 504—Intention to cause breach must be present—Person insulted is reduced to state of abject terror making breach of peace improbable is immaterial.

Mere abuse unaccompanied by an intention to cause a breach of the peace or knowledge that a breach of the peace is likely does not come within S. 504. On the other hand an insult which under ordinary circumstances would be likely to provoke the person insulted to cause a breach of the peace is within the provisions of the section although the person insulted may have been reduced to a state of abject terror so as to render improbable that he would commit a breach of the peace: 39 *Mad. 531* and 10 *Mad. 353, Rel. on.* [P 196 C 1]

Olieveria and *L. Souza*—for Complainant.

M. M. Bhesania and *K. N. Koyajee*—for Accused.

Patkar, J.—In this case the Presidency Magistrate, 4th Court, has submitted under S. 432, Criminal P. C., for the opinion of this Court a question of law arising in a case pending before him. The question submitted by him is as follows:

“Do abusive words (granting that they are insulting) conveyed in a letter sent by post constitute an offence under S. 504, I. P. C. so as to make the writer of that letter liable for the intentional insult and thereby giving provocation to the receiver of that letter, intending or knowing it to be likely that such provocation will cause him to break the public peace or to commit any other offence?”

It is conceded on both sides that the letter in the present case was not sent by post but was sent by a messenger. Under S. 504 the ingredients of the offence are: (1) intentional insult, (2) provocation to any person, and (3) an intention or knowledge that such provocation will cause the person insulted to break the public peace or commit any other offence. There is nothing in the section which confines the insult to spoken words and would not cover words written in a letter.

We agree with the view of Sir Shadi Lal, C. J., of the Lahore High Court, in *Gul Muhammad v. Pir Akbar Ali* (1), that a person is within the ambit of S. 504, I. P. C., not only if the provocation offered by him is of such a character as to cause the person provoked to commit a breach of peace but even if it is of such a nature as to cause him to commit any other offence. In that

(1) A.I.R. 1927 Lah. 129.

case the insult or the abuse was conveyed by a letter and was not delivered face to face. Similarly, in the case of *The Queen v. Adams* (2), where the accused was tried and convicted on an indictment charging him with having unlawfully and maliciously written and published to a young woman of virtuous and modest character a defamatory letter concerning her character for virtue and modesty it was held that the conviction could be sustained, as under those circumstances, the defamatory letter might reasonably tend to provoke a breach of the peace. According to the English law defamatory matter even if published only to the person defamed will support an indictment if it might reasonably and probably tend to provoke a breach of the peace: see Halsbury's Laws of England, Vol. 18, para. 1216, p. 656.

In the present case the letter was sent by a messenger and it is not beyond the range of possibility that the complainant might lose his temper and break the public peace, or assault the messenger and commit an offence. The decision in the case of *King Emperor v. Chunibhai* (3), is not inconsistent with this view.

Mere abuse unaccompanied by an intention to cause a breach of the peace or knowledge that a breach of the peace is likely does not come within S. 504: see *Re Kuppusami Aiyar* (4). On the other hand an insult which under ordinary circumstances would be likely to provoke the person insulted to cause a breach of the peace is within the provisions of the section although the person insulted may have been reduced to a state of abject terror so as to render improbable that he would commit a breach of the peace: see *Empress v. Jogayya* (5). The insult again may be of such a character that a person of ordinary temperament would not complain of the abuse and the abuse might come within the terms of S. 95, I. P. C.

It is, therefore, for the Magistrate to consider whether, under the circumstances of the present case, the insult which was conveyed to the complainant

by the written letter is of such a character as to come within the ambit of S. 504. It is not possible to give a categorical answer to the question submitted to us. With this expression of opinion we will return the papers to the Magistrate.

V.S./R.K.

Answer accordingly.

1930 Cr. Cases 196

(Calcutta)

GRAHAM AND LORT-WILLIAMS, JJ.

Tafiz Pramanik and others—Petitioners.

v.

Emperor—Opposite Party.

Criminal Appeal No. 141 of 1929, Decided on 9th August 1929.

(a) Evidence Act, S. 32 (1)—Dying declaration can be proved by examining person recording it or person who heard its being made—It must be taken as a whole and portion only cannot be allowed.

The method of proving the dying declaration and the method usually adopted is to examine the person who recorded the statement as to what the deceased said or to examine some person or persons who were present at the time and heard the statement being made; and the statement if admissible must either go in as a whole or not at all and if otherwise no portion of it should be allowed to go in evidence.

[P 197 C 2]

(b) Criminal P. C., S. 299 — Although Judge be of opinion that witness ought not to be believed for giving different version, provided deposition in lower Court is put in under S. 288, jury is at liberty to believe evidence in lower Court.

Where deposition of witness for prosecution in preliminary enquiry under Chap. 18, is put in evidence under S. 288, Criminal P. C., by the defence, it is open to jury to believe the evidence if they so wished although the Judge may be of opinion that the witness having given different version in the lower Court ought not to be believed.

[P 198 C 2]

(c) Evidence Act, S. 33—Dying declaration made to Sub-Inspector—Sub-Inspector examined under S. 208, Criminal P. C., but not cross-examined — Sub-Inspector dying before Sessions Trial — Deposition can be admitted in evidence.

Where the deceased makes his dying declaration as to the cause of his death to a Sub-Inspector of Police just before death, and the Sub-Inspector is examined under S. 208 but not cross-examined by defence, if the Sub-Inspector dies before Sessions trial, his deposition is admissible under S. 33 in the Sessions trial.

[P 197 C 2]

K. N. Charidhury, Mirtyunjoy Chattopadhyaya and Manindra Nath Banerjee—for Petitioners.

Debendra Narain Bhattacharya—for the Crown.

Graham, J.—This is an appeal by ten persons who have been convicted

(2) [1898] 22 Q.B.D. 63.

(3) [1903] 4 Bom.L.R. 78.

(4) [1916] 39 Mad. 561=28 M.L.J. 505=2 M.L.W. 463=29 I.C. 109=(1915) M.W.N. 365.

(5) [1887] 10 Mad. 353.

under Ss. 147 and 304 read with S. 149, I. P. C. and sentenced to one year's rigorous imprisonment and six years' rigorous imprisonment respectively, the sentences being directed to run concurrently. The appellants Nos. 2, 3, 4, 5 and 9 have also been convicted under S. 323, I. P. C. and sentenced to six months' rigorous imprisonment.

The case for the prosecution was that at about 11 p. m. on the night of 19th April last one Mayan Khan, who died subsequently as the result of certain injuries received, hearing a noise in his cowshed went outside, that he was thereupon seized by a number of people who dragged him along and trampled upon him and beat him severely. His brother Ayen Khan who went to his aid is also alleged to have been beaten. Several of Mayan's ribs were broken and he died on the following day. At about midnight he had been brought to the house of one Jayan Pramanik. Information of the occurrence was lodged at the thana about a mile distant at 5 a. m. next morning. In the course of the investigation which followed a dying declaration was made by Mayan to the Sub-Inspector of Police. The Sub-Inspector was examined in the Committing Court to prove this, but he died before the Sessions trial. The prosecution sought to put in the deposition of the Sub-Inspector under S. 33, Evidence Act. The learned Sessions Judge held that it could not be admitted in evidence on the ground that no specific opportunity had been given to cross-examine the witness. While, however, disallowing the prayer to put in the deposition the learned Judge directed that portions of the statement itself as recorded by the Sub-Inspector, in which the names of Mayan Khan's assailants are mentioned, might go in on the ground that some of the witnesses had deposed to those statements as having been made by Mayan Khan in their presence to the Sub-Inspector. These facts are referred to because one of the main points in the appeal is connected with this dying declaration.

The accused all pleaded not guilty to the charges but do not appear to have set up any very definite defence. Some of them pleaded enmity and the accused Rahimuddi pleaded an alibi.

On behalf of the appellants objections

have been taken to the learned Sessions Judge's charge upon several grounds. The ground upon which most stress was laid was that the learned Judge having rejected the dying declaration as inadmissible misdirected the jury by placing before them certain portions thereof relating to the names of the accused. Now the dying declaration could not as such be admitted in evidence. The method of proving such a statement, and the method, which so far as my experience goes as usually adopted, is to examine the person who recorded the statement as to what the deceased said, or to examine some person or persons who were present at the time and heard the statement being made. In this view of the matter the learned Sessions Judge erred in my opinion in admitting portions of the statement in evidence. It appears that those portions were exhibited, as the order of 10th January 1929 shows. In my judgment too the statement itself as recorded must either go in as a whole or not at all. If it is inadmissible, no portion of it should be allowed to go in evidence.

At the same time the learned Judge in my opinion was in error in holding that the deposition of the Police Sub-Inspector, which was recorded in the committing Court, could not be admitted in evidence, the ground given by him for so holding being that specific opportunity had not been given to the defence to cross-examine the witness. S. 33, Evidence Act, provides *inter alia* that the adverse party must have had the right and opportunity to cross-examine. There can be no doubt that the defence had that right under S. 208 (2), Criminal P. C., and I do not see how it can be said that they had not the opportunity. If they wished to exercise their right, it seems to me that it was incumbent upon them to claim it. The fact that they did not do so can only give rise to the inference that they did not wish to cross-examine in that Court, and that they reserved the cross-examination for the Sessions Court. The adoption of that course necessarily involves some risk, though it is not a risk which would ordinarily be deemed to be a serious one.

In my judgment it is a case for the application of the maxim "*omnia prae-sumuntur rite esse acta*." It can fairly

be assumed that there was opportunity to cross-examine the witness if the accused had chosen to exercise their right. The assumption it seems to me is that it existed and not the contrary. Now if the deposition had been admitted, as I hold it should have been, it is clear that it would have been to the disadvantage of the accused, because in that case the whole statement would have gone in instead of only a portion. To that extent the advantage is with the accused. But it is objected in this connexion that, if the whole deposition had been admitted, the defence would have been able to cross-examine some of the witnesses, who have deposed concerning it, with a view to showing what really took place and discrediting the statement as recorded, as for example by proving that leading questions were put by the Sub-Inspector. We find, however, that as the result of the admission of a part of the dying declaration some of the witnesses were in fact cross-examined with the above object in view, and, that being so, there does not seem to be much substance in this objection, or in the objections generally with regard to the dying declaration.

The next point which was argued on behalf of the appellants was that the learned Judge misdirected the jury in telling them that they were to discard the evidence of certain prosecution witnesses as their story was inconsistent with the prosecution version, and the Public Prosecutor had thought fit to declare them hostile; whereas he ought to have made it clear to the jury that, although the prosecution was not entitled to rely on any part of the testimony of those witnesses, it was open to the jury to rely on their evidence in so far as it contradicted, or was inconsistent with the prosecution case and supported the defence version. If this ground and especially the first part of it had been substantiated, we should undoubtedly hold that there had been misdirection. The learned Judge does not, however, appear to have given any such direction. He certainly has not put it in the form in which it has been stated in ground 2 of the memorandum of appeal. The only passage in the charge which appears to support the contention on this point is at p. 10 thereof where this passage occurs:

"This witness (the Judge is here referring to P. W. 2 Kafiluddin) should be wholly disbelieved for in the lower Court he did not give such a version."

That direction was apparently meant to be in favour of the defence, for it seems to amount to this that the Judge told the jury that this witness having given two different versions ought not to be believed. In substance that appears to be a proper direction. It is complained, however, that the Judge omitted to tell the jury that it was open to them to believe the evidence which this witness had given in the committing Court. The deposition of this witness was, however, put in by the defence under S. 288, Criminal P. C., and it was, therefore, evidence in the case and it was open to the jury to believe that evidence if they so wished.

The next ground of objection, is that the learned Judge omitted to draw the attention of the jury to the delay in lodging the first information. The facts in this connexion are that the occurrence took place at 11 o'clock at night and the information was lodged at the thana one mile distant at 5 a. m., the following morning. It cannot be said that there was any inordinate delay so as to impose on the Judge the duty of drawing the particular attention of the jury to it.

It was next argued that the Judge should have drawn the attention of the jury to certain facts referred to in ground 4 of the petition of appeal. This relates to details and it is obviously not possible for a Judge to refer to every fact in this charge. We do not think that the omission to refer to the particular matters mentioned in this ground can be held to amount to misdirection.

Grounds 6, 7 and 8 in the memorandum of appeal were not pressed by the learned advocate for the appellants in view of the explanation which has been submitted by the Sessions Judge, and we think that the learned advocate in the circumstances very properly adopted this course. At the same time the legal advisers of the appellants cannot be altogether excused for making these somewhat reckless allegations, in particular the allegation contained in ground 6, which is to the effect that the Judge misdirected the jury in telling them that, if there had been any reasonable doubt about the guilt of the accused,

they would not have been committed to the Court of Sessions. It is not in the least likely that the learned Judge would have given any such direction in his charge, and he has categorically denied that he did so, and we accept his statement. The importance of the matter is this that appeals are sometimes admitted on such statements in the grounds of appeal, and grounds of appeal ought to be carefully drawn up and with a due sense of responsibility.

Grounds 19, 21 and 22 were also briefly referred to, but were not seriously pressed, and we do not think that there is anything in them which would amount to misdirection.

In the result all the grounds which have been urged fail, the appeal is dismissed and the convictions and sentences are confirmed.

Lort-Williams, J.—I agree.

v.B./R.K.

Appeal dismissed.

1930 Cr. Cases 199

(Madras)

BEASLEY, C. J. AND PANDALAI, J.

(Pantam) Venkayya—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 375 of 1929 and Criminal Revn. Petn. No. 339 of 1929 Decided on 30th October 1929.

Penal Code, S. 171 (f)—*Mens rea is necessary ingredient in offence under S. 171 (f).*

Mens rea is an ingredient in the offence under S. 171 (f) and where the corrupt intention is absent, the offence of personation cannot be committed: *The Stepaney Case*, 4 O. M. & H. 34, Foll. [P 200 C 1]

Nugent Grant, V. Satyanarayan—for Petitioner.

K. N. Ganapathi—for the Crown.

Beasley, C. J.—The petitioner was convicted by the Sub-Divisional Magistrate of Rajahmundry and sentenced under S. 171 (f), I. P. C., to a fine of Rs. 50 and in default to suffer simple imprisonment for a month.

The offence of which he was convicted was that of personation at an election. Briefly, the facts of the case are that on 16th April 1928 there was an election to fill vacancies of the Peddapur Taluq Board. There were two vacant seats for Peddapur firka and eight candidates and eight polling stations. The petitioner's name was by mistake on the roll of two different villages, namely

Geddanapalli and Bhupalapatam. The petitioner voted once in the morning in the polling station for Geddanapalli and in the afternoon for a second time in the polling station for Bhupalapatam.

The offence of personation at elections is defined in S. 171-D., I. P. C., as follows :

"Whoever at an election applies for a voting paper or votes in the name of any other person whether living or dead, or in a fictitious name or who having voted once at such election applies at the same election for a voting paper in his own name ; and whoever abets, procures or attempts to procure the voting by any person in any such way commits the offence of personation at an election."

In the Sub-Divisional Magistrate's Court evidence was given in support of the complaint against the petitioner by certain witnesses proving that the accused voted twice which is not disputed by the petitioner and that he did so although this conduct was objected to by P. Ws. 1 and 2. The petitioner filed a written statement denying the offence. He, however, admitted that he voted a second time but stated that he had done so in the bona fide belief that he could do so as his name was included in two lists. He also disputed the evidence of the prosecution witnesses as to the objection raised by them at the time of his second voting. Two witnesses were called by the petitioner who were the Polling Officers and they deposed that no objection, oral or in writing, was raised at any time to the petitioner voting on the second occasion. On behalf of the petitioner three contentions were raised, namely: (1) that the accused did not specifically apply for the ballot paper and that the second voting was not an offence in the strict letter of the section (2) that the accused had a right to vote a second time as his name appeared twice in two polling areas in the voters' list and (3) that *mens rea* is an ingredient in this offence and no *mens rea* was proved. The Sub-Divisional Magistrate decided all the three points against the petitioner and, since, no argument was addressed to us by Mr. Grant on behalf of the petitioner that his findings on the first two points are wrong we have only to consider his finding on the third point, namely, whether *mens rea* is an essential ingredient in this offence. The Sub-Divisional Magistrate thought that all that it was necessary to prove was the

fact that the petitioner had voted twice and that his motive for doing so, whether corrupt or otherwise, was immaterial. He, therefore, did not come to any finding as to the petitioner's motive or guilty knowledge. He thinks that however genuine the belief of a person may be that he is entitled to vote twice if his name appears twice upon the electoral roll, he none the less commits an offence under S. 171-D, I. P. C. We have been referred by Mr Grant to the corresponding S. 171-D, I. P. C. in the English Act, namely the Ballot Act (35 and 36 Vic. Ch. 33). S. 24, of that Act is S. 171-D, I. P. C. We have compared the two sections and they are clearly the same. That being so, we were referred to an English decision on that section reported in the *Stepney* case (1). There, in discussing the offence of personation, Deman, J., stated on p. 46 as follows :

"It is thoroughly understood election law that, unless there be corruption, and a bad mind and intention in personating, it is not an offence. If it is done under an honest belief that the man is properly there for the purpose of voting, it is held in these cases and in other cases analogous that no offence has been committed. . . . They are enactments which can be really only applicable to an intentionally bad act, because if a man is guilty at all he is guilty of felony, and may be imprisoned as a felon for a considerable time. To suppose that the legislature ever intended to enact that a man, who with perfect honesty but from a mere blunder as to his rights gives a vote, and then (believing that he has a right to do so), gives a second vote, he being on the register, on the same day, is to be deemed guilty of felony, is to impute an intention to the legislature which is absurd though if it had said so in absolutely plain words, we must have carried it out. I do not think that that is the intention of the Act ; I think there is still to be added to the offence of personation a corrupt intention, and where the corrupt intention is absent, the offence of personation cannot have been committed."

The facts in that case were that a man's name had been wrongly included in the register of two divisions. He voted twice and it was admitted that he was ignorant of the law and had acted conscientiously by mistake, that he had no corrupt intention and that he had not been corruptly influenced.

It was argued by the Public Prosecutor that there is no such thing as *mens rea* in India, that, unless an accused person can bring himself within any of the exceptions in the Indian Penal Code, the

offence is committed as soon as the acts set out in the section in the code which defines the offence have been committed that it is not stated in S. 171-D that the personation must be with a corrupt or any other intention and that therefore intention is immaterial. It was contended that the petitioner's plea amounts to nothing more than the plea that he was ignorant of the law which plea could be of no avail to him. But we find ourselves quite unable to agree with that argument. It does not follow that the petitioner's plea was merely one that he was ignorant of the law. His plea apparently is that as his name was twice upon the electoral roll, he believed by a mistake of fact, that he was on that account entitled to vote twice. His plea is not that he thought that a voter could vote more than once at an election. We have no doubt whatever that the Sub-Divisional Magistrate was wrong in not applying his mind to that aspect of the case. He should have seen, whether, upon the evidence, the petitioner was able to bring himself within any of the exceptions in the Indian Penal Code. This he has not done. Quite apart from this, we are unable to say that the intention of an offender in the commission of this crime is any different in India to what it is in England.

There can be no question whatever that the legislature in introducing the new chapter, Ch. 9 (a), into the code exactly copied the English statute law with regard to offences relating to elections and we see no reason for saying that, whereas in England the corrupt intention of the voter is to be considered here it is immaterial. We, therefore, set aside the conviction of the petitioner, order the fine inflicted upon him to be refunded and direct that this complaint be reheard by the District Magistrate, Rajahmundry or some other Magistrate whom he may direct other than this Sub-Divisional Magistrate. We ourselves are not prepared to decide this matter on the evidence and we think it is essential that the case should be decided by the Court before which the evidence is presented.

P.R. S./V.S.

Conviction: set aside.

1930 Cr. Cases 201 (1)
(Lahore)

SHADI LAL, C. J.

Mt. Mahbub Sultan—Petitioner.

v.

Qutub Din—Respondent.

Criminal Revn. No. 1066 of 1929, Decided on 18th October 1929, reported by Sess. Judge, Rawalpindi, on 24th June 1929.

Criminal P. C., S. 488—Civil litigation is no bar to giving effect to order awarding maintenance.

The bare fact that civil litigation is pending between the parties is no reason for not giving effect to an order awarding maintenance under S. 488 so long as it is in force. [P 201 C 1]

Ghulam Mohyuddin—for Respondent.

Facts.—The Magistrate refused to carry out execution for arrears of maintenance on the ground that the maintenance had been fixed by compromise. From the file it appears that there was never any compromise. The respondent Mirza Qutab Din put in a statement dated 31st May 1923, in which he stated that he was prepared to pay maintenance of his daughter, and left the amount to be settled by the Court. On 6th June 1923, apparently some discussion took place before the Magistrate, who wrote, "respondent's counsel has put in statement by respondent, who states that he is willing to pay maintenance for the child. Both parties agree to pay Rs. 22-8-0 per month."

Reference.—Respondent to pay 22-8-0 per month to Mt. Nur Jahan, mother of the infant, from 1st June 1923 in advance." This is clearly no compromise, and the Magistrate, First Class was undoubtedly wrong in refusing to execute the warrant. Counsel states that civil litigation is pending, but that is no reason whatever for not giving effect to the order awarding maintenance which is still in force. I therefore forward the case to the High Court with a recommendation that the order be quashed.

Order.—For the reasons recorded by learned Sessions Judge I quash the order of the Magistrate and direct him to enforce the order granting maintenance to Mt. Mahbub Sultan.

R.M./R.K.

Revision allowed.

1930 Cr. Cases 201 (2)
(Nagpur)

SUBHEDAR, A. J. C.

Tukaram—Accused—Applicant.

v.

Dagdu — Complainant — Opposite Party.

Criminal Revn. No. 23-B of 1929, Decided on 12th June 1929, against decision of Sub-Divisional Magistrate, Basim, in Criminal Appeal No. 61 of 1928.

Criminal P. C., S. 12 — Honorary Magistrate appointed for term of years—No order cancelling appointment—His powers do not cease even after expiry of term.

Where an Honorary Magistrate has been appointed in the Central Provinces for a term of years his jurisdiction to decide cases must be considered to continue unless there is an order cancelling such appointment. [P 202 C 1]

V. N. Herlekar—for Applicant.

S. S. Deshpande and *G. P. Dick* — for Opposite Party.

Order.—In a trial held by a Bench of Honorary Magistrates, Basim, the applicant Tukaram was ordered, under S. 22, Cattle Trespass Act, to pay to the complainant Dagdu Rs. 15 as compensation by way of fine and Rs. 8-8-0 by way of expenses for illegal seizure of six head of cattle belonging to the complainant and impounding the same in the cattle pound. The Sub-Divisional Magistrate, Basim to whom an appeal was preferred upheld the above order of the Bench of Magistrates and dismissed the appeal. The applicant has therefore filed an application for revision to this Court on several grounds the first of which is reproduced below :

"That Mr. S. K. Rahim was appointed an Honorary Magistrate by virtue of notification No. 1653-889V appearing in the C. P. Gazette dated 4th August 1923 on p. 937 for five years only and the Quarterly Civil List for 1st July 1924 also shows the date of expiry of the term of his office as 29th July 1928. Thus he had ceased to be a Magistrate on 6th October 1928 when the judgment was delivered by the Bench. It is thus illegal and passed without jurisdiction."

In reply to the rule calling upon the District Magistrate to show cause against the application that learned officer referring to the above ground merely stated that the judgment of the trying Magistrates was not vitiated because :

"The Honorary Magistrates under standing orders continue to exercise powers so long as they are not cancelled or withdrawn."

Since the learned District Magistrate had not in his reply given any reference to the standing orders I had to call upon the Government Advocate to appear, and

support the view of the District Magistrate.

The learned Government Advocate has accordingly appeared today and placed upon the record a copy of the Circular letter No. 2062/1774-V issued by the Chief Secretary to Government, Central Provinces, to all District Magistrates, Central Provinces and Berar, which makes it perfectly clear that the practice of appointing Honorary Magistrates under S. 12, Criminal P. C., for a term of five years was wrong because the said section like S. 14 *ibid* makes no provision of any time limit. The letter therefore states that :

"Government has accordingly been advised that the five years term imposed in accordance with recent practice is *ultra vires* and should be regarded merely as an expression of the intention of the Local Government to withdraw the Magistrate's powers after the expiry of five years, unless in the meanwhile it determines to continue them."

In para. 2 the letter goes on to state that :

"I am accordingly to say that in all cases in which a Magistrate has been appointed for a term of years, his jurisdiction must be considered to continue even after that term has expired."

Even in the Quarterly Civil Lists for October 1928 and January and April 1929 the name of Mr. S. K. Rahim appears among the list of existing Honorary Magistrates and therefore it is evident that his appointment had not ceased on the day that he signed the judgment of the Bench with his other colleagues. There is thus no force in the first ground of the application. Neither is there any force in the other grounds which merely attack the concurrent findings of the two lower Courts with which I agree. The result is that this application for revision fails and is dismissed.

P.N./R.K. *Revision dismissed.*

1930 Cr. Cases 202

(Patna)

COURTNEY-TERRELL, C. J. AND

MACPHERSON, J.

Raghu Dusadh and others—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 635 of 1929, Decided on 6th December 1929, from a Decision of Sess. Judge, Patna, D/- 3rd October 1929.

Criminal P. C., S. 239—Capture of one of four thieves uprooting crops in field by

owners—Owners assailed by mob of about 20 with deadly weapons—Joint trial of some of offence of theft and some of offence of rioting and use of deadly weapons is bad in absence of evidence that rescuers were in collusion with thieves to establish connexion between two sets of offences to form them one and same transaction.

Where owners of field finding that some 4 persons are uprooting crops in their field, capture one of the thieves and after they walked a short distance are attacked and assaulted by a mob of 20 persons with deadly weapons, the joint trial of some of the offence of theft and some of the offence of rioting and use of deadly weapons is bad unless there is evidence that the rescuers had been in collusion with the thieves committing the theft and had stood by with the object of effecting a rescue to establish a connexion between the two sets of offences so as to make one and the same transaction. [P 203 C 1, 2]

Jyotirmoy Chatterji and G. Sharma—for Petitioners.

Asst. Government Advocate or the Crown.

Courtney-Terrell, C. J.—This is an application for the revision of an order by the Sessions Judge of Patna affirming on appeal the convictions of the ten petitioners some of whom were charged with rioting, some of whom were charged both with rioting and with theft and one of whom was charged with theft only. The trial took place before the Sub-Divisional Magistrate of Barh. The circumstances alleged by the prosecution may be very briefly stated as follows: The accused persons belong to a village called Bhatgawan. Three quarter of a mile from that village there is a field which is owned by some persons who reside at another village called Akbarpur. On the day in question the owners of the field went half an hour before sunset to inspect the crops growing there. They there saw four persons who are the petitioners Nos. 1, 2, 9 and 10 in this case engaged in uprooting the crops. They are said to have captured one of the thieves, that is to say, petitioner 10, and were in the act of taking him to their own village in order that they might charge him with theft. When they had gone a short distance from their field they were set upon by a mob of 20 or 25 people including the petitioners whom I have mentioned, that is to say, Nos. 1, 2 and 9 and the other petitioners and they were there

assaulted by these people with deadly weapons.

The petitioners were placed on trial, Nos. 1, 2, 9 and 10 were charged with theft, No. 10 being charged with theft alone under S. 379, Nos. 1 and 2 were charged with an offence under S. 326 and under S. 148 with rioting with deadly weapons. No. 9 was charged with theft and also charged with rioting under S. 147. Nos. 3 to 6 inclusive were charged under S. 326 and S. 148, Nos. 7 and 8 were charged under S. 147 and therefore a trial took place in which some of the petitioners were accused of theft, and some were accused of the offence connected with rioting although they were not charged with or tried under the accusation of theft. It is said that the riot and the attack upon the complainants was with the object of rescuing the petitioner No. 10 who had been caught in the act of stealing the crops and was in the custody of the complainants.

The objection taken by Mr. Jyotirmoy Chatterji on behalf of the petitioners is in substance that the trial was had under S. 239, Criminal P. C. He says that the offences of rioting and the use of deadly weapons upon the complainants were not part of the same transaction as the offence of theft with which some of the petitioners have been charged. In my opinion that contention is sound. The learned Sessions Judge has stated his view that the offences were in the course of the same transaction because they are in the relation of cause and effect but that would be true of any case of violence effected in the rescue of a person from custody. The rescue and the violence would not have taken place had not petitioner 10 been taken into custody for the offence. It does not necessarily follow that the rescuers of a person in custody have been in collusion with him in the commission of the offence for which he is in custody. We have been unable to find any trace in the judgment of any finding that the persons charged with rioting and the use of deadly weapons were directly or indirectly concerned with the theft. Had there been evidence that the rescuers had been in collusion with the thieves committing the theft and had stood by with the object of effecting a rescue then there

would have been such a connexion between the two sets of offences as to make them one and the same transaction, and that would have justified the trial of the two sets of offences together; but in this case there is no trace of any such connexion. It therefore follows that the joint trial was bad. Petitioner 10 was only charged with theft and sentenced to one month's rigorous imprisonment and has already served his sentence. Petitioner 9 has been sentenced to six months rigorous imprisonment in respect of the theft but that is probably a mistake on the record because as far as we can see there is nothing to make his case worse than that of the other persons accused of theft who have all been sentenced to one month's rigorous imprisonment in respect of the theft. We see no reason to send the case back for retrial in respect of those who are accused of theft only, nor indeed of any further investigation of the crime of theft but it is necessary in the interests of justice that petitioners 1 to 9 inclusive be retried on the charges for which they were originally tried excluding the offence of theft under S. 379. The convictions and sentences will therefore be set aside and the case in this respect will go back to the Magistrate for fresh trial. These petitioners will be on bail to the satisfaction of the District Magistrate to appear this day fortnight before the Magistrate.

Macpherson, J.—I agree.

P.N./R.K.

Order accordingly.

1930 Cr. Cases 203

(Rangoon)

MAUNG BA, J.

Mohamed Hayat Mulla—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 117 of 1929, Decided on 25th March 1929, from order of Dist. Magistrate, Rangoon, in Criminal Regular Trial No. 133 of 1927.

(a) Criminal P. C., Ss. 366 and 367—Omission to write judgment before passing sentence should not vitiate trial unless it occasions failure of justice—Criminal P. C., S. 537.

Though it is desirable that Magistrates should obey the express provisions of the law, yet the omission to write a judgment before pronouncing a sentence should not necessarily

vitiates the trial, unless such omission has in fact occasioned a failure of justice: 14 All. 242 and 27 Mad. 237, not foll. 23 Cal. 502, Rel. on. [P 204 C 2]

(b) Criminal P. C., S 367—Omission to sign judgment is mere irregularity curable by Criminal P. C., S. 537.

Where a Magistrate prepares a judgment but does not sign it, such omission to sign the judgment amounts to a mere irregularity curable by S. 537: A. I. R. 1925 All. 299, Rel. on. [P 204 C 2]

^a *Rauf*—for Appellant.

Judgment.—Appellant aged 64 appeals from a sentence of four years' rigorous imprisonment on three charges of cheating in the last case tried by the late U Po Nu as Additional District Magistrate, Rangoon. The first legal objection taken is that the sentence is illegal as there is no judgment signed by the learned Magistrate. On the record there is a judgment prepared by the late U Po Nu. From the affidavits of his two clerks, Maung Tha Tun and Maung Ba Sein, it would appear that that judgment consists of 12 paragraphs out of which paras 1 to 3 were written by Tha Tun at U Po Nu's dictation, paras 4, 5, 6 and 7 were typed by U Po Nu himself, and the remaining 5 paras were written by Maung Ba Sein at U Po Nu's dictation; that the corrections in the judgment were by U Po Nu himself; that that judgment was pronounced in open Court and the accused sentenced to four years' rigorous imprisonment on the evening of 22nd December 1928; that U Po Nu then handed that judgment to his Bench Clerk Maung Tha Tun to be fair typed; and that unfortunately U Po Nu died before he could sign the fair copy.

The appellant's learned advocate relied upon the case of *Queen-Empress v. Hargobind Singh* (1). In that case Hargobind and two others were tried for murder, found guilty and sentenced to death. The sentence was passed first and the judgment written afterwards. The sentence was held to be illegal, and the learned Judges observe:

"The requirements of Ss. 366 and 367 are no mere matters of form. The provisions of those sections are based upon good and substantial grounds of public policy and whether they are or not, Sessions Judges must obey them and not be a law to themselves. Any Judge at the conclusion of the evidence in a case, some of which may be not quite distinct in his mind owing to the length of the trial, might pass sentence on a prisoner and find it impossible

afterwards honestly to put on paper good reasons for having convicted him, or, on the other hand, might direct that the accused be set at liberty and find it impossible afterwards honestly to put on paper good reasons for the acquittal. The law wisely requires that the reasons for the decision shall accompany the decision, and shall not be left to be subsequently inserted or recorded."

This decision was approved by a Bench of the Madras High Court in the case of *Bandanu Atchayya v. Emperor* (2). There too the Sessions Judge passed sentences on the accused persons and wrote the judgment some days afterwards. The learned Judges held that this was a violation of Ss. 366 and 367, Criminal P. C., and was more than an irregularity, and that it was a defect which vitiated the convictions and sentences. But a Bench of the Calcutta High Court in *Tilak Chandra Sarkar v. Baisagomoff* (3), held a contrary view. The learned Judges held that the omission of the Magistrate in recording a judgment before pronouncing his sentence was an omission or irregularity which fell within the purview of S. 537 of the Code, and so the sentence itself, by reason of this irregularity, was not an illegal sentence so as to render the trial nugatory.

Sub-S. (4) of S. 366 reads:

"Nothing in this section shall be construed to limit in any way the extent of the provisions of S. 537."

I am inclined to think that, though it is desirable that Magistrates should obey the express provisions of the law, yet the omission to write a judgment before pronouncing a sentence should not necessarily vitiate the trial, unless such omission has in fact occasioned a failure of justice. In the present case it cannot be said that there was no written judgment at all. The learned Magistrate might have signed the judgment already prepared, though it looked untidy and might append a fair copy of it later. It is true that S. 367 says that a judgment shall be dated and signed by the presiding officer in open Court at the time of pronouncing it. In my opinion the omission to sign the judgment amounts to a mere irregularity curable by S. 537. In *Emperor v. Ram Sukh* (4), Mukerji, J. held such a view. There a Magistrate wrote a judgment with his own hand

2) [1904] 27 Mad. 237.

3) [1895] 23 Cal. 502.

(1) [1892] 14 All. 242=(1892) A. W. N. 88.

(4) A. I. R. 1925 All. 299=47 All. 284.

but forgot to sign and date it, and it was held that this did not amount to more than an irregularity, such as would be cured by S. 537.

I now come to the second legal objection with regard to the jurisdiction of the Court. Three charges were framed against the appellant; firstly that he cheated Dudumia at Mudon in the Amherst District by dishonestly inducing him to deliver Rs. 143, secondly that he cheated Maung Tun Gyaw at Taloktaw in the Hanthawaddy District by dishonestly inducing him to deliver Rs. 11; and thirdly that he cheated Hakim Khan at Thanatpin in the Pegu District by dishonestly inducing him to deliver Rs. 10-10-0. S. 177 lays down that every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed. In the present case the alleged cheating was committed in the Pegu, Hanthawaddy and Amherst Districts and the trial took place in Rangoon. The question is whether the irregularity has vitiated the trial. S. 531 provides that no finding, sentence or order of any Criminal Court shall be set aside merely on the ground that the inquiry, trial or other proceeding in the course of which it was arrived at or passed, took place in a wrong Sessions division, district, sub-division or other local area, unless it appears that such error has in fact occasioned a failure of justice. In my opinion there has been no failure of justice by this error relating to territorial jurisdiction. (Then his Lordship considered the facts and the evidence in respect of the charges of which the appellant was convicted and concluded as follows.) In my opinion the conviction of cheating cannot be sustained. The appeal is allowed, the convictions and sentences are set aside and the appellant is acquitted.

P.N./R.K. *Sentence set aside.*

*** 1930 Cr. Cases 205**
(Privy Council)

(From Allahabad)

13th December 1929.

LORD TOMLIN, SIR LANCELOT SANDERSON AND SIR BINOD MITTER.

A, a Pleader of Agra—Appellant.

v.

Judges of the High Court of Judicature, Allahabad—Respondents.

Privy Council Appeal No. 99 of 1928.

*** Legal Practitioners Act, S. 14—Pleader exclusively retained by a client accepting brief against that client in another suit by opponent, is guilty of professional misconduct.**

The appellant, a pleader, was standing counsel for a company on certain terms. On 20th May 1926, certain debenture-holders and other shareholders of the company filed a suit against the company and a number of firms, companies and individuals who had acted or were acting as managing agents of the company or as directors or agents of such managing agents claiming, for the benefit of the company against the defendants other than the company large sums alleged to have been fraudulently misappropriated by such defendants or some of them. In this suit *G*, the person, who directed the affairs of the company, declared that the company has always been treated as a co-plaintiff and would continue in future to accept the status of co-plaintiffs.

On 21st March 1927, the company received a notice, dated 17th March 1927, from the debenture-holders of their intention to enforce their debentures. On 13th May 1927, the appellant informed *G* of his intention to act for the debenture-holders and about the same time he accepted a brief for such debenture-holders. On 14th May 1927, the plaintiff in the debenture-holders' suit was filed by one *B*, who admittedly was the appellants' junior, acting under his directions. On 25th May 1927, *G* cancelled the appellant's vakalatnama, and applied to the Court in the suit of 1926, to remove his name from the record as the company's pleader, and on the following day his name was removed on the ground that his vakalatnama had been cancelled. On 27th May 1927, the appellant filed a vakalatnama in the suit of 1926 on behalf of one of the plaintiffs.

Held: that the appellant, in making himself responsible for the filing of the plaint in the debenture-holders' suit filed on 14th May 1927 and in accepting a brief from the plaintiffs in that suit at a time when his exclusive retainer in favour of the company was still running, acted in violation not only of the principles which govern the conduct of a legal adviser, but of the ordinary principles of good faith as between man and man. Such a course would not have been justified even if the retainer had been first determined. The conduct of the appellant was irregular in form and improper in substance, and was "grossly improper conduct in the discharge of his professional duty" within the meaning of the Act. [P 208 C 1, 2]

Held further: that the appellant's acting for a plaintiff in the suit of 1926 after his retainer for the company was determined, though unwise and to be regretted, does not amount to "grossly improper conduct in the discharge of his professional duty." [P 208 C 1, 2]

A. M. Dunne and W. Wallach—for Appellants.

L. De Gruyther and E. B. Raikes—for Respondents.

Lord Tomlin—This an appeal from an order dated 23rd January 1928, of the High Court of Judicature, Allahabad whereby the appellant, a pleader prac-

tising at Agra, was suspended from practice for four years from the date of the order on the ground that he was guilty of professional misconduct in respect of three out of six matters charged against him.

The order was made after enquiry and report by the District Judge of Agra under S. 14, Legal Practitioners Act (18 of 1879). This jurisdiction of the High Court to suspend or otherwise punish a pleader practising in any subordinate Court arises after report by the presiding officer of such subordinate Court that the pleader has been guilty of any of the offences mentioned in S. 13 of the Act. These offences include fraudulent or grossly improper conduct in the discharge of his professional duty.

Of the six charges made against the appellant, the three upon which the High Court found him guilty were as follows :

"(1) That having been standing counsel of the Agra United Mills, Limited, employed by Kunwar Ganesh Sinha since 25th April 1925, on 27th May 1927, you filed a vakalatnama on behalf of Major A. U. John, a plaintiff in Suit No. 126 of 1926 in the Court of the Additional Subordinate Judge, Agra, against Kunwar Ganesh Sinha, the Agra United Mills Limited, and other defendants.

"(2) That having been standing counsel of the Agra United Mills, Limited, for over six years under an agreement not to give advice or to conduct case against the Mills, and having obtained an increment to your retainer on the express undertaking that you would not appear for Messrs. John against the Mills, you advised Messrs. John in preparing their Case No. 84 of 1927, against the Mills, and you got your junior, Mr. Baboo Lal, to file the plaint.

"(6) That in Suit No. 126 of 1926, in the Court of the Additional Subordinate Judge, Agra, you made an unfair use of your position as legal adviser of the Agra United Mills, Limited, and forced the Mills to agree to give you a fee of Rs. 12,000. That you did nothing for the Mills except to file your vakalatnama."

At the end of the hearing before their Lordships' Board, their Lordships being of opinion that the first and sixth charges had not been made out, but that the second charge was established, intimated that they would humbly advise His Majesty that the suspension should cease as from 22nd November 1929.

It is now necessary for their Lordships to give the reasons which led them to this conclusion.

For this purpose a statement of the relevant facts is required.

In 1920, Messrs. John Bros., the owners of a mill at Agra sold the mill to the

Agra United Mills Company, Limited. The sum of Rs. 50,000, the purchase price or part of the purchase price, was satisfied by the issue to the vendors of debentures of the company. There was a debenture trust deed, of which Messrs. John Bros., were the trustees.

In January 1921, the appellant was appointed standing counsel of the company. He also from time to time acted on behalf of Messrs. John Bros. Their Lordships are satisfied that both the company and Messrs. John Bros., were fully aware of the appellant's position and that neither of them raised any objection to it.

On 31st January 1924, the appellant wrote to the company a letter setting out what he described as "the terms we settled the other day about my fees, etc., for Court cases." The letter was not answered, but their Lordships are satisfied that in subsequent transactions fees were paid by the company to the appellant upon the basis of the terms set out in the letter.

In 1924 a suit was launched by or in the name of the company against the debenture holders, attacking the validity of the debentures. The suit was dismissed by consent on 28th May 1925. It does not appear that the appellant had any part on either side in this suit, but it may have brought to his mind the possibility of conflict between the respective interests of the company and Messrs. John Bros.

At any rate, on 25th September 1925, the appellant wrote to the company a letter in which he referred to the possibility of a conflict of interests between his two clients, and stated that he had decided to give up Messrs. John Bros. and act only for the company.

Thereafter he ruled himself by the terms of that letter, and their Lordships do not accept his story that, notwithstanding the letter, he was to be free to advise Messrs. John Bros. in respect of their debentures in the company.

On 20th May 1926 Messrs. John Bros. and other shareholders of the company filed a suit in the Court of the Subordinate Judge at Agra against the company and a number of firms, companies and individuals who had acted or were acting as managing agents of the company or as directors or agents of such

managing agents claiming for the benefit of the company against the defendants other than the company large sums alleged to have been fraudulently misappropriated by such defendants or some of them.

The defendants other than the company held a majority of the shares in the company and controlled the company. The appellant as pleader for the company received his instructions from Ganesh Sinha, one of such defendants—Ganesh Sinha was managing director of the Darbhanga Trust, Limited, the managing agents of the company, and as such directed the affairs of the company. On 4th August 1926, the appellant under instructions from Ganesh Sinha, made a statement to the Court to the effect that as the suit was for the benefit of the company, it was unnecessary for the company to file any written statement.

Later on in August 1926, a suit committee was set up by the majority shareholders, which apparently desired to get rid of the appellant as pleader on the record for the company and on 24th January 1927, an application was made to substitute on the record as pleader for the company one Din Dayal in place of the appellant. The application failed, the Judge saying :

"that though figuring as a defendant, the Mills are virtually plaintiffs in the case."

In the meantime the appellant had made a claim to Ganesh Sinha to be paid Rs. 15,000 as his fee as pleader for the company in the suit, calculated in accordance with the terms of the letter of 31st January 1924.

Ultimately the claim was settled on 17th March 1927, by payment to the appellant of Rs. 12,000. It is this payment which is the subject of the sixth charge. On 21st March 1927, the company received a notice dated 17th March 1927, from the debenture-holders of their intention to enforce their debentures.

On 25th March 1927, an answer to this notice was sent to the debenture-holders. The answer was signed by Swarup, pleader for Ganesh Sinha. It is said to have been drafted by the appellant. This the appellant denies, but his denial was not accepted by the District Judge or the High Court. The matter is in their Lordships' opinion, of

little importance. In their Lordships' opinion the appellant at this time or shortly afterwards made up his mind that in the debenture-holders' suit which was then being threatened, he would act for the plaintiffs against the company. At the same time their Lordships are satisfied (and in this respect they differ from the High Court) that the appellant never intended to give up his position as pleader for the company in the suit of 1926.

On 13th May 1927, the appellant informed Ganesh Sinha of his intention to act for the debenture-holders, and about the same time he accepted a brief for such debenture-holders.

On 14th May 1927, the plaint in the debenture-holders' suit was filed by one Babu Lal, who admittedly was the appellants' junior, acting under his directions.

On 17th May 1927, Ganesh Sinha wrote to the appellant, protesting against the appellant's action and pointing out in effect that the appellant had while acting for the company, received information which would necessarily embarrass him if he acted for the debenture-holders. The appellant's answer on 21st May 1927 was a long and violent letter in the course of which he said :

"Please therefore note that I sever my connexion with you absolutely from this date except that I insist on representing the unfortunate defendant company, the Agra United Mills, Limited, in suit No. 126 of 1926, because I cannot resist the conclusion that if I am eliminated therefrom you will do your utmost to sacrifice it. Any effort to supplant me in order to serve your own dishonest ends will be resisted by all the force and energy I can command."

On 25th May 1927 Ganesh Sinha cancelled the appellant's vakalatnama and applied to the Court in the suit of 1926 to remove his name from the record as the company's pleader, and on the following day his name was removed on the ground that his vakalatnama had been cancelled. In the course of the hearing of this application Ganesh Sinha made a declaration to the effect that the company had always been treated as a co-plaintiff and would continue in future to accept the status of co-plaintiffs.

On the day on which the last-mentioned application was made the appellant applied by petition to the District Judge for advice as to whether he could

properly appear for the plaintiffs in the debenture suit. This petition was forwarded to the High Court by the District Judge and on 31st May 1927, the High Court told the District Judge that the appellant must decide this matter for himself.

On 26th May 1927, the company, acting through Ganesh Sinha, petitioned the District Judge under the Legal Practitioners Act to take action against the appellant on the ground that he had been guilty of professional misconduct. The charges were further expanded in a second petition on the 28th May.

On 27th May 1927, the appellant filed a vakalatnama in the suit of 1926 on behalf of one of the plaintiffs. The company, through Ganesh Sinha, at once applied to the Court to prevent the appellant from doing so. The Subordinate Judge refused to interfere saying—

"I do not think there is anything to preclude him from doing so, as the Mills Company has been and is being treated virtually as a co-plaintiff, the suit being for its benefit."

Subsequently the defendants in the suit of 1926 raised upon the pleadings an issue as to the validity of the debentures, and this apparently led the Additional Subordinate Judge to take the view that the appellant could not continue to act for one of the plaintiffs in that suit.

Out of this confused welter of happenings one thing only emerges clearly, that the appellant had no true appreciation of the principles which should govern the conduct of a professional legal adviser. This is the more apparent because, in regard to the matters the subject of the first and second charges, he affected no concealment in what he did, but openly asserted his right to pursue the course he had marked out for himself.

Their Lordships are of opinion that the appellant, in making himself responsible for the filing of the plaint in the debenture-holders' suit and in accepting a brief from the plaintiffs in that suit at a time when his exclusive retainer in favour of the company was still running, acted in violation not only of the principles which govern the conduct of a legal adviser, but of the ordinary principles of good faith as between man and man. Their Lordships do not think that such a course

would have been justified in the circumstances of the present case even if the retainer had been first determined. In their Lordships' judgment, the conduct of the appellant was irregular in form and improper in substance, and was "grossly improper conduct in the discharge of his professional duty" within the meaning of the Act. Their Lordships therefore think that the second charge was made out.

With regard to the first charge, based upon the appellant having acted for a plaintiff in the suit 1926 after his retainer for the company was determined, their Lordships are impressed by the contemporaneous facts that the Subordinate Judge approved the course pursued by the appellant, and that Ganesh Sinha had declared to the Court that there was no conflict of interest in the suit of 1926 between the company and the plaintiffs. The view taken by the learned Subordinate Judge does not commend itself to their Lordships, but they do not think that in the circumstances which have been indicated the conduct of the appellant in this matter, though unwise and to be regretted, amounted to "grossly improper conduct in the discharge of his professional duty."

The sixth charge is of a different character. It is in the nature of a criminal charge. It is one which demands precision in statement and strictness in proof. It was in fact framed in vague terms, giving no indication of the real gravamen of the charge, and in their Lordships' opinion the evidence adduced was insufficient to establish it.

The appellant has been suspended from practice since 23rd January 1928. Their Lordships are of opinion that the appellant will have been adequately punished if the suspension ceases as from 22nd November 1929, and that the order of the High Court should be varied accordingly, but without any variation in that order so far as it relates to costs. Their Lordships therefore humbly advise His Majesty accordingly. There will be no costs of this appeal.

D.D.

Order varied.

Solicitors for Appellant—*T. L. Wilson & Co.*

Solicitors for Respondents—*The Solicitor, India Office.*

*** 1930 Cr. Cases 209**
(Calcutta)

MUKERJI AND JACK, JJ.

Prafulla Kumar Bose—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 216 of 1929, Decided on 3rd September 1929, against order of Sess. Judge, Sylhet, D/- 8th February 1929.

*** (a) Penal Code, S. 366—'Forced' includes forced by circumstances.**

The word 'forced' as used in S. 366, is used in its ordinary dictionary sense and would include forced by stress of circumstances.

[P 210 C 1]

(b) Penal Code, S. 366—'Seduced' includes subsequent seduction for further acts of illicit intercourse.

The word 'seduced' as used in S. 366 should not be taken to have that narrow meaning of inducing a girl to part with her virtue for the first time but that even though a girl may have by the first act of seduction surrendered her chastity, subsequent seduction for further acts of illicit intercourse is also meant to be included: *Rex v. Moon*, (1910) 1 K. B. 818, *Ref.*

[P 210 C 1, 2]

(c) Criminal P. C., S. 297—Age of girl in dispute—One count of charge setting out both kidnapping and abduction in alternative or both does not vitiate charge.

In a case under S. 366, Penal Code, if the age of girl is in dispute one count of charge setting out both kidnapping and abduction in alternative or together does not vitiate the charge to jury: *A. I. R. 1927 Cal. 200, Ref.*

[P 210 C 2, P 211 C 1]

(d) Evidence Act, S. 65—Oral evidence of contents of letter inadmissible under S. 66 cannot become admissible by subsequent dispensing with notice.

Oral evidence of the contents of a letter neither called for nor produced, is inadmissible under S. 66 though no objection may be taken to the giving of that evidence, and no subsequent dispensing with the notice can operate to make it admissible: *20 Cal. 53, Rel. on.*

[P 211 C 1]

*** (e) Criminal P. C., S. 342—If accused declines to answer questions Court should not hold inquisitorial proceedings.**

If an accused professes to be reticent the Court should not hold an inquisitorial proceeding and the fact that the accused declines to make a statement would not necessarily indicate to the Judge that the accused would not like to answer specific questions put to him.

[P 212 C 1, 2]

Narendra Kumar Bose and *Hari Charan Banerji*—for Appellant.

Birbhusan Dutt—for the Crown.

Judgment.—The appellant Prafulla Kumar Bose has been convicted by the Sessions Judge of Sylhet under S. 366, I. P. C., and has been sentenced to undergo rigorous imprisonment for 18 months and to pay a fine of Rs. 1,200, or

in default to undergo rigorous imprisonment for 18 months more. The fine has been ordered to be paid as compensation to the father of the girl in respect of whom the offence has been found to have been committed. The trial was held with the aid of a jury on charges under Ss. 366, 368 and 376, I. P. C. The jury were unanimous in their verdict. They found the appellant not guilty under S. 376, I. P. C. They held that he was guilty under S. 366, I. P. C., finding that the girl had been kidnapped, the seduction having taken place before the girl left her father's place. They held that in the circumstances the offence under S. 368, I. P. C., did not arise.

The story needs no recounting. It is set out in all its harrowing details in the voluminous charge which the learned Judge delivered and which purports to deal with every point in controversy with all the evidence bearing on it and from all conceivable view points. Put in a nutshell, the story is that the appellant who was an Assistant Surgeon at Sunamgunge in the District of Sylhet, taking advantage of his position as the next door neighbour, and abusing the confidence that was reposed on him as the medical attendant of the girl who was placed under his treatment and which enabled him to have almost free access into the house wherein the girl lived, kidnapped or abducted the girl on or about 20th August 1920, and removed her from place to place keeping her concealed to avoid detection till the girl was recovered at a place called Khalsini, near Chandranagore on 23rd March 1923. The story is that in the meantime the girl gave birth to a child, which however died. Information of the girl having left her father's house was given to the police almost simultaneously with her disappearance. The appellant remained at Sunamgunge till April 1921, presumably to keep up appearances. Subsequently, some time in 1922, the father on receipt of some information against the appellant applied for and obtained warrant for his arrest and search warrant for the production of the girl. After the girl was recovered on 23rd March 1923, as already stated, the usual investigation by the police followed, and a charge sheet was submitted against the appellant on 10th

June 1924. The appellant, however, could not be arrested then. He eventually surrendered on 21st December 1927.

In this appeal which the appellant has filed to this Court from his conviction and sentence, various grounds have been taken which we propose to deal with one by one.

It has been urged in the first place that the learned Judge has not correctly explained the offence punishable under S. 366, I. P. C. It has been argued that the expression "in order that she may be forced or seduced to illicit intercourse" has been wrongfully explained. The contention is that the learned Judge wrongly explained the two words 'forced' and 'seduced.' As regards the word 'forced' the learned Judge said as follows :

"Force implies not merely physical force but also the force of circumstances. For instance, a girl who has been kidnapped from her father's house may be placed in such circumstances that she has no option but to submit to illicit intercourse. For instance, if she was entirely in the power of her kidnappers or abductors, her consent might be nothing more than a mere submission to their will."

It is contended that this explanation of the word 'forced' goes far beyond the definition given in S. 349, I. P. C. This argument overlooks that the definition that is given is not the meaning of the verb 'force' but of the expression 'to use force.' In our opinion there is no reason to suppose that the word 'forced' as used in S. 366, I.P.C., was not used in its ordinary dictionary sense which would include forced by stress of circumstances. Assuming, however, that the learned Judge was not right in the meaning he gave to the word, the error, even if there was any, did not matter, because the learned Judge made it plain to the jury that the question they had to consider was:

"whether or not the doctor's main motive in kidnapping or abducting the girl was that she should be seduced to illicit intercourse with himself."

It is 'seduction' that the jury had to deal with and not 'force,' and the verdict shows that the jury rightly understood the point. As regards the word 'seduced' the learned Judge told the jury by reference to some decided cases that though the word 'seduction' is sometimes used to mean to induce a girl to part with her virtue for the first time, the word as used in the section should

not be taken to have that narrow meaning, but that even, though a girl may have by the first act of seduction surrendered her chastity, subsequent seduction for further acts of illicit intercourse was also meant to be included. It has been urged that this view is wrong and as authority in support of this contention *Rex v. Moon* (1) has been cited, though that case, amongst others, has been relied upon by the learned Judge and in support of the view he took. We are of opinion that the view taken by the learned Judge is correct. It is the view taken in several reported decisions on the section, and is amply supported by what Channel, J. as well as the Court of appeal says in the case of *Rex v. Moon* (1) as regards the meaning of the word. The Court of appeal in that case only held that the wider meaning should not be given to the word 'seduction' as used in the particular section of the Childrens' Act, in view of the words "or prostitution" that stood next to it.

The second ground urged is that the learned Judge mixed up the two offences of kidnapping and abduction and did not keep the elements of those offences separate before the jury. As indicating this confusion, reliance has been placed upon the following passage in the summing up:

"I should also be glad if you would come to a further finding of fact whether you think that the girl had been kidnapped or abducted or kidnapped and abducted."

This contention in our opinion has no substance inasmuch as one of the questions in dispute in the case was that relating to the age of the girl. If the girl was 16 or over, she could only be abducted and not kidnapped, but if she was under 16 she could be kidnapped as well as abducted if the taking was by force or the taking or enticing was by deceitful means.

Thirdly it has been contended that the charge under S. 366, I. P. C., should have been split up into two, one relating to kidnapping and the other to abduction, and it has been said on the authority of the case of *Isu Sheikh v. Emperor* (2), that it was illegal to frame one count of charge setting out both the offences in the alternative. We are not prepared to say that a charge of latter

(1) [1910] 1 K. B. 518=79 L. J. K. B. 505=74 J. P. 231.

(2) A. I. R. 1927 Cal. 200.

character contravenes the requirements of the law, far less that there was the least prejudice caused to the appellant thereby.

The next ground of objection relates to the admission of oral evidence from the girl as regards certain letters which she said she had received from the accused and which she returned either to a man of the accused named Ram Charan, or to the accused himself. This ground has been pressed with considerable force. What happened was that no exception was taken to the reception of this evidence when it was given but several days after the deposition was over, an application was made objecting to it on the ground that the notice contemplated by S. 66, Evidence Act, had not been given. The learned Judge then passed an order that as the accused denied having got the letters in his possession this was a case in which he would dispense with the notice. It has been urged that the fact that objection was not made at the time did not matter and that the subsequent dispensing with of the notice would not make the evidence admissible that was inadmissible at the time it was given. The first of these propositions need not be disputed: *Kameshwar Pershad v. Amanutulla* (3), and the second one is obviously just. But there are several answers to the appellant's contention. One is that the learned Judge might have expunged the evidence that had already been given and after dispensing with the notice, allowed the same evidence to be given over again this technical defect of procedure that there was, in not adopting this course can well be condoned. Another is that the case can hardly be regarded as one in which the originals are "shown or appear to be in the possession or power" of the accused,—it not having been stated by the girl that that was so, and it not having been the case of the accused that he had the letters. It was therefore not a case under S. 65, Cl. (a), but rather under Cl. (c) of that section. If so, it was only a question of sufficiency of the search that should have been made for justifying the reception of secondary evidence. In such a case, as the Judicial Committee has pointed out:

"whether or not there was evidence of such an amount of search for the originals as would

(3) [1898] 26 Cal. 53=2 C.W.N. 649.

justify the Court in admitting secondary evidence of it was a point which was proper to be decided by the Judge of first instance, and was to be treated as one depending very much on his discretion, and the conclusion should not be overruled except in a very clear case of miscarriage of justice: *Harripriya Debi v. Rukmani* (4)"

Anent this ground it has been also urged that sufficient directions were not, given by the learned Judge to point out to the jury the improbability of the girl remembering the contents of the letters for such a length of time, but we do not think that there is anything in this objection.

The fifth ground is a complaint against the procedure adopted by the learned Judge in interposing too frequently in the midst of the examination and the cross-examination of the girl by putting questions to her. We have examined the evidence that was elicited in that way, and we think that the only object of the learned Judge was to clear up matters involved in obscurity, and that except as regards one or two points, what was said in answer to the question put as aforesaid, was in favour of the accused. Of course if the learned Judge hampered the prosecution or the defence by taking the case out of their hands that would be a different matter; but no complaint of that character was made at the time, and there is nothing on which such a complaint can reasonably be made now.

The sixth ground is to the effect that the learned Judge did not give sufficient or proper directions as regards the non-examination of witnesses. What he did was to tell the jury:

"It has also been pointed out that a number of persons whose names transpired in the evidence, have not been examined as witnesses and during the course of the arguments the learned defence pleader produced a list of 26 persons who are according to his contention should have been examined by the prosecution."

Having said this the learned Judge proceeded to deal specially with one of these witnesses, namely the husband of the girl. Then he said generally:

"If such witnesses are not produced and examined, you may draw an inference that their testimony would not have supported the prosecution case."

He then briefly discussed the information on the record regarding the said 26 witnesses in order to explain to the jury to what extent the said witnesses

(4) [1892] 19 Cal. 438=19 I. A. 79=6 Sar. 177 (P.C.).

could have given material evidence and placed the whole list before the jury in that way.

We do not think there was anything left unsaid that should have been said on the question of non-examination of material witnesses. Amongst these witnesses were the astrologer and the mother, for whose non-examination a good deal of argument has been advanced before us. Hemangini also is mentioned in that list.

It has been contended as the seventh and eighth grounds that the learned Judge should have told the jury that if the charge of rape failed the evidence of the girl and of the other witnesses should be regarded as very much discredited. The ninth ground is to the effect that on the question of omission on the part of the girl to state before the Committing Magistrate matters that she spoke to in the Court of Sessions the Judge's remarks had the effect of minimizing the importance of the omission. We do not feel pressed by any of these grounds.

The tenth and last ground is a complaint as regards the examination made of the appellant by the learned Judge. The contention is that after the appellant had declined to make a statement the learned Judge should not have put questions to him in the way that he did. Objection is also taken to the form of the questions, their range and their number and it is also said that the questions were of an incriminating character and were in the nature of cross-examination. Now the first question that the learned Judge put and the answer that the appellant gave to it were as follows:

"Q. Do you wish to make a statement? You are not bound to do so but if you do so your answers may be taken into consideration at the trial and put in evidence for or against you.

"A. I am not guilty. I do not wish to make any statement. What I have got to say my lawyers will say in the argument."

After this the learned Judge put to the appellant a very large number of questions covering almost every single point which formed the main allegations in the case for the prosecution. It is true that if an accused prefers to be reticent the Court should not hold an inquisitorial proceeding; but what was done in this case was something entirely different. The fact that the appellant declined to make a statement would not

necessarily indicate to the Judge that the appellant would not like to answer specific questions put to him. The appellant did answer all the questions without demur. The questions were not inquisitorial or of a cross-examining character, and were not intended to fill up the gaps, if any, in the prosecution case. They were clearly put with the object of knowing what portion, if any, of the prosecution case was also the case for the defence, so that the learned Judge might be better able to place the case properly before the jury. They were also put to give the appellant a proper opportunity of explaining, if he would the circumstances appearing against him in the evidence. No advantage has been taken of any slips that the appellant may have made in his answers. The questions may have been somewhat inconvenient for the appellant, but there is nothing therein of which he can legitimately complain.

We are unable to hold in appellant's favour upon any of the ten points on which the appeal has been pressed.

The appeal is accordingly dismissed.
V.B./R.K. *Appeal dismissed.*

* * 1930 Cr. Cases 212*

(Calcutta)

Full Bench

RANKIN, C. J. AND C. C. GHOSE,
SUHRAWARDY, PEARSON AND PAGE, JJ.
Emperor
v.

Ermanali and others—Accused.

Full Bench Ref. No. 2 of 1929 in Jury Reference No. 41 of 1929, Decided on 9th January 1930.

* * (a) Criminal P. C., Ss. 274 and 326 (1)—Number of persons summoned for trial of offence under Penal Code, S. 302—Summoning less than 18 does not vitiate trial—38 C. W. N. 1054, *Overruled*.

In a murder case where the number of jurors summoned is 14, nine of whom appear and are chosen by lot, the trial is not bad by reason of the fact that only 14 jurors have been summoned in contravention of the provisions of Ss. 274 and 276: *A.I.R. 1927 P.C. 44, Appr. 25 Mad. 61 (P.C.), Dist.*; 33 C. W. N. 1054 *Overruled*; *A.I.R. 1930 Cal. 60 (2)* and 33 C. W. N. 1053, *impliedly overruled*.

(b) Criminal P. C., S. 326 (1)—Large area of selection in persons attending is not the underlying intention of S. 326 (1).

Per Rankin, C. J.—It is no part of the intention of the legislature to have a large area of selection in the persons attending upon the summons on the theory that the larger the number of effective names in the ballot box,

the greater the chance, the persons chosen will make good jurors. [P 215 C 1]

(c) **Criminal Trial — Court should look to substance rather than to form — Criminal P. C., S. 537.**

Per *Page, J.* — When the decision of a criminal Court in substance appears to be correct an appeal Court should endeavour to uphold the decision even in cases where the rules of procedure by which the trial is to be regulated have been transgressed; except where the breach of the proscribed rules is of so grave a nature, where the form of trial was substantially different from that provided by law for the offence charged, or where, although the violation of the rules was not so profound as to radically alter the mode of trial, it is proved that thereby in the event a failure of justice has in fact been occasioned. [P 217 C 1]

(d) **Criminal Trial — Decision just and reasonable on merits should not be disturbed.**

Per *Page, J.* — Rules and Regulations are intended to be the handmaid and not the mistress of the law; in criminal proceedings it is of the utmost importance that a decision just and reasonable on the merits should not be disturbed because in the course of the proceedings some flaw can be detected that is not fundamental and which is not proved to have worked injustice to the accused, although it may constitute a breach of the rules of criminal procedure: *R. v. Justices of the County of London*, (1898) 2 Q. B. 491, *Rel. on.* [P 217 C 2]

(e) **Criminal P. C., S. 537—Scope.**

Per *Page, J.* — Whether a particular breach of the procedure prescribed in the Code vitiates the proceedings or not must depend upon the gravity of the breach and the consequences that are presumed or proved to have flowed from it: *Allen v. Flood*, (1901) A.C. 506, *Rel. on.* [P 218 C 1]

Suresh Chandra Talukdar, Jatish Chandra Guha, Radhika Ranjan Guha, Sudhansu Sekhar Mukerjee, Surajit Chunder Lahiri, and Benod Lal Ghose—for Accused.

Debendra Narain Bhattacharjee and Bikash Chunder Ghose—for the Crown.

Rankin, C. J.—In this case there were nine accused persons. One of them was charged with murder under S. 302 and the remaining eight with an offence under S. 302 read with S. 149, I. P. C. They were tried by the Sessions Judge of Bakarganj with a jury of nine persons chosen by lot from among 14 persons who had been summoned to serve as jurors under the provisions of S. 326, Criminal P. C. The learned Judge, disagreeing with the verdict of the jury, referred the case to the High Court under S. 307, Criminal P. C.

At the hearing of the reference it was objected by the learned advocate for the accused that the jury had not been constituted in accordance with law and

that accordingly the proceedings before the trial Judge should be set aside altogether. The objection taken is not that the number of persons who served on the jury, namely nine, was not the correct number under S. 274, but that under S. 326 the number of persons to be summoned was not less than 18 whereas summonses were sent to 14 persons and no more.

By S. 326, it is provided :

"326 (1) The Sessions Judge shall ordinarily, seven days at least before the day which he may from time to time fix for holding the Sessions, send a letter to the District Magistrate requesting him to summon as many persons named in the said revised list or the said special list as seem to the Sessions Judge to be needed for trials by jury and trials with the aid of assessors at the said Sessions, the number to be summoned not being less than double the number required for any such trial."

Upon this subsection, the first thing to notice is that it purports to prescribe something that is "ordinarily" to be done by the Sessions Judge. He is to request the District Magistrate to summon as many persons as seem to the Sessions judge to be needed for trials by Jury. The subsection envisages him as having fixed time for holding the Sessions and the number referred to is the number not for any particular trial but for the trials by jury which are to take place at the Sessions. The minimum number to which the subsection refers is not less than double the number required for any such trial, i.e., for any one of the trials to take place at the Sessions.

It has been found convenient in Bengal and is a practice generally adopted, to fix dates for each particular case to be tried before the Sessions Judge and to summon a certain number of persons to attend on the date fixed in order to provide a jury for that particular case. This practice is authorized by S. 327, and in the present case it has been followed.

Under S. 274, Criminal P. C., it is provided that where an accused person is charged with an offence punishable with death, the jury shall consist of not less than seven persons, and if practicable of nine persons.

Now, in dealing with these matters this Court has by its decisions from time to time laid down four things. The first is that although a jury is summoned for a particular case, the number to be

summoned should always be double the number required for the trial. If the summoning of persons to act as jurymen for the whole of a Sessions as contemplated by S. 326 is not to be carried out, nevertheless the direction "not less than double the number required for any such trial" can and should be carried out by adopting that minimum in each individual case. The standard set by the subsection should not be lowered by reason that the services of the persons summoned are in practice to be utilized for one case only : *Serajul Islam v. Emperor* (1).

The second thing which this Court has laid down is that if by reason of a failure to observe this standard, it results, whether from non-attendance of jurymen or otherwise, that a jury of nine persons cannot be empanelled for the trial of an accused charged with an offence which is punishable with death, this fact will not entitle the Sessions Judge to proceed to trial in such a case with a jury of seven, in other words that it cannot be said that it was impracticable to have a jury of nine merely because an insufficient number of persons have been summoned from the jury list : *Serajul Islam v. Emperor* (1).

The third thing which has become matter of decision is that in applying this standard to such a case it is not correct to regard seven as "the number required for any such trial" in the absence of circumstances which make it impracticable to have nine. Hence 18 persons and not 14 persons only should be summoned : *Durika Malo v. Emperor* (2) and *Amir Khan v. Emperor* (3).

The fourth thing which this Court has determined is that the persons who are actually to serve as jurors must be chosen in strict compliance with the provisions of Ss. 276 to 278, Criminal P. C. and that if these provisions are not strictly observed the proceedings will be treated as altogether bad : *Kedar Nath Mahato v. Emperor* (4).

Upon this reference we are asked by the learned advocate for the accused to hold that notwithstanding that the number of persons empanelled on the jury was the correct number, and not-

withstanding that they have all been chosen from among persons summoned to act as jurors in strict accordance with the provisions of Ss. 276 and 278, the proceedings have been altogether illegal and must be quashed because summonses were not issued to at least 18 persons. He contends in view of S. 326 that if any less number of persons be summoned, there is a breach of a mandatory provision of the law which affects the constitution of the tribunal and renders void the proceedings. For this contention there is the authority of *Emperor v. Tamizuddin* (5), which is directly in point. The learned Judges of the Division Bench who dealt with the present case disagreed with that decision and they have referred to us the following questions :

(1) In a murder case where the number of jurors summoned is fourteen, nine of whom appear and are chosen by lot, is the trial bad by reason of the fact that only fourteen jurors have been summoned in contravention of the provisions of Ss. 274 and 326, Criminal P. C. ?

(2) Was the case of *Emperor v. Tamizuddin Ahmed* (5), rightly decided ?

In my opinion these questions should be answered in the negative and the case should be remanded to be dealt with on the merits.

The persons who are summoned to attend are chosen by lot (sub-S. 2, S. 326) and in addition, the accused persons have the right of challenge given to them by S. 277. Mr. Taluqdar for the accused contends that the requirement that the number to be summoned shall not be less than double the number required for any trial finds place in the Code not merely for the purpose of ensuring that a sufficient number of persons whose names are on the jury list shall attend at the hearing and be found competent to be jurors and unobjectionable, but in order that an additional element of chance may exist in the interest of the accused person who is, therefore, prejudiced if the area of selection by lot under S. 276 is more limited than S. 326 contemplates. In *Kedar Nath Mahato v. Emperor* (4). I find in the order of reference the following observations :

"If the accused cannot successfully challenge him, any one of the persons summoned can be a juror to try the case. On this view the object of a second choice being made by lot is to eliminate arbitrary or biased choice as between one person summoned and another."

(1) A. I. R. 1928 Cal. 645=55 Cal. 794.

(2) A. I. R. 1930 Cal. 60=56 Cal. 1154.

(3) [1929] 83 C. W. N. 1053.

(4) A. I. R. 1928 Cal. 88=55 Cal. 871 (F.B.).

(5) [1929] 83 C. W. N. 1054.

In the judgment of Buckland, J., in which the Full Court agreed, it was said:

"In the course of the argument it was suggested that the ballot required by S. 326 (2) as to the persons to be summoned, and that required by S. 276 were intended to benefit the prisoner by ensuring as far as possible an unbiassed and impartial jury, chosen haphazard and that this furnishes an additional reason for requiring that even when the proviso is to be invoked, there shall nevertheless be a ballot. With this, in some measure, I agree, but inasmuch as the prisoner has a right to challenge conferred by S. 278, I should be disposed to think that the object of the several ballots was as much to ensure a fair and impartial incidence of the duty of service upon juries upon those who are liable to it."

This passage, it is clear, in no way conflicts with the other. The contention before us that if in a murder case 18 persons are summoned, 9 attend upon summons and 9 are chosen to serve without objection, the trial will be good; but that if 17 persons are summoned 17 attend and 9 are chosen without objection, the trial will be bad. In my judgment very clear reason must be shown for any such contention.

In the interests alike of the jury and of the prisoner, it is desirable that the persons who are in fact to serve as jurymen should not be selected by the conscious choice of any one, whether it be the District Magistrate, the Judge or any other person. It is necessary in practice to summon a greater number of persons than is required to serve and for this reason some method of elimination is required. This method must be free of the dangers attendant upon a voluntary choice. It is no part, so far as I can see, of the intention of the Legislature to have a large area of selection in the persons attending upon summons on the theory that the larger the number of effective names in the ballot box the greater the chance that the persons chosen will make good jurors. This aspect of the matter is dealt with by the ballot under S. 326 (2) which directs that all the names on the jury list (with certain exceptions) are to be entered for that ballot. There is much sense in saying that the jurors are to be chosen haphazard from the whole of the jury list but this having been done there would indeed be little point in another lottery but for the considerations I have mentioned. Since mistake, sickness or accident may diminish the number of persons attending upon summons and

challenges may diminish their number still further, it is reasonably clear that the provision as to the number to be summoned is not motivated by any idea that a certain superfluity of jurors is required to provide an additional element of chance. It is required to meet these very contingencies and the element of chance is required as a consequence of the superfluity.

It is said that the requirement as to the number to be summoned is "mandatory". This word is used in various senses but I understand it to be used as the equivalent of "imperative" as distinct from "advisory" "directory" or "facultative". Now if we look carefully at the wording of S. 326 we will find it to be expressed somewhat loosely. There are two clauses which may be compared. Immediately after the word "ordinarily" comes the phrase:

"seven days at least before the day which he may from time to time fix for holding the sessions."

This fixes a minimum in spite of the word "ordinarily" but the minimum fixed is governed by the word "ordinarily". The requirement as to the number to be summoned is also a minimum and in strictness of form it too is part of a statement of what the Sessions Judge shall "ordinarily" do. The whole practice of summoning jurors for special cases is a departure from the strict terms of the section and is a departure which can be justified under the word "Ordinarily" and by S. 327. If one is summoning a number of people from whom juries have to be chosen for the trial of several cases, the legislature thinks that the number to be summoned should never fall below double the number required for any single case. The legislature has not dealt expressly with the question whether for the purpose of a single case the minimum might be reduced. But the word "ordinarily" can be explained by S. 327 which refers to "other periods than the period mentioned in S. 226" and unless it is so explained a very important provision which ensures that jurors are to be taken from the jury list by means of a ballot becomes optional as under the word "ordinarily" a Judge could in a particular case ignore the section altogether. This he certainly cannot do *Brojendra Lal Sircar v. Emperor* (6); *Rahamat* (6) [1902] 7 C. W. N. 188.

Sheik v. Emperor (7). Hence in such cases as *Serajul Islam v. Emperor* (1), this Court has held that the standard set by the section for the case contemplated therein is in all cases to be complied with.

When the circumstances which call for certain action are in character and number such as can be fully stated or clearly implied the Code constantly uses the word "shall" or other imperative words. The Code is a long list of such imperatives some of which have reference to matters which are in no way vital and many of such are directed to minor incidents of procedure. But for S. 537 there would be grave disadvantages in a Code which makes statutory so many and so various requirements. That section obviates the difficulty which would arise by reason of all irregularities bearing the character of transgressions of a Statute.

The Judicial Committee pointed out in *Subrahmanya Iyer v. Emperor* (8), that though in a sense the merest irregularity may be illegal, it does not follow that all illegalities are within the scope of S. 537. They did not say or suggest that nothing could be cured under the section if it was illegal and as the Division Bench has pointed out we now have in *Abdul Rahman v. Emperor* (9), an express decision to the contrary. Both decisions are really a condemnation of the view that all illegalities are as such in the same category for the present purpose. In the former case it was idle to suggest that there was no prejudice. The accused had suffered in an aggravated form the very prejudice from which the Code intends to save him. In *Abdul Rahman v. Emperor* (9), the test applied was whether there was ground for any probable suggestion of any failure of justice. The Judicial Committee in view of difference of opinion in India and of the fact that no case had come before them since *Subrahmanya Iyer v. Emperor* (8), carefully explained and applied S. 537 "for the guidance of the Courts" and this decision must now govern the interpretation of the section unless and until the legislature shall see fit to amend the section.

(7) A. I. R. 1927 Cal. 593=54 Cal 1026.

(8) [1902] 25 Mad. 61=28 I.A. 257=11 M.L.J. 233=8 Sar. 160 (P.C.).

(9) A. I. R. 1927 P. C. 44=5 Rang. 53=54 I.A. 96 (P.C.).

In my judgment the test there laid down cannot be evaded by saying that the omission here is an omission to do what is required by a "mandatory" provision of the Code. Nor by saying on the one hand that the summoning of jurors is not even a "proceeding before or during the trial" and on the other hand that it is such a matter that a defect therein will vitiate the trial.

I do not understand what was meant when it was said in *Emperor v. Tamizuddin Ahmad* (5):

"By summoning less than 18 you initially reduce the chances of selection by lot and make it more possible to pack the jury."

Nor, save on the footing that one illegality is the same as another, can I agree that the summoning of less than 18 persons is on a par with trying a murder case with a jury of five. The present case has no analogy to the error in the "mode of trial" referred to in *Subrahmanya Iyer v. Emperor* (8). The fact that the legislature has expressly provided in S. 537 that in the absence of prejudice to the accused an omission even to revise the list of jurors shall not render a trial void an irregularity which would prima facie entitle the accused to "challenge the array" in no way inclines me to think that the present case is beyond the scope of S. 537.

In the course of the argument before us the case was put of some jurors having to be chosen from among "persons present in Court" whose names were not on the jury list and of the need for this course having been occasioned by reason that the number of persons summoned was insufficient. I desire to express no opinion as to the effect upon the validity of a trial of such events as these.

Moreover as I have had occasion to refer to previous decisions upon S. 537 and as we are sitting as a Full Bench, I think it well to add that in view of *Abdul Rahman's* case some of the previous decisions of this Court may require to be revised. This case does not require us to consider that aspect of the matter and it should be left for discussion when the need arises, and when specific questions can be considered.

In my opinion, the view taken by the learned Judges who have referred this matter to the Full Bench is correct and

the questions which they have propounded for our decision should be answered in the negative. *

The case should be remanded to a Division Bench for disposal on the merits of the other questions which arise.

C. C. Ghose, J.—I agree,

Suhrawardy, J.—I agree.

Pearson, J.—I agree.

Page, J.—I agree and I desire to add some observations on the general question raised, which I regard as of prime importance.

The maintenance of law and order in India, as in other countries, depends mainly upon criminal law and procedure being so plain and sensible that ordinary persons are not mystified by its intricacies, and recognize that thereby substantial justice is done between the Crown and the accused. No one doubts that the utmost precaution should be taken to ensure that an innocent person is not convicted, but the extent to which the administration of the criminal law suffers when an obviously guilty person succeeds in evading conviction is not so fully appreciated. In truth, a miscarriage of justice of either description bewilders the public, and tends to shake the faith that is reposed in the stability and good sense of the Courts that administer justice in criminal cases. For this reason I am strongly of opinion that when the decisions of a criminal Court in substance appear to be correct an appeal Court should endeavour to uphold the decision even in cases where the rules of procedure by which the trial is to be regulated have been transgressed; except where the breach of the prescribed rules is of so grave a nature that the form of trial was substantially different from that provided by law for the offence charged, or where, although the violation of the rules was not so profound as radically to alter the mode of trial, it is proved that thereby in the event a failure of justice has in fact been occasioned.

The test to be applied, in cases where the prescribed rules of procedure have not been followed, to ascertain whether there has been a mis-trial is always essentially the same, namely, whether there has been a miscarriage of justice for if the appeal Court is satisfied in point of fact that the accused has

materially been prejudiced by the breach of procedure clearly a failure of justice has occurred; while if by reason of the breach of procedure there has in effect been substituted another mode of trial for that prescribed by the legislature as affording the best means of obtaining a fair trial, it is presumed that a fair trial has not been accorded the accused, and that in that case also there has been a failure of justice. In either case, therefore, the proceedings pro tanto will be set aside upon the ground that by reason of the breach of the rules of procedure a miscarriage of justice has been occasioned. On the other hand, if the appeal Court is not satisfied that the breach of procedure falls within one or other of those categories, in my opinion it ought not to hold that the proceedings have become vitiated merely because there has been a transgression of the prescribed rules by which such proceedings are to be regulated. It is ever to be borne in mind that rules and regulations are intended to be the handmaid and not the mistress of the law, and that in criminal proceedings it is of the utmost importance that a decision just and reasonable on the merits should not be disturbed because in the course of the proceedings some flaw can be detected that is not fundamental and which is not proved to have worked injustice to the accused, although it may constitute a breach of the rules of criminal procedure. Now, in 1901 *Subramania Ayyar v. Emperor* (8), was decided by the Privy Council. It was a plain case in which there had been a flagrant violation of a rule of procedure enacted to prevent the prejudice that an accused person inevitably will suffer if he is called upon to answer in one trial a multiplicity of charges. In that case the failure to conform to the procedure laid down in the Code of Criminal Procedure clearly went to the root of the trial, and vitiated it. Lord Halsbury (Lord Chancellor) however, in the course of delivering the judgment of the Board took occasion to animadvert upon the view expressed by Maclean, C. J., in *Abdur Rahman v. Keramat* (10):

"that because all irregularities are illegal, as he says in a sense, and this trial was illegal, that therefore all things that may in his view be called illegal are, therefore, by that one adjective applied to them, become equal in im-

portance, and are susceptible of being treated alike *Subramania Ayyar v. Emperor* (8)."

That, no doubt, was a sound criticism of the proposition enunciated by Maclean, C. J., and I apprehend that it would equally be incorrect to assert that every violation of the Code of Criminal Procedure is curable as that every failure to conform to the rules of procedure ipso facto vitiates the proceedings. There is no magic in the use of the imperative in this connexion, and it cannot reasonably be contended that each and every transgression of the mandatory rules of procedure set out in the code are "equal in importance" or "are susceptible of being treated alike." I respectfully agree with the observations of Brown, L. J., in *R v. Justice of the County of London* (11):

"that there is no such exact division of sections in Acts of Parliament into those that are directory and those that are imperative as is ordinarily assumed to be a categorical division which exhausts every possible class of section. You must look at each Act of Parliament and each section to see exactly what it means. No other rule of construction of Acts of Parliament that I know of is of much use, except to try and find out as best you can what the Act of Parliament means, and that is not a rule of construction at all."

Whether a particular breach of the procedure prescribed in the Code vitiates the proceedings or not, in my opinion must depend upon the gravity of the breach and the consequences that are presumed or proved to have flowed from it and I am satisfied that Lord Halsbury, whose judgments were permeated with sturdy common sense, and who in *Allen v. Flood* (12), laid down:

"that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found therein are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found"

did not intend to encourage in any way a tendency to exaggerate the importance of breaches of procedure that did not materially affect the due course of justice.

I discern, however, in the numerous decisions which purport to be founded upon *Subramania Ayyar v. Emperor* (8) a tendency to regard the judgment in that case as indicating that, in the opinion of the Judicial Committee, where there has been a departure from the strict letter

of the Code of Criminal Procedure indeed, according to some of the decisions as I venture to think with all due deference even in matters of mere triviality and where it cannot reasonably be suggested that the accused has suffered any prejudice—the appeal Court ought to hold that a mistrial has taken place. The result has been that the path of a Judge exercising criminal jurisdiction is beset with pitfalls and obstructions, and his attention must needs be diverted unduly from the substance to the form of the proceedings, lest perchance if he fails in any particular to conform to the provisions of the Code the proceedings may be set aside. Of course, a Judge who deliberately or through inadvertence does not follow the procedure laid down in the Code fails in the performance of his duty, but the effect of non-compliance with the statutory rules of procedure, in my opinion, must vary according to the gravity and effect of the breach, and the test in each case is whether the proceedings have resulted in a miscarriage of justice. In *Allen v. Flood* (12) Lord Halsbury added:

"that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical Code, whereas every lawyer must acknowledge that the law is not always logical at all."

and in, my opinion, no sanction or warrant can be found in *Subramania Ayyar's* case (8) for a method of construction that tends to magnify the importance of technical defects to the detriment of the substance and the merits of a case. In my opinion the objection raised to the validity of the trial in the present case is misconceived. The accused was tried by the statutory number of jurors, who were chosen by lot without objection or challenge from the accused. It is not proved that the accused was prejudiced in making his defence or in any other way by reason of the course that the proceedings took. In these circumstances an argument that the trial was a nullity merely because only 14 instead of 18 persons were summoned as jurors is one that with all due deference, in my opinion, ought not to be countenanced, and I agree that a negative answer should be given to the questions that have been propounded. The

(11) [1893] 2 Q. B. 491.

(12) [1901] A. C. 506.

case of *Abdur Rahman v. Emperor* (9), decided in 1926 marked the turning of the tide, and the decision of the Full Bench on this reference will, I trust, have the salutary effect in criminal matters of discouraging objections that are merely technical, and broadening the outlook of those whose duty it is to administer justice according to law.

v.s./R.K. *Reference answered.*

*** 1930 Cr. Cases 219**
(Calcutta)

SUHRWARDY AND GRAHAM, JJ.
Obedar Rahaman—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1076 of 1928, Decided on 8th February 1929, against order of Sess. Judge, Chittagong, D/-27th August 1928.

*** Criminal P. C., S. 342—Accused cannot claim to be examined when he enters upon defence after prosecution has closed its case and he has once been examined.**

The word "examination" in S. 342 includes cross-examination and re-examination and "examined" means completely examined.

[P 219 C 2]

When the accused enters upon his defence the stage at which he must be examined under S. 342 passes. After the prosecution has closed its case by examining its witness in chief and submitting them to cross examination and re-examination, the accused cannot re-open the prosecution case by applying for an indulgence from the Court for further cross-examination and then claim the right that he should be examined over again: *A. I. R. 1923 Cal. 196* and *A. I. R. 1923 Cal. 927, Ref.* [P 220 C 1]

Anilchandra Ray Chaudhuri—for Petitioner.

Suhrawardy, J.—This rule has been issued upon two grounds. Ground 1 is that the provisions of S. 342, Criminal P. C., were not complied with and, therefore, the conviction is bad in law. The facts, in so far as they are relevant for our present purposes are that, on 16th May 1928, six prosecution witnesses were examined in chief and the accused was also examined. The charge was, thereafter, framed under S. 354, I. P. C., and the prosecution wanted to examine some witnesses. On 31st May 1928, the next hearing day, the prosecution examined one more witness and all the witnesses for the prosecution, eight in number, were cross-examined by the accused. Then the accused was examined, presumably under S. 342 and the Magistrate's order runs thus:

"Defence wants to examine six prosecution

witnesses after this. Of them, the Sub-Inspector is to be resummoned. Others to come on personal recognizance. Accused as before. Defence will pay costs of all but the Sub-Inspector. Defence will bring in witnesses on next date."

On the next date, 14th June 1928, seven prosecution witnesses were cross-examined and the accused was again examined. Only one witness (the Sub-Inspector) was not in attendance, and, therefore, could not be cross-examined. He was examined on the next day of hearing, but no further examination of the accused was held. It is argued that the accused should have been examined under S. 342, after the examination of the Sub-Inspector and as he was not so examined, his conviction must be held to be illegal.

Section 342, Criminal P. C., has been interpreted by this Court in several cases and, in my opinion, has been too liberally construed. I do not think it will be profitable to discuss it any further. S. 342 says that, for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may at any stage of any enquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary and shall question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

As has been held in *Mozahur Ali v. Emperor* (1) and *Dilakanta Chatterjee v. Emperor* (2), the word "examination" in that section includes cross-examination and re-examination, that is the witnesses have been completely examined. Now in the present case, the witnesses were completely examined on 31st May 1928. The order recorded by the Magistrate on that day does not expressly say so, but it shows that, after the examination of the witnesses was closed and the accused examined, he was asked to examine his witnesses or he was called upon to enter upon his defence. The accused, however, applied to the Court for permission to recall some of the prosecution witnesses for further cross-examination. That was apparently done under S. 257 of the Code, which says that if the

(1) A. I. R. 1923 Cal. 196=50 Cal. 228,

(2) A. I. R. 1923 Cal. 727=50 Cal. 939.

accused, after he has entered upon his defence, applies to the Magistrate, etc. This must be so, as the order recorded by the Magistrate on that date shows that the application to further examine some prosecution witnesses was made after the examination of the accused; and further, that the accused was ordered to pay the costs of the prosecution witnesses for their attendance. This order could only be passed under S. 257. It, therefore, appears that the accused had already entered upon his defence and the stage at which he must be examined under S. 342 had passed. I do not think it proper to hold that after the prosecution has closed its case by examining its witnesses in chief and submitting them to cross-examination and re-examination, the accused can well re-open the prosecution case by applying for an indulgence from the Court for further cross-examination and then claim the right that he should be examined over again. In my opinion, there has been sufficient compliance with the directory provision of the section and this ground must be overruled.

Ground 2 upon which this rule has been issued is that two of the witnesses, whom the trial Magistrate regarded as corroborating the complainant did not really corroborate her. The Magistrate, in his judgment, says that these two witnesses corroborate the story given by the girl. One of the witnesses says that,

"the girl told him that the accused had thrown away her pitcher and was pulling to take her away and thereby violated her modesty."

The other witness said that:

"she said that Obedar had thrown her pitcher and was pulling her to take her to the school hut."

He also said that he had heard her cries and saw the accused run away from the tank. This evidence corroborates the story of the girl, at any rate under S. 157, Evidence Act. I do not think that there is any substance in this ground.

The rule is, accordingly, discharged.

The accused must surrender to his bail and serve out the remainder of the sentence.

Graham, J.—I agree that the rule should be discharged. With regard to the first point, it seems to me that the entire argument on behalf of the peti-

tioner is one of technicality, rather than of substance. I am further of opinion that, having regard to the facts and circumstances of this particular case, there was a proper compliance with the provisions of S. 342, Criminal P. C. As regards ground 2, on which the rule was granted, it may be observed, in the first place, that on reference to the judgment of the appellate Court it does not appear that the learned Sessions Judge has said anything about the evidence of Khalilur Rahaman and Chand Mia corroborating the story of the girl. This ground, therefore, was not correctly worded. The judgment of the trial Court does, however, refer to there being such corroboration, and when the evidence of these two witnesses is referred to, it is clear that they do in fact corroborate the story told by the girl. There is, therefore, no substance in this ground.

R.M./R.K.

Rule discharged.

1930 Cr. Cases 220

(Calcutta)

RANKIN, C. J. AND C. C. GHOSE, J.

Satya Ranjan Bakhshi and another—
Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 714 of 1928, Decided on 5th February 1929, from order of Chief Presy. Magistrate, Calcutta, D/- 3rd September 1928.

Penal Code, S. 124-A—It is not necessary that rebellion of any form should be advocated in article — Government may be brought into hatred and contempt by abuse of officials.

It is not necessary for the purposes of S. 124-A that the article should advocate any form of rebellion. So also it is quite possible by abuse of Government officials as officials to make an endeavour to bring into hatred or contempt the Government established by law in British India: 22 Bom. 112 and A. I. R. 1929 Cal. 309, Ref. [P 222 C 1]

B. C. Chatterji, Mrityunjoy Chatterji, Suresh Chandra Talukdar, Jyotishchandra Guha, Bholanath Ray and Binodelal Ghosh—for Appellants.

N. N. Sircar—for the Crown.

Rankin, C. J.—In this case the appellants have been convicted on a charge of sedition under S. 124-A, I. P. C., in connexion with an article which appeared in the issue of 20th May 1928, of a Calcutta daily newspaper published in Bengali and called the "Banglar Katha." The translation of the article is before

us and it is headed "Barbarism in the Garb of Gentlemanliness." We have to read the article solely from the point of view of seeing whether we are satisfied by the internal evidence of the article itself that as a fact the writing or publication of the article was a successful or unsuccessful attempt to bring into hatred or contempt or to excite disaffection towards the Government established by law in British India. It does seem to me that, for the purpose of the present question, from the words used by the writer it is necessary to go into an analysis of the phrase :

"The Government established by law in British India."

Since the case of *Queen Empress v. Bal Gangadhar Tilak* (1) was decided, various changes in form and, to some extent, in principle, have been introduced into the constitution which obtains in British India. But we have, in this case, to see whether the article is an endeavour to express disapprobation against certain measures of Government without exciting or attempting to excite hatred, contempt or disaffection or whether in one guise or another an attempt to excite hatred, contempt or disaffection towards the Government established by law in British India is a part of the purpose of the writer. The article begins by a reference to State prisoners and persons who have been in prison under certain legislation without trial by the ordinary tribunals. It makes a reference to "living burials" taking place every month in the plains of Siberia under the Czar of Russia. It goes on to say that incidents of a far-away land are taking place daily at our own doors and that, while there is no Czar in a physical form in our country, the administrative system which is going on in place of the Czar is still more terrible than the Czar. I do not think there can be any doubt that "the administrative system which is going on" is a reference to the Government established by law in British India. It is not a reference specifically to any legislation or to the exercise of any legislative function, but the Government is not the same thing as the legislature and the administrative system in India as obtaining at the present time is clearly the object of animadversion in the article. It goes on to

say that barbarity is going on under the name of civilization and all its diabolic cruelty is dancing under the mark of law ; and after that it says that more terrible even than the rule of the Czar of Russia is the administration of the bureaucracy in India :

"This is the acme at once of barbarism and of deceitfulness."

Apart from certain exaggerated expressions about a jail being as hot as fire and a reference to self-interested lying spies, we come to certain sentences which show the standpoint of the article for our present purpose. It says that even if the State prisoners had been convicted after an open trial, the writer would not have approved of the sentences. The reason given is that :

"no country has the right to fetter another country to satisfy the thirst for pillage."

Here we get a reference, a direct reference, to British rule at large :

"If the children of an enchained country do even take up arms for the deliverance of the land of their birth, even then no foreign oppressors can have the right to inflict punishment on them."

It goes further to talk about the inhuman oppression of foreign rule and about people having no power to liberate certain persons from the array of the bayonets of a handful of foreigners, and it speaks of weapons, namely, the weapon of boycott of British goods and that if it would be possible to break the "fangs of Lancashire" by boycotting cloths made in foreign countries :

"the edifice of foreign rule would have in a trice tumbled down to the dust of ruin like a house of cards."

My only purpose in making any citation from this article is to show why I think that the article (which is certainly full of hatred and bitterness) is clearly directed against the Government established by law in British India. It is doing exactly what Strachey, J., in the case cited [*Queen Empress v. Bal Gangadhar Tilak* (1)] said must not be done :

"But if he goes on beyond that, and, whether in the course of comments upon measures or not, holds up the Government itself to the hatred or contempt of his readers,—as for instance, by attributing to it every sort of evil and misfortune suffered by the people, or dwelling adversely on its foreign origin and character, or imputing to it base motives, or accusing it of hostility or indifference to the welfare of the people,—then he is guilty under the section, and the explanation will not save him."

Mr. Chatterji has pointed out to us that, while the article advocates the

boycott of cloth, it does not in any way advocate any form of rebellion. I quite appreciate that, but that is not the charge. It is quite clear from the section itself that this is not a necessary element in an offence under S. 124-A. It has been pressed upon us that there are expressions which are to be attributed to a spirit of exaggeration and which may be regarded as excrescences upon this article. That, in fact, is true up to a point, but I must point out that there are exaggerations in this article which are of themselves clear evidence of the desire to bring the Government into hatred or contempt.

We have been treated to an argument on the strength of the Government of India Act of 1919 and on the fact that the legislative power in this country is no longer in the hands of Government officials; and Mr. Chatterji has argued that by the legislation of 1919, the law of sedition underwent a complete transformation. His idea is that "officialdom," to use the word which he tells us, no doubt quite correctly, would be a better translation of the Bengali word than the word "bureaucracy"—that officialdom are the servants of the people and, therefore, abuse of officialdom cannot possibly be an attempt to bring into hatred or contempt the Government established by law in British India. I can only say that in that argument, Mr. Chatterji is gravely wrong. It is quite possible, by the abuse of Government officials as officials, to make an endeavour to bring into hatred or contempt the Government established by law in British India. There is no necessary equivalence between mere legislative power and the :
"Government established by law in British India."

That is a concrete phrase which applies to such Government, whatever form that Government takes, and is just as much applicable to it after the legislation of 1919 as when it was enacted years ago.

We really, in this case, have to see whether, after making all reasonable allowances, we think it possible to hold that this is an article whose criticism, however unreasonable, is still legitimate; or whether it is really an attempt to bring into hatred or contempt the Government established by law in Bri-

tish India. Upon that question, I can entertain no doubt whatsoever that this article is not only on the wrong side of the line, but it is a very long way off the line.

In my judgment, the sentences which have been inflicted are very moderate and this appeal should be dismissed.

C. C. Ghose, J.—I agree. On a previous occasion, I attempted to indicate within what limits S. 124-A is to be worked and also endeavoured to make it clear that criticisms of measures of Government, however strongly worded, provided that criticism itself does not come within the mischief of S. 124-A, will leave the critic unscathed. In my opinion, this article taken as a whole, and after making all allowances for the enthusiasm of the writer goes very much beyond the limits indicated in my previous judgment in the case of the *Emperor v. Satya Ranjan Bakshi* (2). I am, therefore, of opinion that the learned Chief Presidency Magistrate is right in coming to the conclusion that this case does come within the mischief of S. 124-A and I agree also with the learned Chief Justice that the sentences inflicted are moderate and that this appeal should stand dismissed.

R.M./R.K. *Appeal dismissed.*

(2) A.L.R. 1929 Cal. 309.

1930 Cr. Cases 222

(Calcutta)

RANKIN, C. J., AND PATTERSON, J.
Ram Gopal Goenka—Petitioner.

v.

Corporation of Calcutta—Opposito Party.

Criminal Revn. Nos. 793 and 794 of 1929, Decided on 8th August 1929.

(a) *Calcutta Municipal Act (3 of 1923)*, S. 363 (2)—Onus of proving that work was done more than five years previously is on owner.

Under S. 363 (2) the question before the Magistrate is not whether the Corporation has shown the date of the work being done or that the date was within five years of the institution of the proceedings but whether the owner has established to his satisfaction that the work has been done more than five years previously. (P 223 C 2)

(b) *Criminal P. C.*, S. 200—Complaint for demolition of structure by building-surveyor of Calcutta Corporation is complaint by public servant and he need not be examined.

Under the *Calcutta Municipal Act* any Municipal officer is a public servant and apart altogether from any express provisions, a complaint for demolition of structure made by a

buildings-surveyor of the Corporation is a complaint by a public servant in the discharge of his official duty and he need not be examined as to the complaint when lodging it.

[P 223 C 2, P 224 C 1]

(c) **Calcutta Municipal Act (3 of 1923), S. 557-A (4)—Effect and Scope enunciated.**

The effect of Cl. (4), S. 557-A is this that between August 1926 and August 1927, in a proceeding for demolition of structure under S. 363 even although five years may have expired, a legal proceeding would have been competent because the clause was intended as an extension of limit in view of the fact that legal proceedings had not been possible effectively for some considerable period prior to the amending Act. The clause does not say and it does not mean that no legal proceeding under S. 557-A is ever to be taken after the expiry of one year from August 1926. What it says is that if in the Act or any other law a legal proceeding between August 1926 and August 1927 would have been barred it is not to be barred until August 1927. Such a clause at no time was of any use to anyone except to the Corporation, and that in a case in which it was desired to get in extension of some restrictive period of limitation imposed by some other section of the Act or some other law.

[P 224 C 2]

K. N. Chaudhuri, Suresh Chandra Taluqdar and Kanaidhan Dutt — for Petitioner.

D. N. Bagchi and Gopendra Krishna Banerji—for Opposite Party.

Rankin, C. J.—In my opinion, this R. 793, should be discharged. The order complained of is an order directing demolition of certain structures mentioned in the order under the headings (a), (b), (c) and (d). The contention before us is, first, that so far as (d) is concerned the rule is not pressed. So far as (c) is concerned, it is conceded that there is some evidence before the Magistrate to show that the structures were raised within five years from the date of the present proceedings. So far as (a) and (b) are concerned, the contention of the learned counsel on behalf of the applicant is that there is no specific evidence on the part of the Corporation to show that these structures were erected within five years of the present proceedings and that the Magistrate should have been satisfied with certain evidence called by the owner to the effect that the structures were erected more than five years from the date of the proceedings. Another ground is taken to the effect that the whole proceedings before the Magistrate were bad because they were instituted upon a complaint made by Mr. C. K. Chatterji and that

under S. 200, Criminal P. C., it was necessary that Mr. Chatterji should be examined, and on this point reference has been made to a decision of this Court in the case of *Ambica Prosad v. Corporation of Calcutta* (1).

As regards the question of the age of the structures the provision of the Calcutta Municipal Act is clear. Sub-S. (2), S. 363 is as follows :

"Notwithstanding anything contained in sub-S. (1), no proceeding shall be instituted thereunder in respect of any work which has been done more than five years before the institution of such proceedings, provided that the onus of proving that the work was done more than five years previously shall lie on the owner."

Under this provision it is claimed that the question before the Magistrate was not whether the Corporation had shown the date of the work being done or that the date was within five years of the institution of the proceedings but whether the owner had established to his satisfaction that the work had been done more than five years previously. The Magistrate had dealt in a most painstaking fashion with this question and he has given very good reason, as it seems to me, for refusing to be satisfied with the evidence of the owner to the effect that the work was done more than five years from the date of the proceeding. In my judgment, there were materials before him which entirely justified him in finding, as he has in fact found, that the structures in question were newly made in 1923-24 and, therefore, are within the period of five years prescribed by the section which I have just referred to.

On the question whether the proceedings are bad by reason that the complainant was not examined under S. 200, Criminal P. C., the Magistrate contends in his explanation, first, that the Magistrate in a case of this sort is not acting with a complaint under the Criminal Procedure Code at all. Whether that view be right or wrong I do not require now to consider. What the Magistrate says is that even if this be taken to be a complaint under the amended Criminal Procedure Code there is no need any longer to have the complainant examined when a complaint is filed by a public servant acting in the discharge of his official duties. Under the Calcutta Municipal Act any Municipal offi-

(1) A. I. R. 1928 Cal. 4-3.

cer is a public servant ; but, apart altogether from any express provision, it appears to me plain that if the document referred to is to be treated as a complaint it is a complaint by the Building Surveyor of the Corporation acting as a public servant in the discharge of his official duties.

For these reasons, it appears to me that this rule must be discharged.

This R. 794 has been obtained at the instance of certain occupiers of the premises referred to in the previous rule and the only additional ground which requires to be considered is this : It appears that these occupiers were made parties to the Magistrate's proceedings on 17th January 1928. The contention is that under the amending Act 5 (B. C.) of 1926, Cl. (4), S. 557-A, Municipal Act, puts a limit of one year from the date of the commencement of the Act to the time within which proceedings may be taken in such a case as this against a party. When one comes to examine Cl. (4), S. 557-A, one finds that its real meaning is as follows : When the Calcutta Municipal Act of 1923 was first passed it contained, as afterwards appeared, insufficient provision for a case in which prior thereto an authorized structure had been erected and certain proceedings taken before the General Committee of the Corporation. The new Act applied very well to cases which arose after it was passed but there was no provision which enabled cases which had occurred and been in part dealt with prior to the passing of the new Act to be dealt with under the machinery of the new Act. The object of Act 3 (B. C.) of 1926 was to enable the new machinery to be applied to cases which had arisen prior to the passing of the Act of 1923. But between the date in 1923 when the Calcutta Municipal Act was passed and the date in 1926 which this amendment was made there was no valid or effective process for taking action with reference to cases of work done prior to 1923. The law being out of action for a certain period it was provided by Cl. (4), S. 557-A as follows :

"Notwithstanding anything contained in this Act or in any other law, a suit or legal proceeding under this section may be instituted at any time within one year from the commencement of the Calcutta Municipal (Amendment) Act, 1926."

We are dealing with a limit of five years. The present applicants were made parties to the proceedings on 17th January 1928, and unless they show that these structures were erected before 17th January 1923 they do not show that they are protected by any time limit imposed by the Act. The effect of Cl. (4) to which I have referred is this that between August 1926 and August 1927, in a case such as this, even although five years had expired, a legal proceeding would have been competent because the clause was intended as an extension of limit in view of the fact that legal proceedings had not been possible effectively for some considerable period prior to the Amending Act. The clause does not say and it does not mean that no legal proceeding under S. 557-A is ever to be taken after the expiry of one year from August 1926. What it says is that if in the Act or any other law a legal proceeding between August 1926 and August 1927 would have been barred, it is not to be barred until August 1927. Such a clause at no time was of any use to anyone except to the Corporation, and that in a case in which it was desired to get an extension of some restrictive period of limitation imposed by some other section of the Act or some other law. In this view of the meaning of the section, it is unnecessary for me to examine further into the objection taken in this case.

The Magistrate has in his explanation contended that :

"the Corporation does not proceed against the tenants. It is only the Magistrate who has to hear the tenants under Act 3 (B. C.) of 1923 as well as Act 3 (B. C.) of 1889. The notice on the tenants can be issued at any time before the disposal of the case."

He goes on to cite a ruling of this Court to the effect that the law does not require specifically that a notice should be served on the occupier and that it is for the occupier to move the Magistrate. Whether there is anything in this contention or not, the ground upon which this rule was granted is not made out. The ground was that the order was barred by limitation under S. 557-A. In my opinion, therefore, this rule must be discharged.

Patterson, J.—I agree.

V.B./R.K.

o Rules discharged.

THE CRIMINAL CASES JOURNAL SECTION

S. 27, Evidence Act, and A. I R. 1929 Lahore 344 (F.B.).

BY MR. F. C. WIDGE, *Advocate, High Court Karachi.*

1930]

[MARCH

(Continued from 1930 Journal p. 4)

"Now it will be observed from the opening words of the section that it is really an exception to the sections immediately preceding it and which prohibit the use by the prosecution against the accused person of a confession made by the latter under certain specified circumstances. In its inception, therefore, this section is intended to enable the prosecution to prove against the accused a confession made by him, provided the conditions laid down therein have been complied with. The conditions are (a): that in consequence of the information given by the accused person some "fact" is discovered, some fact or course which is relevant to the issue involved in the case, and (b) that only so much of the information given by the accused is provable as relates distinctly to the "fact" thereby discovered. Within these limitations the prosecution is entitled to prove against the accused a confession made by him to a police officer or while in police custody. The reason for this exception to the general rule is that there exists in such a case an independent circumstance which provides a reliable test of the genuineness of the confession that is to say, the discovery of a relevant fact. We are, however, on the present occasion concerned with the extent of the second limitation mentioned above. The question is, how much of the information given by the accused in this case relates distinctly to the fact thereby discovered such fact being the disposal or possession of stolen property by the prisoner. In my opinion the prosecution is entitled to prove the whole of the information which relates to the fact discovered; in other words, the entire statement made by the accused which enabled the police to discover the fact and to connect or identify the same with the crime, is admissible against the accused."

Section 27 is, however, not intended to let in a confession generally but only such particular part of it as set the person, to whom it was made, in motion and led to his ascertaining the fact or facts of which he gives evidence: *Empress v. Babu Lal* (1), Per Straight, Off. C. J., cited and adopted by Norris, J., in *Adu Shikdar v. Queen Empress* (17). As the discovery intended by this section is:

"The physical act of finding upon search or inquiry some thing or material fact, the existence or the exact locality of which was unknown till then: vide *Woodroffe and Ameer Ali's Evidence Act*, p. 278, 7th Ed."

(17) [1885] 11 Cal. 685.

1930 Cr. C. J 1b/4 & 2a/4

the finding of the thing proves that the information is true and not fabricated. And this correctness of the accused's statement is the ground of its admission which is an exception to the general rule. The statements admitted by the section are statements preceding finding upon such inquiry, for the fact must be discovered in consequence of the information disclosed in the confession, but whether discovered by the recipient of the confession or by someone else is immaterial. There may be cases in which a fact is discovered, partly on information furnished by the accused and partly by his conduct, but when the discovery is wholly due to his conduct, proof of that conduct alone would appear to be relevant, and not proof of his confession: see *Principles of the Law as to Admissions and Confessions* by H. A. Rose, I. C. S., p. 35.

The exposition of the law in *Harnam Singh v. Emperor* (8), was not accepted as correct by another Bench of the High Court (Harrison and Dalip Singh, JJ.) in *Karam Din v. Emperor* (18) and so when the question again cropped up before their Lordships of the Lahore High Court (Tek Chand and Agha Haidar, JJ.), their Lordships referred the following question to the Full Bench:

"A is being tried under S. 302, I. P. C., for having committed the murder of B, who is proved to have suddenly disappeared from his house and whose dead body was recovered from a well two days later. At the time of his disappearance B was wearing certain ornaments, but these ornaments were not found on his body at the time of its recovery from the well. During the investigation A is alleged to have made a statement to the police in these terms: "I had removed the karas, had pushed the boy into the well, and had pledged the karas with Allah Din." and in consequence of the information so received the karas were recovered from Allah Din, which were identified as those worn by B at the time of his disappearance. The whole or any part of that statement admissible against A."

(18) A. I. R. 1929 Lah.

dence Act, and if the latter, how much?"

And the Full Bench held and answered the reference by saying:

"that the statement that the accused had pledged with Allah Din, the karas subsequently recovered from the latter is admissible under S. 27, Evidence Act, but that the rest of the incriminating statement cannot be received in evidence."

(Fforde and Jai Lal, JJ., who had decided *Harnam Singh v. Emperor* (8), dissenting and holding that the information "I had removed the karas and had pledged the karas with Allah Din" may be proved while the statement "had pushed the boy into the well" is not admissible).

Thus, so far as His Majesty's High Court of Judicature at Lahore is concerned the matter has been settled that the statement made by the accused cannot be proved in its entirety but only to the extent of the irreducible minimum in consequence of which some fact or tangible thing is discovered or recovered. Vide opinion of his Lordship, Sir Shadi Lal, C. J., adopted by the Full Bench.

The fact that something is discovered in consequence of the information elicited in the confession, however induced and under whatever circumstances made is some guarantee of its truth and the important point is not so much what information the accused gave, but what fact was discovered in consequence of it. Indeed this confession is partially admitted on the principle of S. 9, Evidence Act, as "necessary to explain or introduce a relevant fact" viz., the discovery. The discovery does not guarantee the truth of the confession as a whole, it only gives a certain guarantee that the part of the confession which distinctly relates to it, is true. As remarked above the section was not intended to let in a confession generally but only such particular part of it as set the person to whom it was made, in motion, and led to his ascertaining the fact or facts of which he gives evidence; the discovery also must be the result of the information and the test of the admissibility of the information has been held to be: "Was the fact discovered by reason of the information, and how much of the information was the immediate cause of the fact discovered?" Whether the information was the immediate cause must depend on the circumstances of each case. There appears to be no authority for

saying that it must be the direct cause of the discovery.

Their Lordships of the Bombay High Court (Faycett, C. J. and Madgavkar, J.) in *Court*

Shivabhai Bepharbhai v. Emperor (15), held that a statement made by an accused person while in the custody of the police to the effect that he had burnt the deceased's clothes, and would point out where he had done so, is admissible in evidence under S. 27, Evidence Act, on the discovery of the clothes in the place pointed out.

The High Court of Patna (Mullick, C. J., and Wort. J.) in *Patna High Court in Lalji Dusadh v. Emperor* (16), held

that where, in answer to the investigating police officer, the accused stated that he threw the weapon with which he assaulted the deceased at a certain place, and the weapon was discovered as the result of that disclosure, the statement consisting of the assertion that the weapon had been thrown at a particular place and that it was the weapon with which the offence was committed was admissible in evidence under S. 27,

In *Sogaimuthu Padayachi v. Emperor* (14), the whole of the Madras view. prisoner's statement

"properties stolen from the mutt were buried by me and others in the Cauvery-Bank" was held to be admissible in evidence against him. Wallace, J., observed:

"The essence of the section is that the statement made by the accused must be a confession i. e., an admission or statement suggesting an inference of guilt is to be excluded and only words, which directly disclose where the property is, are admissible, then the section has no application. It is clear that the Court is not entitled to separate up the actual words used by the accused, which led to the discovery of the property, strike out some words here and admit some words there. So much of the statement, as was the immediate cause of the discovery, is admissible. In this case, if the property was discovered in a particular place, because the accused said, "I buried it there." that statement is certainly admissible."

Spencer, Offg. C.J., was of the opinion;

"But if the accused did use the words, then they are parts of the sentence in which he gave information which led to the discovery of the stolen property and parts of sentences cannot be excluded so as to have the effect of making the whole statement incomplete and less intelligible."

Devadoss, J., was also of the view that:

"the whole of the statement made by the prisoner was admissible under S. 27, Evidence Act."

These decisions of the Bombay, Patna and Madras High Courts purport to proceed upon an interpretation of the section to which its wording naturally, on a wide construction of its terms leads. As Cecil Fforde, J. remarked in *Harnam Singh v. The Crown*:

"The Indian Evidence Act in express terms puts the law on the subject on a wider basis, than does the common law in England."

This is also after the American practice, for;

"In America the tendency of the Courts appears to be to admit the whole confessional statement, once it has been proved that some relevant fact has been brought to light in consequence thereof": see Wigmore on Evidence."

There is no recent English authority on the subject "probably due to the fact that in England the question now very rarely arises." And as his Lordship,

Sukhan v. Emperor (19), the Chief Justice of the Lahore High Court (Sir Shadi Lal) observed:

"In determining the question referred to us we cannot derive much assistance from the English Law. There is no statutory provision in England dealing with the subject of confessions and the common law does not prohibit the reception in evidence of a confession made by an accused to a police officer or whilst he is in the custody of police. A confession by inducement, threat or promise is, however, inadmissible, unless it is confirmed by the discovery of property. The rule as laid down in *R. v. Warickshall* (5), to the effect that only the fact discovered could be given in evidence, but the incriminating statement improperly obtained was wholly inadmissible, even though the fact was discovered in consequence of that statement. But in subsequent cases this rule has been relaxed in favour of the prosecution. In *R. v. Gould* (7), in which a lantern was recovered in consequence of information improperly obtained from the prisoner, Tindal, C. J., admitted the statement that the prisoner had thrown a lantern into the pond, on the ground that the words used with reference to the thing found ought to be given in evidence but he excluded the rest of the confession."

The learned Chief Justice proceeded to remark:

"The judgments of the English Courts are not easy to reconcile, but the rule followed in the later authorities appears to be that so much of the inadmissible confession as relates strictly to the fact discovered in consequence thereof may be given in evidence, but independent statements, though made at the same time, must be rejected."

"Nor do the judgments of the High Courts in India, to which our attention has been in-

vited by the learned counsel on both sides, disclose a complete unanimity as to the extent of the information admissible in evidence under S. 27. The consensus of judicial opinion is, however, in favour of the view that the section allows only so much of the information as leads directly and immediately to the discovery of a fact, but the portion of the information which merely explains the material thing discovered, cannot be proved. This rule is not only warranted by the language of the section, which embodying as it does, an exception to the general rule against the admissibility of confessions, must receive a strict construction but also conforms to the principle upon which the exception is founded."

"The real difficulty arises in applying the test to the facts of a particular case. To illustrate this difficulty I may mention a case in which the admissible portion of a confession is so mixed up with the inadmissible one that these two cannot be separated without modifying the language in which the confession was made by the accused. In cases of this description, which have led to a divergence of judicial opinion it has been laid down in some judgments that the whole of the statement can be given in evidence, and that it is not competent to the Court to split up the language used by the accused in conveying the information, to strike out some words which are objectionable and to admit only those which relate strictly to the discovery."

"There is considerable force in this argument, but I do not see why the protection thrown round an accused person by Ss. 24, 25 and 26, Evidence Act, would be dependent upon the ingenuity of the police officer or the folly of the prisoner in composing the sentence which conveys the information. Suppose a prisoner on being asked about the weapon of offence says: "I buried a hatchet in my field. I killed A with it." Now, it is indisputable that the recovery of a hatchet from the field renders only the first part of the statement admissible, and that the second part cannot be given in evidence. But, if the police officer converts the two sentences into one and repeats to the accused as saying "the hatchet, with which I killed A, I buried in my field," then, according to those judgments, the whole of the above statement would be admissible."

"The admissibility or otherwise of the information must depend upon its intrinsic character, and not upon the manner in which the sentence conveying the information is framed by the police officer or the prisoner. It would be unreasonable to suggest that a statement, which could not be received under S. 27, if it were placed before the Court in a separate sentence, should be let in as soon as it is amalgamated with the admissible statement. In determining the extent of the statement, which should be provable on the ground of its being the proximate cause of the discovery, the Courts must have regard not to the composition of the sentences in which the statement is couched but to its substance."

Thus the salutary rule deducible from the above statement of the law is that the intrinsic character and the substance of the statement

made by the prisoner with reference to the discovery are alone to be looked to, and judicial opinion in the Highest Courts in India will naturally keep constantly veering round in all probability as near as may be to this view; such will be the case, however, so long as there are no legislative changes of substance or principle effected in the language of the section which, as it at present stands, though in the words of Straight, Offg. C. J., in *Empress v. Babulal* (1) "with the deepest respect for the learned authors responsible for the shape given to the section" is not as happily drawn as it might have been

yet is not very easy to improve upon. And there are not going to be made any drastic changes of substance or principle in the section at the hands of the legislature in India so long as the rules of evidence in the juristic system of civilized and enlightened states remain what they have been so far and which have sprung into existence as the outcome and result of long standing experience, strenuous labour, close thought and penetrating legal insight and undivided attention and application on the part of eminent Judges and Jurists brought to bear on the subject.

Canon Law and a Registrar Marriage

BY

A. PHILIPPE FONSECA.

Recently in the case of *Saldanha v. Saldanha** Blackwell and Kemp, JJ., of the High Court of Bombay decided an important point of law with regard to Catholics, and incidentally all those who are bound by personal law, viz., Hindus, Mahomedans, etc. They had to consider S. 88, Christian Marriage Act, 15 of 1872, which reads as follows :

"Nothing in this Act shall be deemed to validate any marriage which the personal law applicable to either of the parties forbids him or her to enter into."

They held that the Code of Canon law is the personal law of the Catholics but as the section uses the word, "forbids," and as there is no canon in the code that pointedly prohibits a civil marriage Catholics are not prevented from marrying before a marriage registrar, if they so choose. For non-Catholics this ruling is important in this way. The Act in S. 4 refers to "one or both of whom is or are a Christian." Thus S. 88 of the Act applies to Hindus and Mahomedans. According to the Judges the Courts will recognize Hindu and Mahomedan Law as their personal law as far as the essentials of a contract of marriage are concerned. But if it is provided therein that a religious ceremony is essential to the validity of a marriage, such a rule will not be enforced as it relates to a mere matter of form. Consequently, a Hindu or Mahomedan can marry before a marriage re-

gistrar, and be legally bound by it, unless there is a direct, express and clear prohibition of such a marriage which is doubtful. Thus, this decision has to be carefully considered by all.

This case really raises an interesting and intriguing question of law, and I propose to deal with it as shortly as possible. I take the liberty of doing so with the greatest respect to the learned Judges. All the parties in this case are Roman Catholics and Goans or Indian Christians. The facts are as follows : Mr. A married Miss. B before the marriage registrar secretly, and did not go through any religious ceremony as mentioned in the Canon law. They did not thereafter live as man and wife. Then Mr. A got engaged to Miss. C, who was probably unaware of a previous marriage, and married her before a person who had received Episcopal Ordination, a Catholic priest as required by Canon Law. Thereafter, they lived as man and wife. A was prosecuted and tried for bigamy, but was acquitted by the Sessions Judge. B also filed a suit against A and C for declaration and restitution of conjugal rights. This suit was decreed by Kemp, J., (now Sir N. W.). Government appealed against the acquittal, and the defendants against the decree. In appeal the respondent was found guilty and the decree of the lower Court was confirmed.

As I am not concerned with the criminal appeal particularly, I will re-

* A. I. B. 1930 Bom. 101.

strict myself to a few words. Taking Canon Law to be a foreign (or special) law, proved as a fact by an expert and exhibited probably under S. 88, Evidence Act, it can be argued that if it is a question of fact, no offence has been committed because under S. 79, I. P. C., a "mistake of fact" is condoned. On the other hand if it is argued that it is a matter of law, then the Canon Law as the personal law of the Catholics may be said to be incorporated in the Act by S. 88, thus, it is law, and the accused is "justified by law." Apart from "the no trace of good faith," on the interpretation general, previous to the judgment, Catholics bona fide believed the law to be as stated by Rev. Fr. Fortuny S. J. and acted on it. Therefore, the accused might have been given the benefit of the doubt, as the case was practically one *prima facie* impressionis. But the judges appear to have rejected the latter argument.

I now come to the civil appeal. Though Blackwell, J., has expressed himself very guardedly, in his judgment yet indubitably he appears to have held: (a) that Canon Law is the personal law of the Catholics, (b) that the *lex domicilli* does not arise (otherwise it would have been useful), (c) that S. 88 applies to the essentials of a marriage contract, (d) that the marriage is not valid by Canon Law, (e) that the Act refers to forms, and (f) that part 6 alone of the Act does not apply to Catholics. Kemp. J., agrees with him, but the following remarks by him are worth noting: (a) "I think it was probably the intention of both to go through a religious ceremony" (b) no need to discuss Canon Law prior to 1918, and (c) "I think the abidance before us supports this contention" an entire nullity." Further, the Sessions Judge has not been overruled on the following points expressly: (a) that "it is impossible to split up the law of marriage", (b) that "the law that governs prohibited degrees governs also the validity" and (c) that "Canon Law defines valid marriages." Keeping the above in mind I proceed to consider the questions whether Canon Law forbids a civil marriage, whether S. 88 applies to forms, whether the other parts apply to Catholics, whether the English decisions are relevant, and whether "invalid" is as good as "forbidden."

The learned Judges have based their

decision on the apparently subtle distinction between "invalid" and "forbids" this is the sole point. The judgment is in accordance with Anglo Saxon jurisprudence which has turned away from the continental juristic thought. Canon Law is a product of the continent of Europe. In this case instead of interpreting the Code as a Latin jurist would, we have a continental system of law interpreted according to English notions and school of thought. Therefore, I may be permitted to say that this important case discloses not only a point of "Conflict of Laws" but also a point of "Conflict of Thought." Rightly or wrongly, the impression left on one is that the Judges grant a great deal of the premises, but fight shy of the conclusion on account of the system of law they represent. That according to me is the one and only explanation of judgments, otherwise brilliant and lucid.

All the English decisions cited are distinguishable and in my humble opinion do not support the findings arrived at, if viewed as stated above. On the contrary the foreign Court decrees, adverted to therein, express the law correctly as applicable to India: vide para. 3 *supra*. I distinguish them on the following grounds: (a) the marriages were generally celebrated in England; (b) the English principle emphatically was that the *lex loci contractus* was binding on the parties; (c) one party or both were English or were residing in England at that time or had expressly come there to marry; (d) the decisions were according to the common law of England, whether statute or case law; (e) in none of the cases, and this is the main point, did the "personal law" applicable and binding on the parties as declared by the Act in India, come up for discussion; (f) in all those cases it was only an academic point of foreign law, not binding on the Judges, as the Canon Law, but as an acceptable or non-acceptable rule of *jus gentium*; (g) in some the facts also differed. Since the Reformation, the Judges and the law of England had designedly drifted away from the Codes followed all over Europe and therefore it is, that the rulings are quite off the point because here, so to say, the Canon Law is engrafted on the Indian System of Law. I might summarise the English view as expressed in

Chitty v. Chitty (1), English Jurisprudence is not against its own nationality, it overrides every rule of foreign law, and overlooks a disability or invalidity and its consequence, mentioned in a foreign system of law.

I will next refer to the Christian Marriage Act.—only so far as the sections apply to Catholics. In Part 1, S. 5(1) refers to a person who has received episcopal ordination marrying persons in accordance with his ceremonies, and S. 4 declares that a marriage solemnized in contravention of S. 4 is void. The rest of the part does not apply to Catholics, as it refers to licensing of ministers and marriages. Part 2, time and place does not govern a Catholic priest in terms of the proviso. Part 3 again will not apply to Catholics. It is worth noting that it refers to a minister licensed under the Act, not episcopally ordained: vide S. (5) (a) minister licensed. Even otherwise, a Catholic priest with reference to this part is exempted from the penalties (cf. S. 73) and consequently its observance. Part 4, registration, a Catholic priest by S. 20 has to follow the form prescribed by his Bishop. The "shall" is mandatory. The rest of the part does not apply. I leave part 5 for discussion last. Part 6, Native Christians, does not apply to Catholics (vide. S. 65) except as to the keeping of a register book, extracts, and allowing searches and copies of entries. Here the exemption is express but elsewhere the same effect can be gathered from the sections, mentioned. It is unnecessary to refer to part 7 penalties, except that S. 66 refers to the oath as required by a Church. Part 8, miscellaneous, contains the last and notorious S. 88. I will consider part 5 now. In this part, Marriage Registrar, S. 44 refers to S. 19, but for Catholics this will be according to the Canon Law, (Vide part 3 supra.) Supposing a Goan is a Native Christian, under S. 59 registration must be in accordance with S. 37, which does not apply to Catholics. (Vide part 4 supra.) S. 65 declares that "nothing herein contained shall invalidate any marriage celebrated between Roman Catholics under the provisions of part 5 of Act 25 of 1864 previous to 23rd February 1865." I speak subject to correction re: Act, 25—these words refer to marriages

without priests and specifically to marriages before 23rd, February 1865. If part 5 of Act 15 of 1872, applied thereafter this was unnecessary because by S. 2 of Act 15 of 1872, the previous Acts were repealed "so as not to invalidate any solemnised marriage, and all licenses granted and things duly done shall be deemed to be done under this Act." This taken in connexion with the frequent repetition of the words in the Act "rules, rites, ceremonies and customs of a Church" not as the judgment might show only the essentials of a contract of marriage but even a mere matter of form is recognised by the Act. Why should it not support the conclusion that part 5 does not apply to Catholics, when the Latin Code provides for the priest as an essential: vide infra. According to me, therefore; the Code of Canon Law supersedes the Act.,

It is admitted that the Act governs forms and forms only. If that is so, how can S. 88 refer to an essential and be an exception to the Act, when it is not expressly said so. S. 88 must consequently refer to forms. According to para 10 below and Canon Law, form is an assential, but, even otherwise the Act will not validate what Canon Law says is invalid. The preamble supports the finding as to form. The distinction is wrong on another ground. S. 88 reads as follows. "nothing in this Act shall be deemed to validate any marriage." This can mean only the form of marriage. To say "essential to marriage" does not make sense and requires an additional clause. As the Sessions Judge puts it so neatly "it is impossible to split up the law as to marriage." In England this splitting up is done by the Common Law. It is not so in India. In the Canon Law there is no splitting up, and that is the Law. In Hindu and Mahomedan Law, form is a part of their personal law and is binding on them. The Courts enforce it as such. Why this distinction with Catholics? The "which" in the section relates to "marriage." It can only mean "which form of marriage," and not "which essential or substantial requisite of a marriage." To supply a *casus omissus*, like the former, is permissible as the act relates to forms. The section ends with the words "to enter into." It refers

to a contract of marriage, "which form of marriage," and not "an essential requisite of a marriage." This ought to be the proper construction of the section, and it is consistent with the preamble of the act.

It is the obiter dicta in the English cases that are important when considering this case, and show the true solution of the problem. In *Chitty v. Chitty* a case of mere disability cited by the respondents, Sir Gorell Barnes P. says at p. 82 :

"Moreover, there is likely to be some confusion if this is not borne in mind that where the judgment speaks of essentials and forms, those who decided those cases were looking at it from the English standpoint; but it may be observed that what may be regarded as form in this country might in a foreign country be regarded as an essential."

In my poor opinion S. 88 refers both to forms and essentials, but according to this remark of a great Judge, in Canon Law the presence of an ordained priest will be an essential and not a mere matter of form. The same Judge in *Ogden v. Ogden* (2) at p. 59 says :

"there are certain exceptions, as, for instance, when the *lex celebrationis* violates the precepts of religion,"

but afterwards he narrows down the principle. Lord Stowell in *Herbert v. Herbert* (3) at p. 63 states that :

"this is according to the *jus gentium*; whatever the regulations may be . . . if they are what the canonical law of the foreign country supports, the canonical law of this country must enforce it."

This was the principle to follow and give effect to in India on the strength of the Canon Law. If the law with regard to Catholics is the Canon Law then as James, Bagallay, and Cotton, L. J., in *Sottomayor v. De Barros* (4) at p. 5 said: "the law of a country 'Canon Law' where a marriage is solemnised must alone decide all questions relating to the validity 'vide Canon Law' of the ceremony by which the marriage is alleged to have been constituted."

The law of marriage should not be split up, as the Sessions Judge says, "the same rule was recognized. . . nor is their reasoning weakened by the fact that certain exceptions out of the rule have been generally recognised, viz., where marriages are contrary to the law of religion. . . and the settled policy of the nation."

Simonin v. Mellae (5) lays down at p. 102 :

This case is restricted to certain facts, but the rule remains. The policy of the Indian Legislature, as *Lopez v. Lopez* (6) shows, was to recognize the Canon Law, and the civil marriage must be held contrary to it.

The Indian decisions are more to the point on the principle that is applicable than the English cases which have preferably been followed. In *Lopez v. Lopez* (6) at p. 717, Garth, C. J. and Wilson, J. said :

"the members of the Roman Catholic religion are, subject to the Ecclesiastical Law which regulates the marriage of Roman Catholics."

In *Lucas v. Lucas* (7) at p. 191, Pratt, J., notes :

"what is prescribed by the Holy Catholic Church for the validity of mixed marriages," and at p. 194 quoting an eminent writer, Rattigan :

"if both parties are subject to the same personal law the marriage will be invalid if forbidden, valid if allowed by that law."

This will be more clear when I touch upon the words "invalid" and "forbidden." In *Kolandaivelu, In re* (8) a strong Full Bench refer : "to the general law of the church, which regarded marriage as a sacrament as well as a contract."

The above leads one to the conclusion that the Canon Law alone applies to Roman Catholics.

It is not definitely decided whether the *lex loci contractus* in Indian or Canon Law. It appears that both are the *leges loci*, though more is said of Indian Law. But this does not appear to be sound according to the English cases. The law of England is that the *lex loci contractus* is the only law applicable to the parties, and validity is governed by that law. In India henceforth the essentials will be governed by Canon Law and the form by Indian Law a very undesirable state. But what effect have these words in S. 4 of the Act "applicable to either of the parties" and "one or both of whom is or are a Christian." This is not the law in England (see the cases cited). Suppose a Catholic marries a Hindu, and the Hindu personal law is

(5) [1860] 29 L.J. Mat. 97=2 Sw. & Tr. 67=6 Jur. (n. s.) 561=2 L.T. 327.

(6) [1886] 12 Cal. 706.

(7) [1905] 32 Cal. 187.

(8) [1917] 40 Mad. 1080=38 M.L.J. 112=6 M.L.W. 126=41 I.C. 664=(1917) M.W.N. 589.

(2) [1908] P. 46=77 L.J.P. 24=24 T.L.R. 94=97 L.T. 827.

(3) [1819] 3 P. 58.

(4) [1878] 3 P.D. 1=47 L.J.P. 23=26 W.R. 455=37 L.T. 415.

against such a marriage and the form itself, i. e., forbids, the Hindu law will be enforced but not the Canon Law in a similar case. The old English Law is correct as far as Catholics go, when the validity depended on solemnisation by ordained clergyman. *Reg. v. Mills* is good law for Catholics. Rayden on Divorce 2, Edn. 1926 in relation to forms and ceremonies says at page 36 : "the validity of a marriage almost entirely depends on the observance of statutory provisions."

In this case it will be the Canon Law. Brown and Watts state at p. 93, Divorce 9th Edn. 1921 : "if the formal requisites are known to both sides, the validity will depend on that."

It appears from Kemp, J's. judgment that the concerned were waiting for a religious ceremony to be performed. The validity must depend on Canon Law, if they were aware of its provisions.

What is the effect of "forbids" and "invalid?" I will try to be reasonable. The learned Judges refer to valid and binding as against invalid and not binding i. e. null and void. Canon Law uses the one word invalid. The meaning in English will be not only invalid, but also null and void or illegal. The judgments appear to show that the word has been interpreted to mean voidable which is translated in Latin by another word not "invalidus." How has invalid been interpreted in India before? In *Lopez v. Lopez*: (6) the evidence at p. 716 reads as follows (Rev Fr. Harford) "marriage with a deceased's wife's sister is perfectly invalid unless a dispensation.. Cunningham, J., at p. 714 interprets this "thus by the rules of the Church they were void." Garth, C. J., Willson, J. at p. 732, Pratt and Mitra in *Lucas v. Lucas* (7) *Brooke v. Brooke* Eversley on "Domestic Relations and other authorities use invalid" to mean "null and void." S. 65 of the Act uses the words "shall invalidate any mar-

riage" as meaning "null and void" If it is void it is against law, it is illegal. Now gambling contracts and contracts against public policy are void under the Contract Act. It is nowhere said that they are forbidden. But what is the meaning of that "voidness." It means it is forbidden. It is not that because they are void and not forbidden the Court will enforce such contracts. "Invalid" is used in the Code in such a sense. This sense or meaning amounts to nothing less than a prohibition. In the Penal Code the section only says if you murder you will be hanged it does not forbid one expressly from murdering. Therefore I wonder if one can murder with impunity. The other words used along with "invalid" e. g., "bound" "must", etc., in the Canon law make it clear that the Code means to forbid nothing less.

The Act recognizes custom and the custom based on Canon Law could be easily proved that since the Tamesti decree Catholics must marry before a priest and the prohibition is more clearly stated there as shown by Blackwell, J's judgment. This statement on the strength of Canon Law is accepted by Kemp, J., vide his remark "an entire nullity." It is also admitted that the Code codifies all the Catholic Law in force prior to 1918. Therefore, the Canon Law must be taken to prohibit in terms of the Tamesti decree. That is how it has to be interpreted or custom forbids it S. 112, Government of India Act, is instructive on the point arising in this case :

"The High Court... shall... in matters of contract and dealing between party and party when both parties are subject to the same personal law or custom... decide according to that personal law or custom..."

The Letters Patent (Bombay) also, I think, support the Warren Hastings rule. re personal law and custom.

(To be Continued.)

* 1930 Cr. Cases 225

(Calcutta)

C. C. GHOSE, J.

On difference between

CUMING AND S. K. GHOSE, JJ.

Emperor

v.

Dukari Chandra Karmakar—Accused.

Jury Ref. No. 24 of 1929, Decided on 24th June 1929, made by Sess. Judge, Birbhum, D/- 16th March 1929.

* Criminal P. C., S. 367 (5)—Court must consider question of sentence with reference to circumstances and not by S. 367 alone—Accused young and of good character—Provocation at unsympathetic treatment from his murdered wife's relation—Transportation held to be sufficient.

Apparently the provision in S. 367 (5) contemplates that death sentence is to be passed as a matter of course unless there is sufficient reason to the contrary. But the Court must consider the question of sentence with reference to the circumstances and if these circumstances justify the passing of a sentence other than the sentence of death, the Court must pass that sentence. Therefore, in fixing the measure of punishment one is to be guided not by S. 367, but by various other matters, for instance, the enormity or otherwise of the offence and the particular circumstances under which the accused committed it. [P 290 C 1]

D, a mere lad of twenty, went to retire with his wife and shut himself in the upper room. In the morning the door was found open and the girl was found murdered. D was found absconding and remained hiding for some six weeks :

Held : that on consideration of his age, good character, the provocation at the unsympathetic treatment he had been getting over since his marriage from his wife's relations, a sentence of transportation for life instead of death, would meet the ends of justice.

[P 290 C 1, 2]

A. K. Dhar—for Accused.

Khundkar, Anil Chandra Roy-Chowdhry and Nirmal Kumar Sen—for the Crown.

Cuming, J.—This is a case of one Dukari Chandra Karmakar whose case has been referred to us by the learned Sessions Judge of Birbhum under the provisions of S. 307, Criminal P. C. The accused Dukari was tried before the Sessions Judge sitting with a jury on a charge of murdering his wife Sakti Kumari. Five of the jury found the accused not guilty. The remaining four of the jury found him guilty under S. 302, I. P. C. The learned Sessions Judge apparently agreeing with the minority has referred the case to this Court under S. 307, Criminal P. C.

I would draw the attention of the learned Sessions Judge to the provisions

of S. 307, Criminal P. C., and point out to him that it is necessary for him to state clearly what offence, in his opinion, the accused is guilty of. It is not correct for him to state that he is "inclined to agree with them."

The facts of the case are briefly these : The accused Dukari was married to the deceased Sakti Kumari a girl at present some 15 or 16 years of age some 6 or 7 years ago. It would seem that there was an arrangement at the time of the marriage that Dukari should reside in his father-in-law's house as a ghar jamai, and apparently he so remained for one and a half months. His father-in-law lives in the village of Panchpara. Apparently, however, this arrangement did not satisfy Dukari and he wanted to go away to his house which he did. The girl remained with her family while the accused went away to the village of Bamnigram some 6 or 7 miles away. It would seem that from time to time the girl did go to her husband's house. But the relation between Dukari and his father-in-law and the girl's aunt Rohit Kumari did not seem to have been very cordial. Rohit Kumari brought up Sakti the deceased and gave Sakti her own ornaments at the time of the marriage and she refused to allow Dukari to take away his wife without giving ornaments to her; the girl on her part would seem to be unwilling to go to her husband's house without ornaments. There was at one time a criminal case between the parties and a petition was lodged by Dukari under S. 552, Criminal P. C., to the District Magistrate of Birbhum. This matter appears to have been settled. The girl went to live with her husband for some time and then again returned home. On 26th Jaistha 1335 corresponding to 9th June 1928 the accused Dukari came to his father-in-law's house. He stayed in the house that day and he also remained on 27th Jaistha the 10th June. He went out in the evening and returned at about one prahar at night, took his meal with his father-in-law and then retired to rest in an upper room where his wife Shakti Kumari, the deceased, shortly joined him and the door was bolted. The next morning the aunt Rohit Kumari seeing that the girl Shakti did not come down went upstairs to call her. On pushing

the door she found it open and on going inside she found the girl lying dead with a number of wounds on her body in a pool of blood. The accused Dukari was not there. Information was at once given to the thana and the usual enquiry was set on foot. The accused Dukari was not to be found at his home. Nor was he found on search by the police. A proclamation was issued and his property was attached on 15th August and on 30th August he surrendered himself in Court. After usual enquiry by the Magistrate he was committed to Sessions on a charge of murder and was tried with the result that I have already noted.

The accused has contended himself with the plea of not guilty. He stated before the Sessions Judge that he was innocent and he used to love his wife deeply and she also loved him in return and, therefore, it was impossible for him to murder her. He does not give any explanation why he was absconding from home up to 30th August. Nor, as far as I can see, has any explanation been attempted to be given by his counsel. On his behalf it seems to have been urged in the Sessions Court that either he was not at the house of his father-in-law or if he was there he did not murder the girl. Suggestion also seems to have been thrown out entirely unsupported by any evidence that the girl was of a bad character and that the young men of the village used to frequent the hut. I may say that there is not a scrap of evidence to support this suggestion and to my mind it is extremely improper to make a serious allegation of this sort against the character of a dead person without any single scrap of evidence of any sort to support it.

The case against the accused Dukari rests on the evidence of persons who saw him in the village on 26th and 27th Jaistha and of his relations who saw him go to the upper room with his wife in the evening and who found her body there early in the morning. If this evidence is believed, and I shall discuss the evidence later on, there can I think be no doubt that it was the accused Dukari who killed the girl Shakti when in addition we find that he was absconding for nearly six weeks immediately after the murder.

On the question of his presence in his father-in-law's house on 26th and 27th Jaistha and of his going to sleep with his wife in the upper room there are the evidence of Manindra, Rohit Kumari, Aghore, Kamini and Nikunja who are his relations and who saw him retire to rest with his wife. The neighbours Suresh, Mohendra and Sashi Bhusan saw him in the village on 26th and 27th Jaistha. I have carefully considered the evidence of the witnesses and I can see no reason whatever to disbelieve them or to think that they are telling a false story. Their evidence is given, as far as can be seen in a simple and straightforward manner and nothing has been brought out in their cross-examination to shake them. Only two points really remain to be considered; one of them arises from the evidence of Rohit Kumari, the aunt of the deceased girl. Rohit Kumari was one of those who saw the girl go up to the room and bolt the door. She would seem to state that the girl did not take any meal that night, while the evidence of the doctor was that the girl's stomach contained undigested meal of rice. None of the other witnesses, however, was examined on the question as to whether or not the girl did eat anything that evening. It is quite possible that she did eat something unknown to Rohit Kumari. The learned advocate who has appeared for the accused has asked us to hold from this fact that Rohit Kumari was not observing what the girl was doing. Even if that were correct there still remains the evidence of the other witnesses who deposed to the events of that night.

The next point which has been urged on behalf of the accused is the evidence of one Radha Gobinda Mandal. This witness was tendered for the prosecution and was cross-examined by the defence. His statement was that on 27th Jaistha at about 1 or 1½ prahar of the night he saw Dukari passing by the side of his house with a shirt on and an umbrella with him. On being questioned by him, Dukari replied that he went to Panchpara and was now returning from there. No doubt if the witness was deposing to the truth this would be a fact strongly in favour of the accused person, because Bamnigram is at some distance from Panchpara and

if the accused was at Bamnigram at the time of the occurrence he could not be at Panchpara on that night at about 1 or 1½ prahar. It is, however, very probable that this witness in deposing to this fact was not certain of the time at which he actually saw Dukari or he altered the time in order to give evidence in Dukari's favour. I am not prepared to rely upon this witness in the face of a number of other witnesses who positively state as to the presence of the accused at the house of Manindra on the night of the occurrence.

The evidence, therefore, comes to this: that Dukari went to retire with his wife on the night of 27th Jaistha and shut himself in the upper-room. In the morning the door was found open and the girl was found murdered and Dukari was found absconding, and remained hiding for some six weeks. It is no doubt true that the mere fact of absconding does not necessarily prove the guilt, but it is a factor to be taken into consideration. It can no doubt in some cases be explained. In the present case no explanation whatever has been attempted to be given. I have no hesitation in coming to the finding that it was the present accused Dukari who had killed the girl Shakti Kumari. What was his motive or reason for killing the girl is known to him and him alone. It may be that he was annoyed because she did not come to the house. It is always a matter of speculation as to the motive with which any human being does any particular act but when the facts are clear, the motive is immaterial. The medical evidence shows that the girl had some four wounds, three on the head and one on the shoulder. They were apparently caused by a large sacrificial knife which was found covered with blood close to the body. This knife was used by Manindra and also by the accused himself to perform certain sacrifices. The nature and severity of the wounds can leave no doubt whatever that it was the intention of the assailant to kill the girl. The first wound was an incised gaping horizontal wound on the right side of the head 3" long going right through the sculp and skull and reaching the brain; the second was an incised gaping wound parallel to the first 4"

long and ½" wide below the first going through the sculp and reaching and fracturing the skull; the third wound was an incised gaping wound extending from outer angle of right eye to below the right ear, 5" long and 2" wide reaching bone and going through the bone at outer angle of right eye. Whoever struck these blows must obviously have intended one thing, namely, to kill the victim. I have no hesitation in finding that Dukari the present accused is guilty of murder S. 302, I. P. C. In coming to this finding I have taken into consideration the opinions of the Sessions Judge and also of the jury so far: as regards the opinion of the jury five of them were of opinion that the accused was not guilty and the four found him guilty. Therefore the difference is not very much. The learned Sessions Judge who heard the evidence and had the opportunity of observing the demeanour of the witnesses was of opinion that the accused was guilty.

I now come to the question of sentence. I have given the case my careful consideration and I am of opinion that it was a cruel and brutal murder perpetrated apparently without any adequate motive on a defenceless girl apparently in her sleep. There is no adequate reason given to me why the sentence of death should not be passed on the accused. S. 367, Cl. 5, Criminal P. C. provides that:

"if an accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death the Court shall in its judgment state the reason why sentence of death was not passed."

Where an accused person is found guilty of murder therefore it is clear that the sentence of death has been considered as the normal sentence and the sentence of transportation for life as the abnormal sentence for which reasons are required to be given by the Judge why the sentence of death is not passed. This was not a murder committed in the heat of passion and as far as can be seen was done deliberately. The wounds show that the girl was attacked either in her sleep or certainly without any warning. It is clear that she was attacked while lying down, and there is nothing whatever to show that they were quarrelling at the time. Obviously it is for the accused who alone knew the exact

circumstances under which he killed his wife to show the extenuating circumstances for it is a fact peculiarly within his knowledge. It is not for the Court to presume such circumstances. It may be that the accused was at the time labouring under a grievance, viz., that his wife would not come back or was not allowed to come back to his house. To hold that such a grievance or imaginary grievance is sufficient to justify a Court in passing the lesser sentence is clearly to hold that murdering a wife is not a capital offence. He is a young man of 20 or 21 and obviously not a child who cannot understand what he was doing. Ordinarily I should be reluctant to disagree on a question of sentence. But it seems to me that the present case involves a question of principle. As my learned brother is of opinion for reasons which he would give in his judgment that the lesser penalty is the appropriate one. The case must be laid before a third Judge under S. 429, Criminal P. C.

S. K. Ghose, J.—I agree with my learned brother that the accused should be convicted under S. 302, I. P. C. but with great respect I am unable to agree that it is a fit case for the death penalty.

I shall therefore confine myself to the question of sentence only. The facts which are material to that question are these: The accused Dukari Chandra Karmakar is a young man of 21. His wife Sakti Kumari, the deceased in the case, was aged about 15 at the time of her death. They had been married for about 7 years and there were no children. The parties belong to different villages. Ever since his marriage the accused had been in trouble about getting his wife to live with him. Her relations were putting all sorts of obstacles in his way and the girl herself was not sympathetic. At the time of the marriage there was a talk that Dukari should remain as ghar jamai. This was tried for some time but the accused did not find it suitable. His father-in-law Manindra was living with his family in the house of his niece Rohit Kumari P. W. 2. Rohit Kumari made certain demands from the accused and the accused on his part also demanded that some lands should be given to him, but this was refused. On

this the accused refused to stay and Rohit Kumari said 'that unless the accused gave ornaments to his wife the latter would not be allowed to go to him. Some time later the accused filed a petition under S. 552, Criminal P. C., before the Magistrate alleging that his wife's people had kept her in their house with an evil motive. The matter was made up and the girl was left in her husband's house by Manindra. But this also was for a short time. In Assin the girl came back to her father's house but was again taken away by her husband for a short time. Then followed some visits on the part of the accused but each time he failed to make his wife go with him. In the month of Jaistha a Bagdi woman was sent by the accused to take his wife to his house, but she was unwilling to go without ornaments. On the following day the accused himself came but he went away the next day without his wife. Ultimately on 26th Jaistha (9th June) the accused came to Manindra's house with the object of taking away his wife with him. But, as Manindra says in the first information, he kept his son-in-law in his house telling him that his daughter would be sent on 5th or 6th Assar. The night of 27th Jaistha (10th June) was going to be the last night which the accused was going to spend on that occasion at his father-in-law's. That night the accused and his wife went to sleep in a bedroom upstairs. The accused had taken his meal as usual. In the bedroom there was a big sacrificial knife belonging to Manindra and the evidence is that it was kept there for safety as there were children in the house. Manindra is a professional sacrificer and had been using this knife for the purpose of sacrifice, but the accused had also acted as his proxy on some occasions. There is no eyewitness as to what happened that night. But early in the morning Rohit Kumari was the first to go upstairs and she discovered that the girl was lying, murdered on the bed. The sacrificial knife was lying blood-stained 'close by. According to the medical evidence there were four gaping incised wounds; two were on the head, the skull being fractured, the third was on the right side of the face, and the fourth was on the right shoulder.

The medical evidence also is that very little movement was possible after the head blow which went right through the brain. The conclusion is irresistible that the girl was murdered as she was lying in bed and the weapon used was the sacrificial knife. The accused was not seen after the occurrence. The police could not find him out and processes were issued. P. W. 19 a resident of mouza Itanda which is about 10 to 16 miles from the village of the accused deposes that he saw the accused in the month of Ashar at the house of Sakti Thakur, the spiritual guide of the accused. The accused surrendered in Court on 30th August 1928.

Before going any further into the facts, I would like to make a few remarks on the principle on which the Court has to make its choice of sentence in the case of an offence carrying with it the death penalty. S. 367, Cl. (5), Criminal P. C., provides :

"If the accused is convicted of an offence punishable with death and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed. Provided that in trials by jury the Court need not write a judgment, but the Court of Session shall record the heads of charge to the jury."

It may be said that apparently this provision in the Code of Criminal Procedure contemplates that death sentence is to be passed as a matter of course, unless there is sufficient reason to the contrary. But to proceed upon such a construction would be to make the alternative punishment the exception in murder cases. This, to my mind, is against the accepted view as found in the reported decisions and actual practice. In my judgment such procedure would also not be warranted by the words of the section. It occurs in Chap. 26 which deals with the form of the judgment. The section contains a variety of clauses dealing with the language and the contents of the judgment and so forth. Cl. (5) itself contains a proviso which is applicable to trials by jury. In my opinion it is wrong to construe this section as referring to such a matter as the measure of punishment which goes beyond mere form. For certain offences, like murder and treason, the Penal Code provides the death penalty, as also an alternative form of

punishment, namely transportation for life.

In such cases, the Court must consider the question of sentence with reference to the circumstances, and if these circumstances justify the passing of a sentence other than the sentence of death, the Court must pass that sentence. All that the first part of Cl. (5), S. 367, lays down is that in such cases reasons must be stated in the judgment. This is a matter of procedure. By way of analogy I may refer to a rule of this Court, namely, R. 72, Chap. 1, p. 27 High Court's General Rules and Circular Orders, Appellate Side, Criminal. It was there provided that in the column of remarks in the form of Sessions Statement which a Sessions Judge has to furnish he must state the grounds on which any person punishable with death has been sentenced to punishment other than death (S. 374, Criminal P. C.) This rule has since been cancelled. In S. 367, Criminal P. C., the legislature has not thought it necessary to provide that reasons must be given in the judgment for passing a sentence of death as well. But these reasons must exist in the mind of the Judge. It is unthinkable that a Judge will pass a sentence of death in preference to the alternative sentence without good and sufficient reasons. Only, as a matter of procedure, such reasons need not be recorded in the case of a death sentence. In the nature of things the judicial mind must be reluctant to pass the extreme penalty and to enact that reasons must be stated in the case if a death sentence might have the undesirable effect of encouraging the Courts to shirk what is after all an unpleasant duty. But the Penal Code simply provides alternative punishments and there is nothing which takes away from the Court the duty to see that in a particular case the punishment fits the crime. That I consider to be the true measure. Once you admit this, the position that by S. 367, Cl. (5), Criminal P. C., death penalty must be the rule becomes untenable. As regards the death sentence, far from making it the ordinary penalty for the relevant offences, the draftsman of the Code stated that it ought to be sparingly inflicted. Experience shows that in practice this has been done, which once more proves that S. 367, Criminal P. C., does

not touch the essence of the matter at all. Therefore, in fixing the measure of punishment one is to be guided, not by S. 367, Criminal P. C., but by various other matters, for instance, the enormity or otherwise of the offence and the particular circumstances under which the accused committed it. They all go back to the facts of the case. But in the case of the death penalty the Courts have gone so far as to consider matters which are not relevant to the crime, e.g. mere delay in passing judgment a circumstance bringing into play humanitarian grounds. I may add that I make these remarks without prejudice, as in the course of a long experience as Sessions Judge it has been my lot, perhaps an ordinary one, to send more than one person to his doom.

Whatever view may be taken of S. 367, Criminal P. C., it presents no difficulty in the present case, for I am satisfied that good and sufficient reasons do exist as to why the death penalty should not be imposed in this case. There is no direct evidence as to what happened immediately before the murder. But it is very probable that the accused having failed again to take his wife, and this being his last night with her, they had a difference before going to sleep. Everything points to the conclusion that the murder was not deliberately planned. I do not overlook the fact that a lethal weapon was used and that more than one blow was struck. But the evidence shows that the weapon was not taken there by the accused. It just happened to be there. I consider that the motive in this case is not an aggravating factor. The motive was a fit of desperate resentment which, in the circumstances, was not unnatural and for which the accused himself was not entirely to be blamed. We cannot overlook the consideration with regard to age. After all the accused is a mere lad. There is positive evidence that he has borne a uniformly good character, that he was a good boy, respectful towards his wife's relations, and not outwardly quarrelsome in relation to his wife, and this in spite of the unsympathetic treatment that he had been getting ever since his marriage. His last visit was one of many that ended in failure. This must have preyed on his mind. In the circumstances, with the

utmost respect to my learned brother, I do not think that the case is a fit one for capital sentence. I think a sentence of transportation for life would meet the ends of justice. (On difference between the two Judges the case was referred to a third Judge who delivered the following judgment).

C. C. Ghose, J.—This matter comes before me as third Judge under S. 429, Criminal P. C., owing to a difference of opinion between my learned brothers Cuming, J., and S. K. Ghose, J. Both the learned Judges are agreed that the accused should be convicted under S. 302, I. P. C. Cuming, J., was of opinion that there was no adequate reason why the sentence of death should not be passed on the accused, while S. K. Ghose, J., was of opinion that on the facts appearing in this case and set out in his judgment this was not a fit case for a death penalty. During the week end after this matter had been referred to me as third Judge I had an opportunity of examining the entire record and of perusing the opinions of the differing Judges. It is unnecessary for me to set out the facts once again; they will be found set out at sufficient length in the judgments of my two learned brothers. Now it was laid in this Court many years ago by Woodroffe, J. that if in any case of murder under S. 302, I. P. C. one finds that two learned Judges of this Court are in disagreement over the question of sentence one favouring the death penalty and the other recommending that the transportation for life would meet the ends of justice, that in itself is a sufficient ground for holding that the death penalty should not be inflicted. Sometime ago I had occasion to refer to this opinion of Woodroffe, J., and I have always acted on that opinion. But it is not to be understood from what I have just said that the rule enunciated by Woodroffe is an inflexible rule or that the third judge to whom the matter is referred on a difference of opinion on the question of sentence is not required to go into the case for himself and to judge for himself whether the case before him is or is not a fit one for the infliction of the death penalty. I have, therefore, as I have just said gone into the case myself. In my opinion, the circumstances present on the

record are of such a nature that I feel abundantly justified in taking the view that a sentence of transportation for life would meet the ends of justice in this case. I feel no doubt whatsoever that the accused was labouring under a serious grievance which was not unnatural in the circumstances disclosed on the record and that he committed the murder in question in a fit of desperate resentment. It is quite true he is not a child but it is equally true that he is a mere lad of 20. His visits to his father-in-law's place for the purpose of taking his wife to whom he had been married for about 7 years, to his house had always ended in failure and there are substantial reasons for coming to the conclusion that the treatment which he had received since his marriage at the hands of his wife's relations had been consistently unsympathetic. These are circumstances which must be taken into consideration. The question of appraising the sentence to be passed on a prisoner is at all times a difficult one. But I think in this case it would not be straining the language of S. 367, Criminal P. C., if I were to hold that the prisoner should be sentenced to transportation for life. I agree with S. K. Ghose, J., and I direct that the prisoner be convicted under S. 302, I. P. C., and be sentenced to transportation for life.

V.S./R.K.*

Order accordingly.

1930 Cr. Cases 231

(Calcutta)

MITTER AND S. K. GHOSE, JJ.

Emperor

v.

Dinbandhu Ooriya—Accused.

Death Ref. No. 3 and Appeal No. 659 of 1929, Decided on 13th November 1929, against judgment of Additional Sess. Judge, 24-Parganas.

(a) Criminal P. C., S. 423—Finding of Judge or jury as to simple issue of fact cannot be disturbed unless opposed to evidence.

A Court of appeal would not be justified in disturbing the finding of a Judge or of a jury on a simple issue of fact unless the verdict arrived at seems to be opposed to the entire weight of evidence. [P 235 C 1]

(b) Penal Code, S. 302—If husband discovers wife in act of adultery and kills her he is guilty of manslaughter only and not murder—This rule cannot be extended when the relationship is not of husband and wife.

If a husband discovers his wife in the act of adultery and thereupon kills her he is guilty of man-slaughter only and not of murder

But that rule has no application where the relationship between the parties is not that of husband and wife: *Rex v. Palmer* (1913), 2 K. B 29. [P 236 C 2]

(c) Penal Code, S. 300, Expl. 1—Provocation—Test of sufficiency.

There must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, so as to lead the jury to ascribe the act to the influence of that passion: *Rex v. Lesbini* (1914) 3 K. B. 1116; *Rex v. Alexander*, 109 L. T. 745; *Reg v. Malsh* (1871) 11 Cox C. C. 336. Ref. [P 237 C 1]

Hiralal Ganguli—for Accused.

D. N. Bhattacharya—for the Crown.

Mitter, J.—This is an appeal by Dinbandhu Uriya who has been convicted of murder under S. 302, I. P. C. by the Additional Sessions Judge of the 24 Parganas in agreement with the unanimous verdict of nine gentlemen of the jury for causing the death of a Brahmin youth named Kartik Chunder Mukerjee, aged about 25/26 years. He has also been convicted under S. 326, I. P. C. of causing grievous hurt by a sharp cutting weapon on one Rajabala a woman of the suburbs of Behala. The learned Additional Sessions Judge has passed the sentence of death on him on the charge under S. 302. He has further sentenced him to rigorous imprisonment for a period of four years under S. 326 which is to be operative until the sentence of death passed by him is confirmed by this Court. The matter has also come before us by way of reference by the Additional Sessions Judge under S. 374, Criminal P. C.

On behalf of the prisoner it does not appear that any very serious criticism has been made of the summing up by the learned Sessions Judge. The only criticism which is made is that the learned Judge should have put to the jury the fact that during the course of the investigation by one of the police officers it was disclosed that the accused was at the shop of one Sindhu Pashi at Barisa during the day on the date of the occurrence before coming to the place where he was arrested and it is said that the learned Sessions Judge ought to have directed the jury to draw an unfavourable inference against the case for the Crown from this very important circumstance. It seems to me that it was not the duty of the Crown to put this witness before the Court seeing that the witness could really have proved the alibi of the ac-

cused. It was really for the accused person to call him as a witness for the defence in support of plea of any alibi which he might have taken but has not taken. It seems to me after considering and reading the summing up by the Sessions Judge, that the summing up was a most careful one. Every point was put before the jury with great lucidity and there was really ample evidence upon which the jury could come to the conclusion at which they arrived with reference to the two defences which were suggested during the course of the argument before the lower Court. One theory put forward was that the deceased Kartic Mukherjee himself cut a sindh and effected an entrance into Rajabala's ghar and eventually engaged himself in a scuffle with her and that these two persons managed to fight with a cutting weapon and cut each other and in the course of the fight Kartic got the worse of it and met with his death. It must be said, in fairness to the learned advocate for the appellant, that he has not put forward or pressed this theory before this Court.

The other theory put forward by the defence in the course of cross-examination of the prosecution witnesses was that there was no light in Rajabala's ghar at or about the time of the occurrence and that it was probable that while Kartic, the deceased, and Rajabala engaged themselves in sexual intercourse the light might have been put out and eventually they might have fallen asleep and that while they were so asleep some unknown enemy might have effected an entrance into the room through the sindh and injured both the man and the woman. It is said that the woman Rajabala having failed to recognise the actual assailant who escaped on her cries took it into her head to mention the name of the accused out of sheer grudge. It is further suggested that the name of Dinabandhu occurred to Rajabala not immediately after the time of the occurrence but after she had held a consultation with the other unfortunate woman living in the same house and other persons friendly to her in the locality. No evidence has been put forward in support of this defence and the learned Judge did mention to the jury this possible defence which was suggested in the cross-examination of

the prosecution witnesses and I shall show presently from the examination of the evidence that this defence is baseless.

Although the matter has come before us as an appeal from the unanimous verdict of the jury and from a judgment accepting that verdict, as the sentence in this case is one of death, it has always been the practice in this and in the other High Courts in India to deal with the case as a whole, that is, to look into the evidence and consider whether the verdict has been rightly arrived at. It becomes necessary, therefore, to examine the evidence in this case and to determine whether the verdict of the jury can be sustained on such evidence.

The short story, so far as it is necessary to state, is that the woman Rajabala, who is an unfortunate woman in the suburbs of Behala was in terms on her own showing, of great intimacy with the accused for about a year or a year and a half, and it was this woman, who out of affection for the accused, enabled him to make his living by starting at her own expense a chat shop in the locality. The accused used to live at night with this woman and the evidence discloses that he used to come at about 10 p. m. in the night and after that ordinarily no other visitor was allowed access into the room of this woman. It seems that the chat shop was carried on under circumstances which left very little profit of late to the accused person and the accused accordingly stopped the small sum of Rs. 8 or Rs. 9 which he used to pay for the food which he would take at the place of the woman. This sort of strained relationship continued indeed for a very short time when it appears that on 18th May last the day immediately preceding the date of the occurrence the woman was found with another person in her room at a late hour of the night. At that time the prisoner came. Evidently he resented the intrusion of the stranger. He entered into the room of Rajabala, assaulted the stranger and took away his cloth and the coat which he was wearing. This resulted in a quarrel between Rajabala and the prisoner. Rajabala had to appeal to some of the neighbours to induce the prisoner to give the clothes back to the stranger who had come to pay her a visit. As a

matter of fact, evidence is given by one of the witnesses who happens to be the carter of a neighbour of the name of Mohim Chandra Pramanik that he did actually beat the prisoner in order to induce him to deliver the clothes to the stranger. It is said that while the accused returned the clothes he uttered threats to the effect that if he was a man he would teach a lesson to the woman. The exact statement which was made is differently stated by different witnesses, but this much is clear that the prisoner did hold out a threat of teaching the woman a lesson or of taking his revenge on her. This was on 8th May.

On the 9th, which is the date of the occurrence, at about 10 p. m. the deceased paid a visit to this woman and the evidence is that after the preliminary settlement of the fee she would charge for entertaining this visitor they entered into Rajabala's room and it is said that while this unfortunate young man was in the act of sexual intercourse with the woman the prisoner came from the direction in which Rajabala was lying with her head and inflicted wounds on the deceased while he was in this act. On the first blow being struck it is said that the deceased and Rajabala rose from the floor where they were lying when another blow is said to have been struck which had the effect of causing this young man to fall on a wooden bedstead or takhtaposh which was lying nearby. After this it is said the prisoner inflicted injuries on Rajabala, Rajabala is said to have snatched the weapon which is said either to be a hasua or a katari or dao from the hand of the prisoner but it was again snatched back by the accused and several wounds were inflicted on the woman. The woman managed to open the door of the room in which the murdered man lay and she cried that it was Dinabandhu, the prisoner, who had committed the murder. This apparently attracted the attention of another unfortunate woman Giribala who was living in the next room and was at that time taking her night meal. The occupant of the next room Hari Dasi another unfortunate woman was also roused from sleep and to her also it was stated that it was the prisoner who had committed the murder. The prisoner in the

meantime, after the door of the room had been opened, escaped into the land and garden towards the west by an opening or sindh which had been cut in the western matwall. A sketch map of the huts of Rajabala and the other women has been made an exhibit in this case and is to be found at the end of the paper book. From that it appears quite likely that the prisoner made his escape through the sindh in the western wall. A short time after the occurrence, the case for the Crown is, a neighbour who had a tea shop which these women frequented, namely, Atul Krishna Das, was called. He heard a report of the occurrence from Rajabala, Giribala and others and immediately went to the thana to lodge the first information report. That information is to be found at p. 5 of the paper book and it is necessary to reproduce portions of it in order to show that the first information report agrees in its broad details with the case now made for the Crown. Atul Krishna said that at about 10 O'clock in the night of 9th May he, Nani Babu and Bhutnath Shaha were working in his shop at the Gholsapur Bazar when a woman of Gholsapur, whom he would be able to recognize if seen, cried out exclaiming "being killed" at which he responded saying what the matter was and she said that the paramour of Rajabala Peshakar had cut her with a katari and murdered another and that the accused who was said to have cut the woman was an Uriya Baman called Dinabandhu. Then the first information proceeds as follows:

"Then I ran up to Rajabala Peshakar and found her lying on her verandah and saw serious bleeding cut wounds on her back and hands and her whole body was soiled with blood. Before I came here I did not notice whether she had any other wounds. At that time a person, whose name I do not know, said that a man was lying murdered inside the room. I have heard from wounded Rajabala that the paramour Uriya Baman Dinabandhu entered the room by cutting sindh and wounded her with a katari, and murdered a man who came to her room. Before coming here, I have not enquired to know why he had been murdered, nor have I heard, what persons have seen the occurrence. I did not see accused Dinabandhu Uriya there, nor before coming here have I enquired at what part of the ghar the sindh had been cut. This is my ejahar.

In respect of the actual occurrence the whole case for the prosecution really rests on the testimony of the woman Rajabala because she is the only eye

witness to the occurrence. (His Lordship after considering the evidence on merits, concluded). As I have stated at the outset, the case made for the Crown and the evidence given by Rajabala in Court tally in main particulars with that was stated in the first information report.

Some argument has been advanced in this Court that Rajabala's evidence must be discredited because the medical evidence shows that her statement that the deceased fell on receiving the first blow or another blow after that is inconsistent with the medical evidence which shows a number of injuries on the person of the deceased. It is difficult to gather in what condition Rajabala was at the time when she found a man with a sharp weapon inflicting wounds on a person who was visiting her at the time and who was having sexual intercourse with her. The attack indeed was very very sudden so far as they were concerned and no wonder that in that confusion Rajabala would not have a clear impression of what actually happened in the room, namely, as to whether there was one injury or several injuries on the person of the deceased. Having regard to the circumstances in which the injuries were inflicted, not much importance can be attached to the medical evidence as to the number of the injuries.

In connexion with Rajabala's evidence it has to be remembered that both the Judge and the nine gentlemen of the jury had an opportunity of observing the demeanour of that witness. That is an advantage which the Judge and the jury in the Court below had over the Court of appeal and, as has been said on the highest authority, a Court of appeal would not be justified in disturbing the finding of a Judge or of a jury on a simple issue of fact unless the verdict arrived at seems to be opposed to the entire weight of evidence. I think, therefore, that the occurrence took place in the manner alleged by Rajabala and that the wounds which caused the death of Kartic were inflicted by the prisoner in the manner in which she deposes.

It has next been argued that there are discrepancies with regard to the occurrence of 8th May and that if the incidents had not taken place in the manner

alleged, there would be no motive in the prisoner in committing the crime on the 9th. We have listened to the learned advocate for the appellant on this part of the case at great length and I do not consider that the discrepancies are such as would entitle us to hold that the incidents of the 8th did not take place in the manner in which most of the witnesses state. The learned Judge did put before the jury the slight discrepancies between the different witnesses. It appears, however, from the evidence of Mohim Chandra Pramanik, one of the principal shop-keepers of the locality who took an active part in the incidents of the 8th, that he called the prisoner and that on his orders his cartman Dabiraddi Sheik (P. W. 12) appeared and slapped Dinabandu and snatched the clothes from him. The cartman corroborates his master in the main details. As I have already stated, the evidence leaves no doubt that a threat was held out by the prisoner to Rajabala that he would teach her a lesson. The question as to whether he actually used the words that if he was to give her up he would cut her to pieces rests on the testimony of the carter Dabiraddi. Be that as it may, the entire evidence supports the threat. There may be some discrepancies with regard to the actual words used.

It has next been argued on behalf of the prisoner that it seems singular that if he was the man who committed this crime there would be no trace of blood on his clothes when he was arrested in the shop at about one O'clock in the morning of the 10th. It seems to me that a possible explanation of this is that as it was a premeditated plan the accused person might have thought beforehand of the means of removing all traces of the crime from his person, he might have thrown the hasua or the katari either in some tank or in some out of the way place, he might have removed either the gurensey or the coat or the jama which he was wearing, and after removing all traces of the crime he might have gone to the shop where he used to work and rested there at that time of the night. It is a very significant circumstance that at 1-30 in the morning when he was arrested by the Sub-Inspector he seemed not to be asleep but was rather awake, and it is quite

possible that he had been to that shop shortly before the time when he was arrested. This interval between the actual commission of the murder and the time when he went to the shop might have been utilized for the purpose of removing all traces of the crime. This of course seems to me to be a possible explanation. It is also said that there was no trace of blood in his hands. Of course the evidence of the Sub-Inspector is that he could not, with his naked eyes, discover any blood, but scrapplings of the finger nails were taken several days after the occurrence and the result of the chemical examination shows existence of human blood in the finger nails of the accused. I do not lay much stress on this circumstance. This is after all a very weak evidence.

Considering therefore all the circumstances, I think that the jury arrived at a correct verdict and that their verdict is justified on the evidence.

It remains now to consider the question as to whether the extreme penalty of the law should be inflicted on the prisoner. The rule which is generally followed in this case is that unless there are extenuating circumstances the person who is found to be guilty of murder should receive the extreme penalty of the law. I do not find any extenuating circumstance in this case to induce me to inflict the less severer punishment of transportation for life. The attack seems to be a deliberately planned one. The *sindh* must have been cut at sometime of the night by the accused who was secretly there, possibly in the closed verandah, watching for an opportunity to wreak his vengeance either on Rajabala or on the person whom she might entertain at that time of the night. There was a considerable amount of pre-meditation and it cannot be said in this case, as has been sought to be argued by the learned advocate for the appellant, that there was a sufficient provocation which would justify us in not passing the extreme penalty of the law. The learned advocate for the appellant has sought to put this case, if not on the same footing, on a somewhat analogous footing as in the case of a husband murdering his wife caught in the act of adultery or murdering the adulterer. The two cases can bear no possible analogy. It is well established law

that if a husband discovers his wife in the act of adultery and thereupon kills her he is guilty of man-slaughter only and not of murder. But that rule has no application where the relationship between the parties is not that of husband and wife. There can be no question in this case that the relationship between the prisoner and Rajabala was that of husband and wife, nor can it be regarded as a case of two unmarried persons living together as husband and wife. The evidence clearly establishes that Rajabala was a public woman and that all persons willing to visit her at any rate before 10 O'clock at night were entitled to be entertained by her. This rule as has been pointed out in a recent case which applies to the case of a husband discovering his wife in the act of adultery, cannot even be extended to the case of a person who kills one with whom he has been engaged to marry. I may just refer in this connexion to the case of the *Rex v. Palmer* (1), where Channel, J., points out :

"It is well established law that if a husband discovers his wife in the act of adultery and thereupon kills her he is guilty of manslaughter only and not of murder. That has been extended in *Reg. v. Rothwell* (2) and *Rex v. Jones* (3) to a sudden confession by a wife of past adultery, an extension which no doubt creates an exception to the general rule that provocation by words is not enough. The reason for that exception is that a sudden confession is treated as equivalent to a discovery of the act itself. But here the relation between the parties was not that of husband and wife, nor was it a case of unmarried persons living together as husband and wife. They were simply persons who were in position of being engaged to be married. Under those circumstances if the effect of the summing up was to leave the jury under the impression that they could not properly find a verdict of man-slaughter we think that it was right."

It has next been sought to be argued on behalf of the prisoner in connexion with the mitigation of sentence that if the prisoner was an illiterate man, a man with a defective mental balance what we have to consider is whether the provocation was not sufficient in the case of such a person to deprive him of his self control ; and, if this was so, it is argued that there is an extenuating

(1) [1913] 2 K. B. 29=82 L. J. K. B. 531=29 T. L. R. 349=23 Cox. C. C. 377=77 J. P. 340=103 L. T. 814.

(2) [1871] 12 Cox. C. C. 145.

(3) [1914] 3 K. B. 1116=84 L. J. K. B. 1102=112 L. T. 175.

circumstance and the extreme penalty of the law should not be passed upon him. The answer to this argument is furnished in a very instructive judgment of Lord Reading C. J., in the case of the *Rex v. Leebini* (4), where the question arose whether the conviction should be altered from one of murder to one of man-slaughter and the sentence consequently altered. It is useful in the present controversy to quote in extenso what was said by the Lord Chief Justice with regard to an argument of this kind—

"It is now said before us that we as a Court of appeal might come to the conclusion that the tests laid down in the well known authorities as to the provocation necessary to constitute a defence of man-slaughter are too narrow and that we could extend it, and if we come to the conclusion that that it ought to be extended we could enter a verdict of man-slaughter and alter the sentence. It is sufficient to say that we see no reason to dissent from what was said by Darling J, in giving judgment in *Rex v. Alexander* (4). A similar argument was placed before the Court in that case. It substantially amounts to this, that the Court ought to take into account different degree of mental ability in the prisoners who come before it, and if one man's mental ability is less than another's it ought to be taken as a sufficient defence if the provocation given to that person in fact causes him to lose his self control, although, it would not otherwise be a sufficient defence because it would not be provocation which ought to affect the mind of a reasonable man. We agree with the judgment of Darling J., in *Rex v. Alexander* (4), and with the principles enunciated in *Rex v. Welsh* (5), where it is said that "there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion." "We see no reason, therefore, to dissent in any way from the principle of law on which this case was tried. On the contrary we think it is perfectly right. This Court is certainly not inclined to go in a direction of weakening in any degree the law that a person who is not insane is responsible in law for the ordinary consequences of his acts."

Applying this test to the present case it appears to me that the act of the accused was one which is shocking to the ordinary sense of humanity. This Brahmin youth Mookerjee in a moment of weakness was led to the vicious atmosphere of a brothel and while he was in the act of sexual intercourse he was attacked with almost dramatic suddenness by the accused with a weapon which caused his death. In my opinion, this is a case where the extreme penalty of the law should be passed upon him. I

would accordingly confirm the sentence of death passed on the prisoner by the Additional Sessions Judge and dismiss the appeal.

S. K. Ghose, J.—The accused was tried on charges under Ss. 302 and 326, I. P. C., before the learned Additional Sessions Judge of Alipore sitting with a jury of nine persons. The jury unanimously found the accused guilty on both the charges. The learned Judge agreeing with the jury has convicted the accused on both the charges. On the charge under S. 302 he has sentenced the accused to death and under S. 374, Criminal P. C., he has referred the case to this Court for confirmation of the death sentence. The prisoner has also appealed to this Court. So the case is open to us both on facts and law. (His Lordship after stating facts and considering the evidence in support of it and objections thereto, concluded). It comes to this then that Rajabala actually recognised the accused as the person who assaulted her and the deceased. At the time of the assault she cried out mentioning the name of the accused and this is deposed to by the neighbours who came immediately afterwards. There is evidence as to circumstances going to show that the accused had a strong motive to commit the assault. In fact, on the previous day he had assaulted another person who was being entertained by Rajabala and he had gone away threatening to do further harm. At the time of the occurrence there was no chance of making a mistake, as there was a lamp burning in the room. The evidence is of witnesses who bear no special grudge against the accused.

The learned Judge in his charge to the jury pointed out that, according to the doctor, the injuries inflicted on Kartik were "not necessarily of immediate dangerousness" and he went on to say:

"The question is whether the jury will find that the act was done with the intention of causing the death of Kartic Mukherji. In this connection jury will notice the nature of the injuries on Rajabala on whom fatal injuries were not inflicted."

It seems to me that in saying this the learned Judge put the matter as much in favour of the accused as was possible.

It has been argued by the learned advocate for the appellant that the learned Judge should not have drawn the atten-

(4) [1914] 109 L. T. 745.

(5) [1871] 11 Cox C. C. 336.

tion of the Jury merely to the first part of S. 304, I. P. C. but that he should have gone on and drawn their attention to the second part of that section. But the jury did not even accept the view that the offence would come under the first part of S. 304, I. P. C.; evidently they took the common sense view that the intention of the accused was to cause death. The learned advocate for the appellant has also argued that there was room for provocation. But this argument is futile in view of the fact that the assailant had already entered the room by cutting a sindh and being armed with a cutting weapon. He was evidently lying in ambush, waiting for an opportunity, and he did enter at the psychological moment when the woman and the other man were engaged in sexual intercourse. It seems to me, therefore, that the plea of provocation cannot possibly be sustained.

The case is a quite simple one and the facts are clear. The learned Judge has delivered an admirable charge in the course of which he has drawn the attention of the jury to all the salient features of the case. The charge is a fair one and the learned Judge has laid due stress on the points that are in favour of the prisoner. The evidence, is, however, sufficient and convincing. Upon this evidence the Judge and the jury could come to no other conclusion than that the accused is guilty under S. 302, I. P. C. in respect of the injuries caused on the deceased and under S. 326, I. P. C. in respect of the injuries caused to Rajabala. In passing sentence the learned Judge has carefully considered the question as to whether there is any extenuating circumstance. He has found none, and I agree with him. The appeal of the prisoner must, therefore, be dismissed and the reference must be accepted. The conviction under S. 302, I. P. C. and the sentence of death passed thereunder must be confirmed. I therefore agree with my learned brother in the order that he has made.

V.B./R.K.

Appeal dismissed.

1930 Cr. Cases 237

(Allahabad)

DALAL, J.

Kamlapat—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn No. 628 of 1929, Decided on 25th November 1929 from order of Sess. Judge, Cawnpore, D/- 21-8-1929.

(a) **Factories Act (12 of 1921), S. 26—Men working outside time fixed for employment—Owner is guilty under S. 26.**

Where men work during a time which is admittedly outside the time fixed for employment of each person employed in the factory, the owner of the factory is guilty under S. 26.

[P 238 C 1]

(b) **Factories Act (12 of 1911). S. 2 (2) (d)—Interruption must be taken in connexion with each individual and the section to be interpreted with regard to actual work.**

Interruption must be taken in connexion with each individual employed and not confined to the general cessation of work and it is more reasonable to interpret the section as meaning actual work and not merely residence in the factory for a certain number of hours.

[P 238 C 1, 2]

K. N. Katju and *R. K. Malaviya*—for Applicant.

M. Waliullah—for the Crown.

Judgment.—Mr. Kamlapat, owner of a factory in Cawnpore, has been convicted under S. 41 (a), Factories Act. The charge is divided into two heads with respect to four workmen Puran, Gopal Singh, Badri and Bhagwat. The first charge is under S. 26, Factories Act, that the manager employed these four men during hours beyond the time fixed for the employment of each person employed in the factory. The second charge is that three of the men Puran, Gopal Singh and Badri were employed in the same factory for more than eleven hours on the particular day about which a report was made by the Chief Inspector of Factories and Boilers.

The argument here was that these four men were pieceworkers and not regularly employed and that therefore the provisions of the Act did not apply to them. No ruling was quoted on this subject, so that matter has to be decided on the ordinary interpretation of words in S. 2 (2) (d) :

“A person who works in a factory, whether for wages or not, in cleaning or oiling any part of the machinery, or any other kind of work whatsoever, incidental to, or connected with, the manufacturing process or handicraft, or connected with the article made or otherwise the subject of the manufacturing process of handicraft therein, shall be deemed to be employed therein.”

There can be no denying that these four men were winding yarn which was performing a process of handicraft connected with the manufacturing process carried out in the factory and whether they were regular workers per day or according to the work turned out by them they were employed in the factory. The hours of work in the factory as fixed by Mr. Kamlapat were 7 a. m. to noon with a break of one hour and after that from 1 p. m. to 6 p. m. The Chief Inspector found the four men working at 8 minutes past 7 when he went to the factory and presumably because of the astonishing ignorance of law of the men in charge of the factory the work went on till 7-53 p. m. in spite of the presence of the Chief Inspector on the premises. The four men admittedly worked from 6 p. m. to 7-53 p. m., that is during a time which was outside the time fixed by Mr. Kamlapat for the employment of each person employed in his factory. He was guilty under S. 26, with respect to all the four cases.

The consideration of S. 28 is rendered difficult by both the subordinate Courts overlooking the provisions of S. 52 of the Act. I have already held that the three men Puran, Gopal Singh and Badri were employed in the factory, but the term of eleven hours is subject to a rider that in computing the hours referred to in S. 28 any interval by which work is interrupted for half an hour or more shall be excluded. The learned Assistant Government Advocate argued that the interruption would connote the cessation of work of all the workers such as by the break-down of the machinery. In this case also no ruling was quoted and one is left to interpret the words of the two Ss. 28 and 52 without any indication as to how they have been interpreted in similar cases in any large city where there may be factories. S. 28 describes individual employment and is not worded like S. 26 for general employment. For that reason I am of opinion that the interruption must be taken in connexion with each individual employed and not confined to the general cessation of work as for the interval between noon and 1 p. m. It will be noticed from the statement of Puran that he did not take the general interval for rest between noon and 1 p. m. but went on working

till 2-30 p. m. as he had work in hand between noon and 1 p. m. In that particular case, therefore, there was no interruption even though there was interruption of work for the entire factory. It seems more reasonable to interpret the section as meaning actual work and not merely residence in the factory for a certain number of hours. The analogy given by the learned Sessions Judge is misleading because if that analogy were applied the employment of every factory hand it would extend for twenty four hours as in general terms a factory-hand would be stated to be employed in the factory just as a gardener is employed for the garden of a house. This analogy does not clear up the doubt as to the interpretation of the word "interrupted" in S. 52. It is quite true that it would not be an interruption if a worker rests for a minute or two. That is why the period of interruption fixed is half an hour or more. In the three cases it has been accepted that every one of them did not do any work for two and half or three hours. If that period is deducted they had not been employed in the factory having regard to the provisions of S. 52 for more than eleven hours.

For these reasons I uphold the conviction in all the four cases under S. 26 and set aside the conviction and sentence under S. 28. It was pleaded that a fine of Rs. 200 was excessive. Personally I think that a very severe fine is necessary where the proprietor of a factory employs for superintending purposes men, who are entirely ignorant of the provisions of the Factories Act. Possibly an expense of Rs. 800 by way of fine, together with payment of counsel in various Courts, will induce Mr. Kamlapat to purchase vernacular copies of the Factories Act for the guidance of the superintendents of his factory. The days of doing everything by rule of thumb without bothering one's head with the written word have long passed. The fine, if any recovered in excess, shall be refunded.

V. B./R.K.

Order accordingly.

1930 Cr. Cases 239

(Lahore)

TEK CHAND, J.

Keshab Chander—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1190 of 1929, Decided on 13th December 1929,

Criminal P. C., S. 195 (c)—Court in which documents had been produced can only file complaint and not Prosecuting Inspector.

The intention of the legislature in framing S. 195 (c) is to give authority only to the Court in which the proceeding was pending to file a complaint in respect of documents which were produced or given in evidence before it. A prosecution, therefore, cannot proceed on a complaint filed by a Prosecuting Inspector. It is necessary for such a complaint to be lodged by the Court in which the documents had been produced: 1925 Bom. 433, *Rel. on.* [P 233 C 2]

M. L. Puri—for Petitioners.

Hem Raj Mahajan—for the Crown.

Report.—The facts of this case are as follows:

The petitioners Keshab Chander and Diwan Chand were proceeded against under Ss. 419 and 465, I. P. C. the original allegation being that they had cheated one Gurcharan Lal, Headmaster of the Sanatan Dharam High School, Rawalpindi, into giving a certificate for admission to the University Examination in favour of Saligram and, that Keshab Chander had sat in the examination, and written the answer books posing as Saligram, and when challenged by the invigilator, Diwan Chand had attested the fact that he (Keshab Chander) was really Saligram. This prosecution was instituted in the Court of Lala Wazir Chand, Additional District Magistrate, and when the stage of framing a charge had reached, the Magistrate apparently came to the conclusion that there were really two distinct charges which could not be dealt with in one trial. The Magistrate in his judgment remarked:

"The investigating officer was not, however, clear about the nature of the offence committed. His entire efforts were spent on trying to establish that Keshab Chander accused sat in the Examination Hall in place of Saligram, and this was the main evidence led by the prosecution before me. At the time, however, when the stage came for framing the charge, it was discovered that the offence of sitting in the Examination Hall by Keshab Chander accused in place of Saligram did not fall under S. 419, I. P. C. and that the offence which Keshab Chander accused did commit, if any by doing so, fell under S. 465, I. P. C. inasmuch as he forged certain examination papers in the name

of a person (Saligram) by whom they were not actually written out.

He accordingly proceeded to frame a charge under S. 419, I. P. C. and eventually convicted both accused. Keshab Chander was acquitted on appeal by the Sessions Judge, and Diwan Chand has now been acquitted on revision by the High Court. The Magistrate left it to the prosecution to take separate proceedings regarding the charge under S. 465, I. P. C. which relates to the answer books written by Keshab Chander in the examination. Accordingly on 26th October 1928, the Prosecuting Inspector filed a complaint, and the Additional District Magistrate proceeded with this complaint, and framed a charge. He then, however, on 8th February 1929, came to the conclusion that as he had already expressed an opinion in the case, having decided the other case by his order of that date, the case should be transferred and accordingly on 9th February it was transferred by the District Magistrate to the Court of Sardar Hardial Singh. The Magistrate recorded the statements of the accused, asking whether they wished to recall the prosecution witnesses. Apparently they were not asked whether they wished to have a de novo trial which procedure seems to have been irregular.

The proceedings are forwarded for revision on the following grounds.

Sardar Hardial Singh in the order of which revision is now sought holds that the trial can proceed. The objections raised to the present trial twofold. In the first place it is contended that the prosecution cannot proceed on the complaint filed by the Prosecuting Inspector as under S. 195 (c), Criminal P. C., it is necessary for such a complaint to be lodged by the Court in which the documents had been produced. It is clear that in the present case the documents were produced and exhibited before Lala Wazir Chand. Reference has been made to *Bhau Venkatesh Chakorker, in re* (1) (at p. 614 of 49 Bom.), which seems to show conclusively that this contention has force. The learned Public Prosecutor has attempted to argue that where documents are filed as the basis of a prosecution, it is unnecessary to have a complaint by the Court. But this position does not arise in the present case

(1) A. I. R. 1923 Bom. 433=49 Bom. 606.

as these documents were filed in the Court of Lala Wazir Chand, and not in the Court of the Magistrate now dealing with the case. Had Lala Wazir Chand himself split the case into two in the first instance and dealt with it as if there were two separate cases in the first instance, then this contention might have had some force, but as it is, in my opinion, the contention of the applicants is sound, and must be sustained. I am therefore of opinion that the present prosecution cannot proceed.

The second point, which is mentioned in the grounds of revision, is that practically speaking the accused are being tried a second time for an offence of which they have already been acquitted, but this has not been argued before me and clearly has no force. The offence for which they have been acquitted was of cheating the Headmaster in Rawalpindi into giving a certificate for admission, whereas the present case deals with the use and forgery of the documents in the examination hall.

In view of my finding on the first point as a charge apparently has already been framed, I forward the papers to the High Court with a recommendation that the present proceedings be quashed and it be left to the Additional District Magistrate, if he thinks fit, to file a proper complaint.

Order.—For reasons recorded by the learned Sessions Judge in his report dated 13th July 1929 I hold that the present prosecution cannot proceed. I, therefore, accept his recommendation and quash the proceedings.

At this stage, I do not think it necessary to express any opinion on the second point mentioned by the learned Sessions Judge.

It is much to be regretted that the prosecuting agency have mishandled this case from the very beginning and the accused persons have had to be before criminal Courts for more than two years in connexion with proceedings which were wholly misconceived. In these circumstances, it is a matter for the serious consideration of the Additional District Magistrate whether he should now lodge a complaint against the petitioners.

R.M./R.K. *Order accordingly.*

1930 Cr. Cases 240

(Lahore)

ZAFAR Ali, J.

Indar Singh and another—Petitioners.
v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1146 of 1929,
Decided on 19th November 1929.

Criminal P. C., Ss. 109, 110 and 121—
Commission of offence punishable with imprisonment amounts to breach of bond given under S. 109 or S. 110.

According to S. 121, the commission or attempt to commit or abetment of any offence punishable with imprisonment wherever it may be committed is a breach of bond taken under S. 109 or S. 110 for good behaviour. When therefore a person is convicted of an offence under S. 452, Penal Code, and sentenced to imprisonment, a breach of bond does take place and it is liable to forfeiture: 15 P. R. 1913 Cr. Dist.

A. R. Kapur—for Petitioners.

Judgment.—The learned counsel for the petitioners propounds the proposition that a bond under S. 109 or S. 110, Criminal P. C., to be of good behaviour is not liable to forfeiture if the obligor is convicted of an offence against the person of an individual and not against his property and he cites *Ugham Singh v. Emperor* (1) in support of it. I consider that the learned Judge responsible for the judgment cited did not lay down so broad a proposition contrary to the provisions of S. 121, Criminal P. C. According to that section, the commission, or attempt to commit, or the abetment of any offence punishable with imprisonment wherever it may be committed is a breach of the bond. In the present case the petitioner was convicted of an offence under S. 452, I.P.C. and sentenced to imprisonment. Thus a breach of the bond did take place and it was rightly forfeited.

In the last paragraph of his judgment the learned District Magistrate has correctly stated what the order of the Magistrate should have been, but he could revise that order himself instead of sending the case back to the Magistrate for that purpose.

Further, I am of opinion that the amount of the security bond is excessive, and I reduce it to Rs. 500 and alter the order of the Magistrate in the terms stated in para. 5 of the judgment of the learned District Magistrate.

R.M./R.K. *Order accordingly.*

(1) [1913] 15 P. R. 1913 Cr.=384 P. L. R. 1913=21 I. C. 175=39 P. W. R. 1913 Cr.

1930 Cr. Cases 241

(Rangoon)

BAGULEY, J.

Maung San Myin—Applicant.

v.

Emperor

Criminal Revn. No. 100-B of 1929, Decided on 5th August 1929, against order of Sub-Divisional Magistrate. Amarapura, in Criminal Trial No. 14 of 1929.

(a) Burma Excise Act (5 of 1917), Ss. 53, 54, 55, 56—Excise Officer is not police officer and admission to him is admissible—Evidence Act S. 25.

Although under Burma Excise Act 5 of 1917 an Excise Officer has power of arrest, search and granting bail he is not a police officer and an admission made to him is admissible in evidence: (1907-9) *U. B. R. 1, Held no longer good law.* [P 222 C 1]

(b) Opium Act (1 of 1878), Ss. 14, 15 and 16—Ss. 14, 15 and 16 make provisions of Criminal P.C. as regards search applicable to searches and not seizures.

Under Ss. 14, 15, and 16 it is only search that has to be carried out in accordance with the rules for searches under Criminal P.C., and the rules have no bearing on seizures.

[P 242 C 1]

(c) Criminal Trial—Although search be illegal, conviction for possession of object constituting offence is not illegal.

Although a search made in person's house may be illegal rendering the person who made the search liable to be sued for damages, still if some property is found, possession of which is an offence the person in unlawful possession is liable to be convicted: 4 *L. B. R. 121, Rf; A. I. R. 1925 Rang. 205, Diss. from.* [P 242 C 2]

Judgment.—The applicant has been convicted under S. 9 (c), Opium Act, by the Sub-Divisional Magistrate, Amarapura, and his appeal having been dismissed by the Additional Sessions Judge, Mandalay, he now comes to this Court in revision. The case against him is that certain Excise Officers having received information that he had opium to dispose of, arranged by means of emissaries to buy the opium from him through a dummy purchaser. The first attempt to arrange a meeting between the accused and the dummy purchaser proved abortive. The next night the dummy purchaser was sent out in a car to wait near the Myitnge railway bridge, Excise Officers remained in hiding close by, and it was arranged that as soon as events proceeded far enough to warrant a rush, the lights of the car were to be switched on. The two emissaries were sent off to bring the accused to the spot with the opium. After waiting for some time one of these men came to the car with the

accused, and purchaser asked whether he had a sample of the opium with him. This was produced and the purchaser said he would pay and told the driver to switch on his lights. On the lights being switched on the two Excise Inspectors who were in hiding close by rushed up, a Sub-Inspector of Excise who had been standing close to the car disclosed himself, and the accused was arrested. On asking him where the opium was he stated that it was in a boat in the river close by; so the Inspectors went down to the boat. As they arrived a man who was in the boat threw four tins overboard and followed them into the river himself and got away. The tins were recovered from the water and found to contain opium. In the boat were found a gun and a cartridge-belt belonging to the accused; and it is said that when arrested the accused said that he had brought evil on himself as he had intended it to others, having intended to sell the opium first and then arrest the purchaser.

The evidence in support of the case, as I have pointed out above, consists of the statement of the two Excise Inspectors, of the statements of the ward headman whom they took with them as a witness, the statements of the two emissaries who were sent out to bring the accused with the opium to the spot, and the statement of Maung Su, the taxi owner. (His Lordships after discussing the evidence of the Crown and the defence continued as follows): It has been argued that an admission made to an Excise Officer is not admissible: for this there is direct authority in *V. R. Venkataraman v. Emperor* (1). This ruling was quoted to the trying Magistrate, but as against that he referred to two Indian cases, viz., *Crown v. Wazir Singh* (2) and *Ah Foon v. Emperor* (3). Had the trying Magistrate looked into the Acts a little more closely he would have seen that Excise Officers are now appointed under the Burma Excise Act 5 of 1917. The judgment in *Venkataraman's* case (1) was delivered in 1898 and then the present Act was not in force. In those days all Excise Officers were sworn in as police

(1) [1907-09] *U. B. R. 1.*(2) [1918] *P. R. Cr. No. 8.*(3) [1919] 46 *Cal. 411=22 C. W. N. 534=48 L. C. 504=28 C. L. J. 105.*

officers because the old Act did not give them the necessary powers of arrest, search, granting bail and so on. The Act of 1917 gives all these powers direct to the Excise Officer as Excise Officer, and they are no longer police officers. Their position appears to have been assimilated to the position of Excise Officers of Bengal. Therefore, *Venkataraman's* case (1) must be regarded as out of date and no longer binding.

Another point which has been argued is that the search did not comply with the provisions of S. 103, Criminal P. C. and therefore, the accused must be acquitted. This argument is really entirely beside the point. S. 16, Opium Act, says that all searches under S. 14 or S. 15 shall be in accordance with the provisions of the Criminal Procedure Code. S. 14 refers to searches in a building, vessel or enclosed place. I do not regard a dug out as a vessel from this point of view, and it is quite clear that these things when searched are intended to be regarded as more or less for the time being fixtures. If they have no locale, it is impossible to get witnesses from the locality. S. 15 has two clauses: the first refers to seizures in any open place or in transit; second refers to searches of persons. There was no search in the present case. It is true that the form applicable to searches was utilized; but according to the facts as given by the prosecution it was a case of a seizure of opium in transit, and S. 16, Opium Act does not say that seizures of opium in transit must be made in accordance with the rules for searches under the Criminal Procedure Code. Witness 1, Mr. Lynam, Excise Inspector, answered his question in cross-examination more or less correctly; he says that S. 103 in his opinion would only apply to searches made inside houses and dwelling places. His senior officer, Mr. Paul, is not quite so correct. It is, however, quite manifest that when the article to be seized is on the move and has no locale it may be impossible to get witnesses of the locality to witness its seizure.

It is not necessary for the decision of this case, therefore, to decide whether a person can be convicted on the result of a search which did not comply with S. 103, Criminal P. C. There are divergent rulings on the point. In *Mi Hawk*

v. *Emperor* (4), it was held by Hartnoll, J. (following *Queen-Emperor v. Maw Aung*—P. L. J. B. 367), that persons who make a search illegally render themselves liable to be sued for damages for this illegal action, but that this illegal action does not affect the question whether the person whose house was illegally searched has committed an offence if property is actually found during the search whose possession constitutes an offence. On the other hand, there is an unofficially reported ruling of the High Court *Ma Htway v. Emperor* (5) in which Young, J. (who argued in *Mi Hawk's* case (4) for the Crown before Hartnoll, J.), held that because a search did not comply with the provisions of S. 103, Criminal P. C. the conviction must be set aside. It must be noted, however, that in this case there was no appearance on behalf of the Crown and the judgment itself is an exceedingly short one. My own opinion is that Hartnoll, J.'s ruling is correct. There seems to be no officially reported ruling of this High Court on the point.

I hold that the seizure of the opium was regular, and that the admission by the accused when arrested was admissible.

There is another point to which I would call the attention of the trying Magistrate. The accused when called on his defence devoted a good deal of time to discrediting the two excise spies, Maung Pyant and Ba San. Several witnesses were called to depose to the bad character of these two men; some said that they do not work and some say they eat opium, keep prostitutes and so on. All this evidence is entirely irrelevant and should never have been allowed by the trying Magistrate. If he will refer to the Evidence Act, Ss. 146 to 153, he will see how witnesses are allowed to be tested for their veracity. S. 146 relates to cross-examination: it is permissible under instructions to cross-examine a witness as to his lack of work, his habits of consuming opium or his livings on the profits of a brothel; but when those questions have been put, the examining counsel has got to take the answers, and the examination of further witnesses to disprove his answers is not

(4) [1907] 4 L. B. R. 121=14 B. L. R. 202.

(5) A. I. R. 1925 Rang. 205.

allowed, save as shown in S. 153. The credit of witnesses may be impeached also under S. 155, but S. 155 does not allow evidence of 'a witness' general bad character to be brought in. An attempt was also made to discredit some of the other witnesses, by filing on 23rd May the evidence given by these witnesses in another case. The last witness for the defence had his evidence recorded on 30th April and it is quite contrary to the Evidence Act to try to impeach a witness by means of contradictory statements made unless the contradictory statement is put to him in cross-examination, and these copies of depositions should not have been accepted by the Magistrate, but I find them filed as exhibits.

I would also note one other point. As I have stated, the main defence of the accused is that the excise party went to arrest somebody else and having allowed that person to escape they turned round and accused him of being the owner of the opium. Mr. Lynam stated that, whereas the actual seizure was made on 21st February, he had his information on 5th January and had duly reported his action in connexion with that information in his official diaries, and he offered to produce his diaries. At this point the Magistrate makes a note:

"U Ko Ko Gyi (accused's advocate) objected to the admission of the diary extracts in evidence as irrelevant and that is all that is on the record about the diaries."

The Magistrate should either have definitely admitted them or rejected them and not have left the matter undecided, merely noting that the defence objected. No grounds are given why these extracts from the diaries should have been irrelevant, and of course, it is impossible to say without seeing them whether they were or were not; but the defence is that the case was got up against the accused on 18th February and it would certainly appear in the highest degree relevant to show that the excise department were working the case up against this particular man for more than a month previously.

I see no reason to interfere in revision and therefore dismiss this application.

V.B./R.K. *Application dismissed.*

1930 Cr. Cases 243

(Rangoon)

CARR, J.

Narinjan Dass—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1210 of 1929, Decided on 4th December 1929, against order of Sixth Addl. Magistrate, Rangoon, D/- 21st August 1929.

(a) Criminal P. C., S. 190 — Complaint charging two people in alternative cannot be accepted—Sanction to prosecute such people is wrong—Burma Ghee Adulteration Act (6 of 1927), S. 11.

It is wrong that any Court should accept a complaint which charges two people in the alternative and it is also wrong that an order sanctioning such a prosecution in the alternative should be passed. [P 244 C 1]

(b) Burma Ghee Adulteration Act (6 of 1927), S. 10 (5)—Whether ghee is to be deemed adulterated or not is question of law—Chemical Examiner is simply to submit result of his analysis and Court is to draw inference therefrom.

Whether the ghee is to be deemed adulterated or not is question of law and it is not a matter on which the chemical examiner should be required to express an opinion. What he has to do is to state the results of his analysis and leave the Court to determine whether on those results the offence charged is proved or not. [P 245 C 1]

O'de Glanville and Tun Aung Hlaw—for Appellant.

S. N. Sen—for the Crown.

Order. The appellant *Narinjan Das* has been convicted under S. 12, Burma Ghee Adulteration Act (Burma Act 6 of 1927) of importing into Burma adulterated ghee in contravention of the provisions of S. 3 (i) of the same Act and has been fined Rs. 100. In his appeal three main points have been raised. The first contention is that the appellant was not the importer of the ghee in question. This question I do not think it necessary to discuss for reasons which will appear later. The second claim is that there was no valid order of the District Magistrate authorizing the institution of the prosecution. On this point I think that remarks are called for.

Section 11 of the Act provides that:

"no prosecution shall be instituted under the Act without the written order of the District Magistrate."

Why the prosecution in a matter concerning public health should be vested in a judicial officer I do not know. But if that power is so vested I think it is incumbent on the officer concerned to exercise it in a judicial man-

ner, after due consideration of the facts of the case. From the records in this case, it would seem that there was in fact no consideration of the facts and that the order has been passed as a matter of course. The Health Officer of the Rangoon Corporation filed a complaint in a printed form against "B. Ram Lal, contractor or his agent Narinjan Das." This bears an endorsement as follows signed by the District Magistrate of Rangoon:

"I sanction the prosecution of B. Ram Lal or Narinjan Das under Ss. 3 and 12, Burma Ghee Adulteration Act, and forwarded this complaint to the Sixth Additional Magistrate, Rangoon, for disposal."

It seems to me to be entirely wrong that any Court should accept a complaint which charges two people in the alternative, and to my mind it is equally wrong that an order sanctioning such a prosecution in the alternative should be passed. As a matter of fact, the Magistrate concerned summoned both the persons named and at the first hearing, objection was taken on the ground that Narinjan Das should not be prosecuted as the agent of accused 1 when B. Ram Lal himself was present. The municipal prosecutor then stated that he was prosecuting both the accused as consignor and consignee of the ghee in question and asked to be allowed to change the heading of the plaint into "Ram Lal and Narinjan Das." This request was granted and the heading of the plaint was altered by the substitution of the word "and" for the words "for his agent." Nobody concerned at the time seems to have noticed that there was a discrepancy between the complaint as amended and the District Magistrate's order sanctioning the prosecution. However, I do not propose to go further into this matter, or to decide what is the effect of the defects mentioned in the complaint and the sanction, for, I think, that on the next objection to be considered the prosecution case must necessarily fail.

Coming to the third objection, the Act in question nowhere defines "ghee" but S. 3 (1) prohibits the sale or importation etc., of "any ghee which contains any substance which is not derived exclusively from milk." This by implication the Act provides that ghee is a substance derived exclusively from milk, but it does not define the kind of milk

from which ghee may be derived. The Act confers no power on the Local Government to frame rules or to fix the standard which saleable ghee must attain; but S. 133 (3), Rangoon Municipal Act (Burma Act 6 of 1922), does empower the Local Government to fix with reference to any article of food or drink a standard of quality, specific gravity or percentage of constituent parts, failure to conform with which shall for the purposes of the Act, raise a presumption until the contrary is proved, that the food or drink is adulterated. And under this section, the Local Government has fixed a standard of quality for ghee in Municipal Departmental Notification No. 39 dated 28th March 1928, published at p. 299 of Part 1 of the Burma Gazette for 1928. This notification reads as follows:

"In exercise of the powers conferred by S. 133, sub-S. (3), City of Rangoon Municipal Act 1922, the Government of Burma (Ministry of Forests) fixes with reference to ghee, the following standard of quality, failure to conform with which shall, for the purposes of this Act, raise the presumption unless the contrary is proved that the ghee is adulterated:

Standard of Quality

Ghee means the pure clarified milk fat of the cow or buffalo, shall have a butyro-refractometer reading of not less than 4p, and not more than 12.5 at 40°C, a saponification value of not less than 220, a Reichert-Woolney value of not less than 24 and a melting point not less than 33°C or more than 37°C."

It may be noted here that this notification defines ghee as meaning the pure clarified milk fat of the cow or buffalo, and, therefore, under that notification anything produced from any other kind of milk would not be ghee.

Returning to the Burma Ghee Adulteration Act, S. 10 provides for obtaining samples of ghee and for the forwarding of such samples to the Chemical Examiner to Government for analysis. sub-S (5) reads:

"A report signed by the Chemical Examiner to Government shall be sufficient evidence of the result of such analysis."

Coming now to the facts of the case samples were taken of the ghee in question and were sent to the Chemical Examiner whose reports are filed as Exs. B and C. There is only a very slight difference between these reports as to the values mentioned and it will suffice to quote only the report Ex. B which reads as follows:

Melting point ...	37.5°C.
Reichert value ...	21.8.
Saponification value ...	218.7.
Butyro-refractometer	gure at
40°C ...	44.4.

"The sample ghee is not of the standard laid down by Government and under the Burma Ghee Adulteration Act the ghee is deemed to be adulterated."

There is no evidence other than this report to prove that the ghee was in fact, adulterated, and Mr. De'Glanville's contention for the appellant is that this report does not suffice to prove adulteration for the purposes of the Burma Ghee Adulteration Act, under which the appellant has been prosecuted and convicted. He refers to S. 2 of the Act which lays down the cases in which ghee shall be deemed to be adulterated and says that the Chemical Examiner's report does not prove any fact set out in the section.

This objection, I think, must be upheld. There has evidently been some confusion between the provisions of the Act and the notification above mentioned under the Municipal Act. The report is in itself sufficient to show that the ghee does not conform to the standard prescribed in the notification. But that is not the same thing as proving that the ghee is adulterated withing the meaning of S. 2, Ghee Adulteration Act, which in this case it was incumbent on the prosecution to prove.

Mr. Sen for the Corporation relies on the statement in the report that under the Burma Ghee Adulteration Act, the ghee is deemed to be adulterated. I am very clearly of opinion that this is not a matter on which the Chemical Examiner should be required to express an opinion. It is a question of law. What he has to do is to state the results of his analysis and leave the Court to determine whether on those results the offence charged is proved or not. S. 10 (5) only makes the Chemical Examiner's report evidence of the result of the analysis, and in my opinion, the question whether the ghee falls within the mischief of the Act or not is not comprised within the term "the result of the analysis." Whether if the Chemical Examiner had more fully stated the results of his examination, his report might have been sufficient to prove the charge is a question which I do not propose to discuss now. But at any rate, it would

have been open to the prosecution in this case to call expert evidence to show that the results obtained on analysis were sufficient to prove the facts bringing the case within the terms of S. 2 of the Act. This has not been done, and in the absence of any such evidence, it seems to me quite clear that the fact the ghee was adulterated has not been proved. I, therefore, allow this appeal, set aside the conviction and sentence of the appellant and direct that the fine paid be refunded to him.

The appellant asks that the ghee be returned to him and I think that on this finding he is entitled to its return. Of course, if he should sell it or otherwise deal with it in Burma, in such a manner as to bring himself within the prohibitions contained in either the Rangoon Municipal Act or the Ghee Adulteration Act, he may be liable to further prosecution. But Mr. De'Glanville says that he intends to send it back to India and I do not think that there is any reason for refusing to return the ghee to him. I set aside, therefore, also the order directing the destruction of the ghee in question and direct that the ghee be returned to the appellant.

P.N./R.K. *Conviction set aside.*

1930 Cr. Cases 245

(Rangoon)

MAUNG BA AND BROWN, JJ.

Ba Yin and another—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 607 and 622 of 1929, Decided on 22nd July 1929, against order of Sess. Judge, Shwebo, in Sessions Trial No. 11 of 1929, D/- 9th May 1929.

Criminal P. C., Ss. 164 and 533—Statement of accused recorded under S. 164 but not in strict conformity with it—If error not injurious to case of accused on merit, it can be cured by S. 533.

Even if a statement be not recorded strictly in conformity with S. 164 so long as the Magistrate purports to have recorded it under that section, and even after the statement has been received in evidence, S. 533 can be resorted to and evidence taken that an accused person duly made the statement recorded. S. 533 plainly provides that notwithstanding anything contained in S. 91, Evidence Act, such statement shall be admitted, if the error has not injured the accused as to his defence on the merits : 18 Cal. 549 ; 21 Bom. 498, and

32 Cal. 550; 221 J. 9 Mad. 224, Dist.; 17 Cal. 862, Diss. from [P 247 C 2]

R. G. Aiyanger and L. C. Robertson— for Appellants 1 and 2.

Maung Ba, J.—Ba Kin aged 18/19 and Ba Yin aged 25, have been convicted of the murder of Thein Maung, a boy of 15, at Shwebo, and sentenced to death.

Ba Kin made a confession, but the Magistrate, who recorded the confession, forgot to take his signature. He noticed the omission on the following day and sent his 2nd Clerk to the jail to obtain Ba Kin's signature. Ba Kin refused to append his signature. At the trial the learned Sessions Judge examined the Magistrate. The Magistrate stated that before he recorded the confession he satisfied himself that Ba Kin wanted to confess voluntarily. Then the Magistrate deposed to what had been stated to him by Ba Kin. The Magistrate finally stated:

"I wrote out all that Ba Kin said and then my clerk Ba Din read it out to him in my presence. I asked him whether what had been read out to him was correct. Ba Kin said that it was correct. . . . I took down the statement of the accused in my Criminal Miscellaneous No. 32 of 1928. This record contains a full and true statement of what the accused Ba Kin told me."

The Magistrate's Bench Clerk, Ba Din, was also examined in the Sessions Court. He states that he was present when Ba Kin made his confession and that he read his statement over to him and Ba Kin acknowledged it to be correct. He further states that the statement recorded in Criminal Miscellaneous No. 32 is the confession made by Ba Kin on that occasion.

On behalf of the two appellants it has been urged that the confession is not admissible in evidence. The learned counsel in support of that contention quoted three cases. The first case is *Queen Empress v. Viran* (1). In that case a Deputy Magistrate recorded a statement in the nature of a confession made by V. The statement, which was made in Malayalam, was recorded in English and signed by the Magistrate only. Shortly afterwards the Magistrate examined V as to this statement and V admitted that he had made it voluntarily. V retracted the statement later. Parker J. held that the provisions of S. 164, Criminal P. C. are

imperative, and S. 533 will not render a confession admissible where no attempt has been made to conform to the provisions of the former section. He further held that inasmuch as the record of the statement of V was not admissible, secondary evidence thereof could not be given. The next case cited is *Jai Narayan Rai v. Queen Empress* (2). There the accused, when in custody, made a confession to a Deputy Magistrate. The confession was recorded by the Deputy Magistrate in English, though made in Hindi, which the Deputy Magistrate perfectly well understood and could write. It purported to have been recorded under the provisions of S. 164 and was in reply to one question which was set out. The record bore the signature of the accused and of the Deputy Magistrate, as well as the certificate required by the section. It was held that the provisions of S. 164 read with S. 364 are imperative as to the language in which a confession is to be recorded and that S. 533 does not contemplate or provide for any non-compliance with the law in this respect, and that therefore as it was not impracticable to record the confession in Hindi, the Sessions Judge was right in refusing to admit the document in evidence. It was further held that the Sessions Judge erred in admitting the oral evidence of the Deputy Magistrate as to what accused told him, as, seeing that he was acting under the provisions of S. 164, Criminal P. C., the confession was matter which was required by law to be reduced to the form of a document, and, therefore, under S. 91, Evidence Act, no evidence could be given in proof of such matter except the document.

The third case cited is *Sadananda Pal v. Emperor* (3). The accused made a certain statement before a Magistrate who recorded and took his thumb mark. The accused retracted that statement later. The learned Judge held that a thumb mark is not a signature within the meaning of S. 3, Cl. 52, General Clauses Act, or S. 164, Criminal P. C. They, however, returned the record to the Sessions Judge with a direction to take evidence as to whether

(2) [1890] 17 Cal. 862.

(3) [1905] 32 Cal. 550.

(1) [1886] 9 Mad. 224.

the accused duly made the statement recorded.

The last case will not support the argument. The learned Judges who decided the case were of the opinion that the defect could be remedied by taking evidence that the statement recorded was duly made by the accused. In the present case also the learned Sessions Judge of Shwabo has adopted that remedy. The view of the law taken in *Jai Narayan Rai's* case (2), was doubted in *Lalchand v. Queen Empress* (4). In considering *Jai Narayan Rai's* case (2), the learned Judges observed:

"It is unnecessary for us in the present case to do more than say that, as at present advised, we are unable to agree in the view of the law which formed the grounds of that judgment."

Jai Narayan Rai's case (2), was dissented from in *Queen Empress v. Visram Babaji* (5). The accused's statement was made in Marathi and recorded in English. The learned Judge held that, assuming that it was practicable to record the statement in Marathi, and that consequently it was irregular, with reference to section S. 361 of the Code, to record it in English, the statement was nevertheless admissible in evidence under S. 533, the irregularity not having injured the accused as to his defence on the merits. *Viran's* case (1), was decided in 1886. The learned Judge, who decided the case, in holding that S. 533 could not be invoked, was no doubt influenced by the fact that no attempt had been made to conform to the provisions of S. 164. It appears from the judgment that prisoner No. 1 made three separate statements before the Deputy Magistrate on 9th May, a fourth on 19th May and a fifth on 31st May; but none of these statements were recorded under Ss. 164 or 364. The questions put and answers given were not written down: they were not taken down in the language in which they were made but in English; they were not signed by the prisoner or certified by the Magistrate. In these circumstances S. 533 could not be invoked. Since the decision of that case some verbal alterations have been made in S. 533. After the word "recorded" the words "or purporting to be recorded" have been inserted. After the words "tendered in evidence" the

words "or has been received in evidence" have been inserted. The alterations imply that, even if a statement be not recorded strictly in conformity with S. 164, but so long as the Magistrate purports to have recorded it under that section, and even after the statement has been received in evidence, S. 533 can be resorted to and evidence taken that an accused person duly made the statement recorded. S. 533 plainly provides that notwithstanding anything contained in S. 91, Evidence Act, such statement shall be admitted, if the error has not injured the accused as to his defence on the merits. In the present case the confession was recorded under S. 164, and the Magistrate who recorded it complied with the provisions of that section, except that through an oversight he did not take the signature of the confessor. The learned Magistrate has been examined and from his evidence it appears that Ba Kin did make that confession and that he did so voluntarily.

I, therefore, have not the slightest doubt that the confession can be admitted in evidence. When the Magistrate's Second Clerk, Po Yan visited Ba Kin in the jail to obtain his signature, Ba Kin refused to sign, saying that he had confessed on the previous day because the police had asked him to do so; but when he was examined by the committing Magistrate on 11th January 1929, Ba Kin denied that he ever made a confession. He added that when the Court clerk came to him for signature he refused to sign, because he had not made any confession. Had it been true that the confession was made under inducement he would certainly have said so to the Committing Magistrate. In my opinion the confession was quite genuine and it can be used against Ba Kin under the provisions of S. 21, Evidence Act, and it can be considered against the co-accused Nga Ba Yin under the provisions of S. 30 of the said Act. But as against Ba Yin corroboration by independent testimony is essential. (His Lordship then considered the confession in detail and summed up as follows): To sum up, as against Ba Kin there is his own confession which has been sufficiently corroborated. He gave his age as 16, but the Civil Surgeon who exa-

(4) [1891] 18 Cal. 519.

(5) [1897] 21 Bom. 495.

mined him, fixed it between 18 and 19. As against Ba Yin he is implicated by Ba Kin's confession. There is also the evidence of witnesses who saw him going along with Ba Kin and the deceased, and the evidence of Ma Suleman who actually saw him striking the deceased boy with stones. His defence was a denial. Both Ba Kin and Ba Yin tried to establish alibis. I am of opinion that the plea of alibi has not been established. I am satisfied that the guilt of this dastardly and brutal crime has been brought home to both the appellants. For such a crime the sentence passed appears to be the only suitable sentence that could have been passed.

I would, therefore, dismiss both the appeals and confirm the death sentence.

Brown, J.—I have had the advantage of reading the judgment of my learned brother Maung Ba, and I agree with him that the confession in this case was admissible in evidence and that the failure of the Magistrate to secure the signature of the confessing accused has been cured under the provisions of S. 533, Criminal P. C. The record made by the Magistrate who recorded the confession shows that before recording the confession, he asked Ba Kin a number of questions as to the reasons which led him to confess. He asked him whether he knew that the confession might be used as evidence against him, and to this Ba Kin replied in the affirmative. He also asked other questions to satisfy himself of the voluntary nature of the confession. In none of these questions does the Magistrate explain that Ba Kin was not bound to make a confession, but when examined in Court the Magistrate says that he warned the accused that he had nothing to gain by his confession and that it might be used against him, and the Magistrate appended to the foot of the confession the certificate required by S. 164, Criminal P. C., to the effect that he had explained to Maung Ba Kin that he was not bound to make a confession and that if he did so any confession he might make might be used as evidence against him. I am satisfied in the circumstances that there was a substantial compliance with the provisions of S. 164, and S. 364, Criminal P. C., and that any defect in thi

respect has been cured under the provisions of S. 533.

I agree also that there is sufficient corroboration of the confession to leave no room for reasonable doubt as to the guilt of either of the accused. The confession does not entirely agree with the evidence of the prosecution witness, Maung Ba Lay, as in the confession Ba Kin says that it was Ba Yin who originally called the deceased, saying that he would get compensation for damages to the bicycle, whereas Ba Lay mentioned Ba Kin only. Ba Kin in his confession does not deal with this point at length, and it is possible that he did not speak the truth here as he wished to minimise his part in the assault. I can see no reason, however, for supposing that the confession was not a voluntary one and so far as the case of Ba Yin is concerned, strong corroboration is afforded by the evidence of U Hmu, Maung Pau and Ma Suleman. I see no good reason for doubting the bona fides at any rate of U Hmu and Ma Suleman.

It has been suggested that the confession cannot be used as against Ba Yin, because Ba Yin is assigned the leading part in the crime in the confession. It seems to me clear, however, that the confession does implicate Ba Kin himself in the murder and, therefore, can be considered as against Ba Yin also. The murder was of the most brutal kind and in spite of the youth of the appellant Ba Kin, I do not consider there is any reason for not passing the death sentence on both the appellants.

I agree that both appeals must be dismissed and the sentence of death confirmed in each case.

V.P./R.K.

Appeals dismissed.

1930 Cr. Cases 249 (1)
(Lahore)

JOHNSTONE, J.

Vir Singh—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 535 of 1929, Decided on 22nd May 1929, from order of Sess. Judge, Gujranwala, D/- 19th December 1928.

Penal Code, S. 498—Person cannot be convicted under S. 498 on mere presumption of marriage.

In dealing with offences under S. 498, marriage must be strictly proved. There may arise a presumption that by cohabitation for a period of 13 years marriage took place, but persons cannot be convicted on a presumption of that kind. [P 249 C 2]

Abdul Aziz—for Petitioner.

Des. Raj Sawhney — for the Crown.

Manohar Lal—for Complainant.

Judgment.—This judgment will dispose of Criminal Revisions Nos. 535 and 536 of 1929, which are admitted to hearing by Addison, J. The petitioner, Vir Singh, was convicted under S. 498, I.P.C. for enticing away in 1921, the other petitioner Mt. Ishar Kuar, and since Mt. Ishar Kuar, at the time of the alleged enticement was said to have taken with her two daughters born in 1912 and 1914; he was further convicted under S. 363 read with S. 109, I. P. C., while Mt. Ishar Kuar was convicted under the substantive offence of S. 363, Penal Code.

The case for the prosecution was that Sundar, the complainant married Mt. Ishar Kuar by chadarandazi in 1908 and that they lived together thereafter until 1921, when Mt. Ishar Kuar disappeared, taking with her the two daughters one of whom is now married. It was alleged by the prosecution that one Milkha Singh had sold Mt. Ishar Kuar to Vir Singh for Rs. 450 and although Milkha Singh denied that allegation, the Courts below have not believed his denial on the ground that he and Vir Singh were both convicted in another case under S. 363, I. P. C.

The real point in the case is whether there is an adequate proof of the alleged marriage between Mt. Ishar Kuar and Sundar in 1908. The prosecution evidence on the point is admittedly full of discrepancies with regard to all material particulars of the chadarandazi ceremony. They have been brushed aside on the ground that the affair happened about 20 years ago, but the evidence

does not, in my opinion, establish that any such ceremony took place. Some witnesses say that Gobiud Brahmin performed the ceremony, but he has not been called as a witness, and there is nothing to show that he is dead. The withholding of that evidence must be reckoned against the prosecution.

There can be no doubt that in dealing with offences under S. 498, I. P. C., marriage must be strictly proved, and it is obvious that in the present case strict proof is lacking. There may arise a presumption that, by cohabitation for a period of 13 years marriage took place, but persons cannot be convicted on presumption of that kind. Moreover, Mt. Ishar Kuar has been living with Vir Singh for seven years and it might equally well be urged that a presumption of marriage between them also arises. The learned counsel for the Crown has frankly admitted that the case against Vir Singh is, for those reasons extremely weak and I have no hesitation in endorsing that opinion. Counsel for the complainant had little to urge on behalf of his client.

So far as Mt. Ishar Kuar is concerned, I am of opinion that the second exception to S. 361, I. P. C. is applicable. The two girls were in 1921, only nine and seven years old and she may well have thought that she was then entitled to their custody.

I accept both petitions for revision, set aside the convictions and sentences and discharge the petitioners from their bail. The fines, if paid, will be refunded.

P.N./R.K. *Convictions set aside.*

*** 1930 Cr. Cases 249 (2)**
(Oudh)

STUART, C. J., AND RAZA, J.

Mata Din—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 256 of 1929, Decided on 21st August 1929, against the order of Second Addl. Sess. Judge, Lucknow, D/- 25th April 1929.

*** (a) Evidence Act, S. 24 — Confession not full—Court can reject portions that are false and deduce guilt.**

Where the confession is anything but a full confession the Court is at liberty to use the confession as it stands and derive a deduction of the guilt of the man who made it even while rejecting portions of it which are false.

[P 252 C 2; P 253 C 1]

(b) Penal Code, S. 201—Removing corpse of murdered man is causing disappearance of evidence of offence.

The ordinary inference to be drawn from the conduct of persons who have been concerned in a murder in a house, and who have removed the body to another place, is that they do so with the intention of causing, at any rate, the true evidence about the locality, in which the murder took place, to disappear. Whether such evidence was caused to disappear with the intention of screening the offender from legal punishment is a question to be decided from the circumstances of the case: 47 *All.* 306, *Rel. on.* [P 255 C 2; P 256 C 1]

Three men were sleeping close to the deceased man. Some one came in the night and struck the man with a violent blow severing the neck from body. Subsequently these persons removed the corpse to another room, broke bars of the windows and obliterated blood marks in original place, thereby causing evidence of locality of murder to disappear and putting police on wrong scent as to murderer.

Held: that the fact that none of them was disturbed was improbable and it must be held that those persons must have had an intention of screening the murderer or murderers

[P 256 C 1]

* (c) Criminal P. C., S. 237—Person tried for offence known and believed to have been committed by him—No evidence to prove his having taken part—Conviction under S. 201 is not illegal.

Conviction of an accused under S. 201 as accessory to an offence known and believed to have been committed by him, although evidence does not sufficiently or definitely prove that he was present at and had taken part in the offence is not illegal: 22 *Cal.* 628; 8 *All.* 252; 2 *All.* 713 and 6 *Cal.* 729; *Dec. from, A. I. R.* 1925 P. C. 130, *Rel. on.* [P 257 C 1]

H. N. Misra—for Appellant.

G. H. Thomas and J. N. Mulla—for the Crown.

Judgment.—Debi Dayal and Sheonandan Singh have been convicted by the learned Second Additional Sessions Judge of Lucknow, sitting at Unao of an offence of murder under S. 302, I. P. C. and sentenced to transportation for life. In the same trial the same two persons Debi Dayal and Sheonandan Singh and Salik Ram and Mata Din were sentenced under the provisions of S. 201, I. P. C. for causing the evidence of the same murder to disappear with the intention of screening the offender from legal punishment and sentenced to three years rigorous imprisonment each. All these four persons appeal. The Government Advocate has on behalf of the Local Government filed a revision that the sentence on Debi Dayal and Sheonandan Singh should be enhanced to sentences of death. At the town of Bihar in the Unao District there is a Fort belonging to

Raja Sham Sundar Nath Kaul, a Kashmiri Brahman, Taluqdar of Bithar, The Raja (P. W. 15) resides in Lucknow. His agent Pandit Bishambhar Nath deceased, also a Kashmiri Brahman, resided in the Fort at Bithar and managed the business of the estate there. On the night of 4th September 1928, or the early morning of 5th September Pandit Bishambhar Nath received injuries while in the Fort which caused his death. The first information which was received as to his death was contained in a report made at the police station at Achalganj two miles distant from Bithar at 7 a. m. on 5th September 1928. This report was made by Salik Ram appellant. Salik Ram was an agent of the estate who worked under Pandit Bishambhar Nath. Sheonandan Singh appellant accompanied Salik Ram. The report was recorded by Sub-Inspector Raghunandan Prasad who was then officer-in-charge of the Achalganj police station. The report is as follows:

"Pandit Bishambhar Nath, the general agent of Pandit Sham Sundar Nath Kaul, the zamindar of Bithar, used to reside at Bithar in the Fort. He used to sleep at night in the Court room of the Fort. Last night too, having taken his meal as usual, went to Mt. Keola Bhatin's place. She lives at the door of the Fort. It is not known at what time he returned in the night. This morning when I and others awoke from sleep Sheonandan Sipahi told me that Panditji was lying dead. I saw that Pandit Bishambhar Nath was lying on the charpoy with his throat and face cut. His dhoti was unfastened and a little blood also lay on the charpoy. Two or three wooden bars of the window which is to the west on the back of the Court room, are also broken, from which it appears that someone having come from that very side has killed him. At night, upto 12 o'clock, the sipahis had remained awake in the Fort. It is thought that this event happened after that hour. I have not at all questioned the sipahis and gorais and have at once come away to make the report. The rest, whatever it may be, will be told by these people."

Mt. Keola Bhatin (P.W.10) is a widow who was the mistress of the deceased man. The "Sheonandan Sipahi" mentioned is Sheonandan Singh appellant who accompanied Salik Ram. Sub-Inspector Raghunandan Prasad (P. W. 26) had to proceed that day to Unao which is nine miles distant from Achalganj to attend a sessions case. As he was unable to proceed himself to Bithar he deputed Sub-Inspector Sheo Parkash (P. W. 25) to Bithar. Sub-Inspector Sheo Parkash reached Bithar at 9 a. m.

He at once proceeded to the Fort where he found on a charpoy in the outer room of the kachehri (Court room) the dead body of Bishambhar Nath. He held an inquest upon the body the result of which was recorded in the inquest report Ex. 7. From this report it appears that the body was lying face upwards on two daris which were placed on a charpoy. Two pillows were at the head of the corpse. The whole of the corpse was covered with a white sheet. At the portion of the sheet over the neck of the deceased there was a large cut. The sheet was soaked with blood. The upper dari and the pillows were also soaked with blood. The post-mortem examination of the corpse disclosed that death had been caused by a cut from a cutting instrument which had cut through the whole of the throat and had cut through the branches of the carotid artery. There were no other injuries except a slight bruising on the right arm and a slight bruising on the left temple. From the injuries and the circumstances attending the discovery of the corpse the conclusion can be drawn that the deceased met his death by receiving a blow with a sharp edged heavy weapon delivered through the cloth which was covering his face. The blow must have been delivered with great force. There must have been a large amount of blood shed. A portion of the blood had remained on the sheet, the pillows and the top dari, but it would have been easy for a considerable amount more to have fallen on the ground and to have splashed over surrounding objects. Sub-Inspector Sheo Parkash appears to have done little investigation. He appears to have satisfied himself with conducting the inquest and despatching the corpse to headquarters. He was clearly waiting for the arrival of his superior officer Sub-Inspector Raghunandan Prasad.

Raja Sham Sundar Nath Kaul (P. W. 15) had been in Unao on 4th September 1928, and had seen the deceased there. On 5th September 1928, he received a telegram to the following effect:

"Pandit Bishambhar Nath killed last night come immediately. Salik Ram."

The telegram has been lost but a copy Ex. 6 has been filed which shows that the telegram was despatched on 5th September 1928, from the railway telegraph office at the Achalganj rail-

way station. It was sent urgent a fee of Rs. 2 being prepaid. The Court has been unable to discover with certainty from the copy the time when it was despatched but it apparently was despatched at 9 a. m. and it would appear to have been despatched by Salik Ram from Achalganj after he had made the first report. There is no evidence as to the exact time when the Raja received this telegram. As soon as he received it he obtained a motor car and motored at once to Bithar. He had first motored to Unao which is over 30 miles from Lucknow and then 11 miles on to Bithar. Three miles from Unao he met the dead body being brought in. Near Achalganj he passed Sub-Inspector Raghunandan Prasad who was riding in. They both arrived at Bithar at about 5 p. m. the Raja getting in before the Sub-Inspector. We thus have it that at 5 p. m. on 5th September 1928, Sub-Inspector Raghunandan Prasad and the Raja had arrived at Bithar. The Fort at Bithar contains a large collection of scattered buildings. The prosecution has prepared a plan of the Fort (Ex. 1) drawn to scale. The Fort covers a large area. It is enclosed with walls six to seven feet high. The walls can in many places be climbed. There is an outer gate which is secured at night. The suggestion for the prosecution is that on the night when the deceased met his death the following persons were in the fort.

(1) Bishambhar Nath deceased manager of the Raj; (2) Salik Ram appellant, under-manager; (3) Mata Din appellant, a superior chaprasi, who also did work of a clerical nature; (4) Sheonandan Singh appellant, a sepoy; (5) Debi Dayal appellant, also a sepoy; (6) Fateh Singh sepoy P. W. 12; (7) Kalka Gorait (P. W. 23); (8) Manewa Gorait (P. W. 20); (9) Nanhua Gorait, who has not been called as a witness. These are all the persons who according to the prosecution were on the premises that night. The time was near the end of the rains and according to the prosecution all these persons were sleeping out of doors. According to the prosecution the deceased was sleeping in a space between the kachehri or office and a building called the zenana which had formerly been occupied by women, and round him

were sleeping on charpoys the appellants Sheonandan, Debi Dayal and Mata Din. It has been noted that the dead body of the deceased was found inside the Court room. But the case for the prosecution is that he was actually sleeping outside, that he was murdered outside and that the body was then carried inside the Court room. According to the prosecution Salik Ram, Fateh Singh and Kalka were sleeping near the gate. Manewa was sleeping to the north of the Court room and Nanhua was sleeping on the zenana premises. The first report, as has been seen, refers to the breaking of the bars of a window of the Court room on the west. The prosecution case is that no one had entered though that window, and that the bars had been broken with the intention of leading the police to believe that the murderer of the deceased had obtained ingress by breaking through that window. There was a broken lamp also in the Court room. It is suggested that this lamp was broken accidentally, as the body was being carried in.

The evidence as to the conduct of the inquiry raises questions to which no answer has been given. It would have seemed necessary, considering the facts that the deceased was the manager of the estate and that there were only eight other persons who were residing in the Fort with him on the night of his death, to have examined closely and in detail every one of those persons, in order to discover where each person was, and whether he had heard or had seen anything. It was further necessary to obtain some information as to when it was first discovered that the deceased was dead. But the record does not show that a close investigation took place on these lines. It may have taken place on those lines, but there is no evidence upon the point. The woman Keola was sent for and was examined. The case was considered of great importance and on the evening of 5th September 1928, both the Deputy Commissioner and the Superintendent of Police arrived on the spot and stayed there for about two hours.

On 6th September 1928, Mata Din and Salik Ram are said to have made disclosures to the Raja (P. W. 15). Their Lordships then considered the

evidence of Raja (P. W. 15) and Sheonandan Shukul (P. W. 14) and disclosures made to them in extenso and proceeded.) We can now come to the actual trial. In this Suraj Narain, Madho and Hari Shankar were acquitted. The evidence of Kashi Ahir and Borey Lodh was disbelieved, against them. As there is no appeal against their acquittal, it is not necessary for us to go at length into the evidence against them. This much we may say that we agree with the learned Sessions Judge that the evidence of Kashi and Borey is completely unreliable. We shall deal later with the evidence of Fateh Singh. The evidence produced by Suraj Narain to establish that at the time of the murder he was in the Central Provinces working as a labourer on railway construction was believed by the learned Sessions Judge and we see no reason to disbelieve it. The evidence of Fateh Singh was disbelieved by the learned Sessions Judge. He has given excellent reasons for disbelieving it. Apart from anything else the evidence of this man to the effect that Suraj Narain was the man who actually struck the blow that severed the neck of the deceased must be absolutely inaccurate, if Suraj Narain was at that time in the Central Provinces. There are, however, many other reasons for discrediting the evidence of Fateh Singh.

The case in support of the convictions of Sheonandan Singh and Debi Dayal for abetment of murder therefore rests entirely as against Sheonandan Singh himself upon the statement which he is said to have made to Sheonandan Shukul on 7th September. There is one portion of the statement which is palpably inaccurate on the finding that Suraj Narain was in the Central Provinces at the time that the murder was committed. This is not, however, the only point to which criticism can be directed. It is very noticeable that according to Sheonandan Shukul, Sheonandan Singh insisted that Mata Din, Debi Dayal, Salik Ram, and himself had had nothing to do with the murder. Thus the confession was anything but a full confession. The learned Sessions Judge is, however, correct in his view that the Court is at liberty to use the confession as it stands, and derive a

deduction of the guilt of the man who made it even while rejecting portions of the confession which are false. The learned Judge regarded the confession in this manner. He found that Sheonandan Singh was in the Fort at the time of the murder. He found that Sheonandan Singh admitted that he was standing near the bed of the deceased man while the deceased man was murdered. Although Sheonandan Singh had clearly indicated as the actual murderer a man who was at that time in the Central Provinces, he considered that this statement was sufficient to show that Sheonandan Singh was present at the time of the murder and he was unable to draw any other inference from his presence other than that he was an active abettor of the murder. Such a conclusion is a legal conclusion. But we are unable to accept the statement of Sheonandan Shukul as of sufficient value to justify a conviction. There are many peculiar points about the evidence of Sheonandan Shukul. He had been engaged on 5th September 1928, as officiating manager of the estate. There was no reason established why Sheonandan Singh should wish to confide in him. We have it from the evidence of the Raja that on 6th January 1928, Sheonandan Singh had told him that he knew nothing about the murder, that he had been sleeping close to the charpoy on which deceased was lying, but that he had heard and seen nothing. That is the only implication that is to be drawn from the story that he told. He continued that next morning being afraid that suspicion might fall upon him he had joined Salik Ram and others in removing the bed to another place. He had been privy to the removal of the body to another place and the breaking of the bars of the window.

It is thus clear that on 6th September 1928, he had no apparent intention of admitting that he had seen the murder committed. There is no apparent reason, why Sheonandan Shukul should have gained the confidence of Sheonandan Singh. The former had taken charge only on 5th September 1928. Yet we have it from Sheonandan Shukul that on the morning of 7th at 8 a.m. Sheonandan Singh came and sat by him and Sheonandan Shukul pressed

him again asking what did he know about the murder. Everybody knew that Sheonandan Singh had stated that he knew nothing about the murder, but Sheonandan Shukul returned to the subject, and pressed him saying that as he was sleeping close by he must have known something about it. Then according to the witness Sheonandan Singh made this incriminating statement.

It is quite clear that the police officials in charge and the Raja were very anxious to obtain evidence as to the murder. They had according to their account been unable to obtain any information of any value but where they had failed it is said that Sheonandan Shukul succeeded. This story is not convincing. If otherwise, Sheonandan Shukul would have been of importance. Yet we find that in the police charge sheet of 21st September 1928 the name of Sheonandan Shukul is not entered as a witness. His name was not mentioned until a subsequent date. When the Sub-Inspector Raghunandan Prasad was asked in cross-examination why he had not put up the name of Sheonandan Shukul at the beginning he replied that he only learnt late in the proceedings that a statement made by an accused person before people other than police men could be proved in Court. This, however, is hardly a sufficient explanation, for the Raja is put up in the police charge sheet as a witness who can give evidence as to the statements made to him by Mata Din and Salik Ram and Ram Kishen Tewari who was never called as a witness, was put up to give evidence as to statements made to him by Debi Dayal and Salik Ram.

It is true that the Sub-Inspector said in his deposition that proceedings under S. 201, I. P. C., had never occurred to him as possible during the investigation. But if those proceedings did not strike him as possible during the investigation it is difficult to see why he mentioned the Raja as a person who would give evidence as to the statements made by Mata Din and Salik Ram. After giving close consideration to the evidence of Sheonandan Shukul we are of opinion that we are not justified in accepting that evidence as establishing that Sheonandan Singh had been standing near the bed of the deceased at the time of the murder. Upon that finding his con-

viction of abetment of murder cannot stand. The case as against Debi Dayal in reference to abetment of murder is based by the learned Sessions Judge upon the following findings. He finds that Debi Dayal was in the Fort at the time that the murder was committed. This in itself establishes little. Salik Ram, Mata Din, Fateh Singh, Manewa, Nanhua and Kalka were also in the Fort at the time of the murder. To connect Debi Dayal with the murder the learned Judge relies upon the evidence connected with the dhoti. This much is clear. In the house which Debi Dayal occupied, in Bithar a dhoti was found hanging up to dry. There were nearly obliterated stains upon it and those stains have been found by the Imperial Serologist to be stains of human blood. Debi Dayal has stated from the beginning that the dhoti was a dhoti worn by one of his women folk, and explained the stains as being the stains of blood passed in the monthly courses. The learned Judge was under the impression that he had said that the dhoti was worn by his wife. He did not say that. He said it was worn by one of his women folk. As his wife was at the time pregnant, if he had said that the dhoti was worn by his wife, there would have been force in the criticism. But he did not say so.

There is a witness Puran Pasi (P. W. 11) who deposed that at first in the morning on 5th September 1928, he was on his way in the fields when he saw Debi Dayal washing a dhoti in a river. There would be nothing necessarily to connect the dhoti which Debi Dayal was then washing with the dhoti which was found in his house on 6th September. But apart from that we find the evidence of Puran Pasi valueless. We do not agree with the learned Judge that the explanation given by Debi Dayal is incompatible with the stains on the dhoti and we see no reason necessarily to suppose that the witness Rup Rani (D.W. 2) is not telling the truth. We find that the evidence afforded by the discovery of the blood stains on the dhoti is quite insufficient to bring the charge of abetment of murder home to Debi Dayal. We accept the appeals of Debi Dayal and Sheonandan Singh against their convictions of abetment of murder and set their convictions and

sentences on that charge aside. In these circumstances the applications for enhancement of sentence fail automatically.

We now come to the second part of the case.

Have the four appellants been convicted rightly on a charge under S. 201? We see no reason to doubt the evidence of Raja Sham Sundar Nath Kaul (P.W. 15) when he deposed that on 6th September 1928, Mata Din, Salik Ram, Debi Dayal and Sheonandan Singh all admitted to him that the charpoy, on which was the dead body of the deceased, was carried from the place where it lay between the zenana and the Court room and placed in the Court room, in order to create the impression that the murder had been committed in the Court room and not in the space outside and that the bars of the window had been broken to create the impression that the murderer of the deceased had obtained ingress by breaking those bars. There is further evidence that on 6th September 1928 it was noted that in the space between the Court room and the zenana there were obliterated marks of blood. Sub-Inspector Raghunandan Prasad has deposed as follows:

"I then examined the open space carefully and noticed obliterated marks of blood. The attempt was made by throwing dry earth on the blood and then rubbing it off."

The evidence that marks of blood in this case had been removed has been criticised strongly by the learned counsel for the appellants. They suggest that the evidence is untrue and that the idea was an afterthought. They say that if this had been the case the attempt to remove the marks of blood would certainly have been discovered on 5th September. We, however, accept the evidence that marks of blood were effected in the place in question. We are satisfied that the deceased was murdered in the open space between the Court room and the zenana and not inside the Court room itself, and we are partly drawn to this conclusion by the fact that there were no signs of blood on the floor in the Court room. Considering the fact that the deceased must have bled profusely from a cut which severed the branches of the carotid artery it would in our opinion have been surprising if there were no marks of blood upon the floor of the Court room, if the

murder had been committed in the Court room. There is evidence further that marks of blood were found on certain other charpoys, those charpoys being charpoys upon which other persons were sleeping near the charpoy of the deceased. The fact that blood was found on those other charpoys does not go to prove that the occupants of the charpoys were the murderers. But it goes far to show that blood must have fallen on the ground and in addition upon other places. Thus we consider that the evidence that the ground was found to have been scraped in the place in question is corroborated by the circumstances of the murder. It is not surprising in our opinion, if this fact was not discovered on 5th September. As we have already shown, Sub-Inspector Sheo Prakash did little or nothing towards investigation and waited till Sub-Inspector Raghunandan Prasad arrived late in the afternoon. It does not appear that the police officers discovered at first that the murder had not been committed in the Court room. They discovered this fact after Mata Din and Debi Dayal and the two other men had made their statements to the Raja.

The facts then stand that Salik Ram in his first report made what we find to be a deliberately misleading statement that the deceased had been killed inside the kothri and that he referred therein to the breaking of the bars of the window and suggested that the murderer had entered through the widow. Upon the evidence of the Raja we are satisfied that all the four appellants admitted that they had taken part in the removal of the body from one place to the other and to the breaking of the bars. There is further evidence that the ground had been scraped to remove blood marks and there is also the evidence of the old Gorait Kalka who was in the Fort on the night of the murder. It is true that this old man has very bad eyesight but there was much moon light that night the occurrence having taken place three nights after the full moon. This witness may not be correct as to the men who were carrying the charpoy from one place to another, but we see no reason to distrust his evidence as showing that some of the occupants of the Fort were removing the body from one place to another. This is our finding of fact.

Can it be found on this that all these persons or any of them knowing or having reason to believe that an offence had been committed caused any evidence of the commission of that offence to disappear with the intention of screening the offender from legal punishment? It is argued on behalf of the appellants in the first place that on the facts no evidence of the commission of the offence disappeared. Their case is that evidence was created with the intention of putting the investigating officers on a false scent. They further argued that there was no intention of screening the offenders from legal punishment but the intention was rather to safeguard other persons from undeserved suspicion. The final argument which was based on the decision of certain Courts was that unless it could be shown affirmatively that the murderers were persons other than the appellants they could not be convicted under S 201. We are of opinion that the removal of a corpse of a murdered man from one place to another place does cause evidence of the commission of the murder to disappear. It was decided by a Bench of the Allahabad High Court in *Emperor v. Autar* (1), at p. 308 (of 47 All.) :

"The ordinary inference to be drawn from the conduct of persons who have been concerned in a murder in a house, and who have removed the body to another place, is that they do so with the intention of causing at any rate the true evidence about the locality in which the murder took place to disappear."

By removing the body from the open space to the Court room a portion of the evidence which would have been afforded by the discovery of the body in the place where the man had been killed did disappear. It is true that in this case additional evidence has since been discovered to establish the scene of the murder. But undoubtedly certain evidence has disappeared. It can also be argued that, if the bars of the window had remained intact, the fact that they remained intact afforded evidence that the murderer had not entered through the window. The breaking of the bars destroyed that evidence by suggesting that the murderer had entered through the window. But apart from that we have the evidence which we have accepted that the portion of the ground had been interfered with in order to obl-

(1) A. I. R. 1925 All. 315=47 All. 306.

terate blood stains. We consider that there is no doubt that it is sufficiently established that evidence of the commission of the murder was caused to disappear. But it is necessary to go further. Can it be found that it was caused to disappear with the intention of screening the offender from legal punishment? Here we have to look at the circumstances of the case. It is not sufficient for the counsel for the appellants to say:

"They are innocent men. They did not know who committed the murder. They had no suspicion who had committed the murder. They did not intend to save the murderer from the consequences of his act. They only wished to save themselves from undeserved suspicion."

Having found, as we have found, that they were privy to removing the body, breaking down the bars and obliterating the blood stains, can we accept the reply that they did these acts only to shield themselves, and should we not find on the facts that they did these acts partly with the intention of shielding themselves and partly with the intention of screening the murderers. We have to look at the facts. We find that three of these men were sleeping close to the deceased man. Some one came in the night and struck him a blow which severed his neck. The blow was necessarily a violent blow. That in these circumstances not one of these three men was disturbed, and that not one of them was in some position to form a surmise as to the perpetrator is a conclusion which we cannot accept. We consider that when in those circumstances those men deliberately caused evidence to disappear they must be considered to have had an intention of screening the murderer or murderers. Their main intention may have been to save themselves. But there was also in our opinion an intention to shield the murderer or murderers and that is sufficient to justify the convictions. So much for the appellants Mata Din, Dobi Dayal and Sheonandan Singh. In the case of Salik Ram, who was not present we have it that he was consulted by the other three. It was from his brain that the plan was formed. He must be considered to have had the same intentions as the others. We find therefore that the intention is made out sufficiently. In respect to the last argument the views enunciated by a Bench of the Calcutta High Court in *Empress v. Behala*

Bibi (2) :

"We think that S. 201, I. P. C., was not intended to apply to such a case. A case, that is, in which the person, who is the possible or probable offender, makes statements exculpating himself by inculcating another,"

by a single Judge of the Allahabad High Court in *Empress of India v. Kishna* (3) :

"Now S. 201, I. P. C., has been held to refer to persons other than the actual offenders,"

by a single Judge of the same Court in *Queen Empress v. Dungar* (4) and by the Bench decision of the Calcutta High Court in *Torap Ali v. Queen Empress* (5) cannot now be considered as effective. These views were dissented from in the recent Allahabad decisions *Emperor v. Autar* (1) and *Emperor v. Harpiari* (6). We do not propose to discuss these decisions in view of the fact that the law on the subject appears to us now to be settled by the decision of their Lordships of the Judicial Committee in *Begu v. Emperor* (7). In that case their Lordships found on the facts that five men had set on a sixth. The sixth man was killed. His dead body was placed on a horse and taken away by the five men. The Indian Courts had found that two of those men were actually guilty of the murder, that there was not sufficient evidence to convict the remaining three men of murder, but that it was established that those three men had assisted in making away with the body. Their Lordships refused to interfere with the convictions of the first two men under S. 302 and the remaining three men under S. 201, I. P. C. Those three men had been charged with murder. Their Lordships say at p. 195 (of 52 I. A.) :

"The three men who were sentenced to rigorous imprisonment were convicted of making away with the evidence of the crime by assisting in taking away the body. They were not charged with that formally, but they were tried on evidence which brings the case under S. 237."

There the appeal was mainly as to whether the conviction was justifiable as they had not been charged originally under S. 201. But the whole case was before their Lordships. Their Lordships followed their usual practice in

(2) [1881] 6 Cal. 789=8 C. L. R. 207.

(3) [1878] 2 All. 713.

(4) [1886] 8 All. 252=(1896) A. W. N. 71.

(5) [1895] 22 Cal. 638.

(6) A. I. R. 1926 All. 737=49 All. 57.

(7) A. I. R. 1925 P. C. 130=6 Lah. 226=52 I. A. 191 (P.C.).

criminal cases. As Lord Haldane said (p. 195):

"The tribunal is not a Court of criminal appeal. When there has been evidence before the Court below and the Court below has come to a conclusion upon that evidence, their Lordships will not disturb that conclusion, they will only interfere in such circumstances as are referred to in the well known case of *In re, Dillet* (8) where there has been a gross miscarriage of justice or a gross abuse of the forms of legal process."

But it is to be noted that if the views taken in the previous decisions of the Indian Court had been accepted there would have been in that case a gross miscarriage of justice. If the opinion accepted in the Indian decisions to the effect that the conviction of accused, as accessories to an offence, known or believed to have been committed by themselves is illegal: *Torap Ali v. Queen Empress* (5), the three men in question should not have been convicted under S. 201. They had been charged with murder. According to the assessors two of them had taken part in the assault although they were not found guilty of murder. According to the Judge the evidence did not sufficiently or definitely prove that they were present at, and had taken part in the murder. They were found by their Lordships to have been rightly convicted under S. 201. The facts here are not dissimilar. Here the four appellants were charged with murder. Two of them were convicted of murder by the trial Judge. They have been acquitted here on that charge. The other two were not found to have taken part in the murder. Here as there, it can be said that the evidence does not sufficiently or definitely prove that they were present at and had taken part in the murder. They can here as there be convicted under S. 201. After a close examination of the case in all aspects we find that the convictions under S. 201 are correct. We see no reason to reduce the sentences. The result of these appeals then is as follows. The appeals of Mata Din and Salik Ram are dismissed. The appeals of Debi Dayal and Sheonandan Singh are partly allowed. Their convictions for abetment of murder and the sentences of transportation for life passed upon them are set aside. But their convictions under S. 201,

I. P. C., and the sentences of three years' rigorous imprisonment passed upon them are upheld. The Government revision is dismissed.

V.B./R.K.

Order accordingly.

1930 Cr. Cases 257

(Oudh)

STUART, C. J.

Nihal Chand and others—Appellants.

v.

Jai Ram and others—Respondents.

Criminal Ref. No. 51 of 1929, Decided on 24th October 1929, made by 2nd Addl. Sess. Judge, Lucknow.

Criminal P. C., S. 145 (1) (2) (8)—Molasses form produce of land and being subject to decay can be ordered to be sold.

Molasses can be treated as the produce of the factory within the meaning of S. 145 (8) where the land about which there is dispute consists of factory building including vats. A sugar mill produces molasses. The word "produce" is not necessarily confined to what is grown on the ground. It refers also to a finished article or semi-finished article made from raw material. [P 258 C 1]

Where, therefore, the produce is subject to speedy and natural decay, the Magistrate's order for its sale is justified and the Magistrate has jurisdiction to pass such order. The sale proceeds should be made over to persons in possession of molasses only if they give reasonable security. Security need not be in cash. Recognized Government securities as War Bonds are sufficient. [P 258 C 2]

St. George Jackson—for Appellants.

G. H. Thomas and R. P. Verma—for Respondents.

Judgment.—The facts are stated in the order of reference. I need only summarise them. The proceedings were under S. 145, Criminal P. C. Nihal Chand and Jagannath were the lessees of certain factory buildings. Jai Ram Das was the lessor. The lessor's case was that certain vats containing molasses were not included in the lease. The lessee's case was that these vats were included in the lease. At a certain period it was alleged that there was an apprehension of a breach of the peace. The Superintendent of Police posted a guard to prevent a breach of the peace. Proceedings then took place under S. 145 and finally orders were passed which are the subject of this reference. All apprehension of a breach of the peace has now ended, for the lease has come to an end and the lessees have given up possession over every portion of the premises. But what has happened in the meanwhile has been this. Action had to be taken

(8) [1887] 12 A. C. 459=16 Cox. C. C. 241=36 W. R. 81=56 L. T. 615.

in respect of the molasses in the vats. The Magistrate, treating these molasses as property subject to speedy and natural decay, sold the molasses. The sale proceeds are about Rs. 25,000 which at the present moment are in the hands of the receiver. The Magistrate went on to order that the sale proceeds should be handed over to Nihal Chand and Jagannath provided they deposited cash security or bank receipts. This order has been attacked on the ground that the Magistrate had no jurisdiction to pass it. I consider that the Magistrate had jurisdiction to pass it.

He was dealing with a dispute in respect of land within the meaning of S 145 (1) and 145 (2). The land in question consisted of the factory buildings including the vats. I can only treat the molasses as the produce of the factory within the meaning of S. 145 (8). I do not think I am straining the meaning of the words. A sugar mill produces molasses and the molasses can be fairly called the produce of the mill. In the same way a flour mill produces flour and I should consider flour to be the produce of a flour mill. The word "produce" is not necessarily confined to what is grown from the ground. It refers also in my opinion to a finished article or a semi-finished article made from raw material. In these circumstances the Magistrate's order was justified. The produce was subject to speedy and natural decay, so he made an order for its sale. The molasses having been sold, it is now to be seen what disposal is to be made of the sale proceeds. As Nihal Chand and Jagannath have been found to have been in possession of the molasses the sale proceeds should ordinarily be made over to them. But the Magistrate has rightly decided that the sale proceeds are only to be made over to them if they give reasonable security. He was dealing with possession only. I know nothing as to the title to the molasses and I have been careful to hear nothing on the subject as that question will have to be decided elsewhere. But it is obvious that if the sale proceeds are handed over to Nihal Chand and Jagannath some security should be taken from them in event of the title to the molasses being found eventually to be with Jai Ram Das. So security must be taken.

I do not, however, consider it proper to take security in cash. In fact such an order has no meaning. Nihal Chand and Jagannath would then take out the amount in cash and pay the amount back in cash. Fixed deposit receipts would be better. But it appears to me that it will be sufficient if Nihal Chand and Jagannath deposit any recognized Government securities such as War bonds. They inform me that they are ready to deposit War bonds and I direct that they may take out the sale proceeds if they deposit War bonds of the same value and that they shall be permitted to draw interest on these War bonds as it falls due. I next come to the question of the time during which this deposit should be retained. I am informed by the learned counsel for Jai Ram Das that he claims a balance against Nihal Chand and Jagannath. He will not require more than a year for the purpose of filing a suit to recover this balance; of course he can file a suit whenever he likes within the period of limitation, but I fix this limit for withdrawal of security. I direct that after a year Nihal Chand and Jagannath may withdraw their security. If the suit has been filed before the year has expired it will be for Jai Ram Das to obtain the orders of the Court for further security. It will of course be open to the trial Court to pass such orders. I order that the papers be returned with these directions.

R.M. 'R.K.

Order accordingly.

1930 Cr. Cases 258

(Patna)

MULICK, J.

Kishori Jha and another—Petitioners.

v.

Anand Kishore Jha—Opposite Party.

Criminal Revn. No. 128 of 1928, Decided on 12th March 1928, from order of Dist. Magistrate, Darbhanga, D/- 10th February 1928.

(a) Criminal P. C., S. 144—Unless facts are quite clear, proceedings should be drawn under S. 145.

Ordinarily unless the facts are on the face of them quite clear, a proceeding should be drawn up under S. 145 for the purpose of investigating the question of actual possession to land.

[P-259 C 2]

(b) Criminal P. C., S. 145—Suit for recovery of possession decreed—For purposes of S. 145 presumption is that decree-holder entered in possession on date of decree unless possession is proved to have been disturbed by judgment-debtor.

Where in a suit for recovery of possession, possession is decreed, although the decree may be ex parte, as between judgment-debtor and decree-holder for purposes of S. 145, the presumption is that the decree-holder entered into possession on the date of the decree and continued till his possession was disturbed by the judgment-debtor, and the onus is on the judgment-debtor to prove his entry subsequent to date of decree. [P 260 C 1]

Ganesh Sharma—for Petitioners.

Muhammad Hasan Jan—for Opposite Party.

Judgment.—The learned Sub-Divisional Magistrate's proceedings were irregular from the outset.

We have not got the order of 19th December 1927 which is referred to in his order dated 17th January 1928. S. 144, Criminal P. C. provides that in certain contingencies the Magistrate may direct a person not to do any act which causes obstruction, annoyance or injury or risk of obstruction to any person lawfully employed or a disturbance of the public tranquillity. The Magistrate may make this order ex parte or he may make it after issuing notice to the person concerned and hearing the cause shown by him. But sometimes a Magistrate makes the order straightway ex parte and at the same time orders the party affected to show cause. This does not seem to be quite regular because Cl. (4), S. 144, provides that the party affected may show cause after the order has been made and then the Magistrate may either rescind the order or modify it.

However, in the present case it would seem from the order of 17th January 1928, that an order absolute was made ex parte in the first instance against the opposite party and therefore the two months' time provided by S. 144 runs from 19th December and the order has spent itself.

The petitioners dissatisfied with the Magistrate's order of 17th January in which he confirmed his ex parte order, made an application to the District Magistrate, who on 10th February 1928, declined to interfere. Then there was an application to refer the case to the High Court made to the Sessions Judge who on 15th February rejected the application.

The present application is made by the petitioners in revision under S. 439, Criminal P. C.

Having regard to the fact that the order of 19th December 1927, has spent

itself no further proceeding with a view to setting aside that order will be effective; but I desire to bring to the learned Sub-Divisional Magistrate's notice that it has been repeatedly held that ordinarily unless the facts are on the face of them quite clear a proceeding should be drawn up under S. 145 for the purpose of investigating the question of actual possession to land. The learned Sub-Divisional Magistrate appears to have made the ex parte order of 19th December without any investigation and the order of 17th January 1928 did not improve matters because it was passed upon an inspection of the records without examining witnesses as to actual possession. If then there is still any further apprehension of a breach of the peace, the proper course will be to take proceedings under S. 145, Criminal P. C.

I desire at the same time to observe that on 30th August 1923, Mahanth Bishambar Das obtained a decree on compromise against Bhagbat Das and Shivanandan Thakur and an ex parte decree against Anand Kishore Jha, the opposite party in the proceeding now before me. In that decree Bishambar Das obtained an order for recovery of possession of certain lands belonging to the muth in Kaitya. The defendants Bhagbat Das and Shivanandan Thakur were the persons concerned in resisting his possession in respect of those lands. Against Anand Kishore Jha there was a prayer for recovery of possession in respect of those lands. Against Anand Kishore Jha there was a prayer for recovery of possession in respect of the lands in mauza Kanigaon. These lands were covered by Sch. 2 in the suit, and the petitioners before me Kishori Jha and Aklu Jha have obtained a lease of the interest of Bishambar Das in respect of them. The petitioners, therefore, stand in the shoes of Bishambar Das and Anand Kishore Jha cannot be heard to say that he was in possession of the lands on 30th August 1923. Although the decree was passed ex parte against him, it must be assumed that notice of the suit was served upon him and the possession of Bishambar Das on 30th August 1923, cannot be challenged now.

It is urged that Bishambar Das acted fraudulently in obtaining the ex parte decree and also that while he was asking for recovery of possession the Court

had no jurisdiction to give him a decree for confirmation of possession. In my opinion the charge of fraud cannot be examined in the present case, it is open to Anand Kishore Jha to take such steps as he considers necessary to get the civil Courts' decree set aside; and as regards jurisdiction it is obvious that the Court had jurisdiction to pass a decree for confirmation of possession even though recovery of possession had been asked and the Court's order cannot be challenged on the ground that it was a nullity. It is, however, urged before me on behalf of the opposite party Anand Kishore Jha that even though it be admitted that Bishambar Das was in possession on 30th August 1923, it does not follow that he was in possession on 19th December 1927. Now, that is a matter which I do not propose to investigate. All I desire to observe is that if a proceeding under S. 145 is instituted, the Court will assume that on 30th August 1923 Bishambar Das was in possession and that his possession has continued until the opposite party Anand Kishore Jha disturbed that possession, if at all. So far as onus is concerned, it is upon Anand Kishore Jha, the judgment-debtor in the previous suit, now to establish that he was entered into possession by some means or other since 1923.

With these remarks the application is dismissed.

V.B./R.K. *Application dismissed.*

1930 Cr. Cases 260

(Patna)

ADAMI, J.

Sheo Barhi and another—Accused—Appellants.

v.

Emperor—Opposite Party.

Death Ref. No. 25 and Criminal Appeal No. 163 of 1929, Decided on 6th December 1929, from decision of Sess. Judge, Shahabad, D/- 31st August 1929.

(a) **Evidence Act, S. 133—Evidence of approver must be corroborated in material particulars connecting accused with crime.**

The evidence of an approver must be corroborated in material particulars, and those material particulars should connect the accused persons with the crime. [P 262 C 1]

In a charge for theft and murder the approver in "no way sought to exculpate himself so far as the conspiracy to commit theft and the theft itself was concerned, nor so far as regards conspiring to commit murder, though he exculpated himself so far as the actual

murder was concerned. The story of the approver so far as a conspiracy to commit theft and the actual theft was corroborated, and the circumstances showed that the persons who committed theft were the same who committed the murder,

Held: that the corroboration connected the accused with the crime of murder. [P 262 C 1, 2]

(b) **Evidence Act, S. 133—Approver's evidence discarded—Even defence cannot base arguments on it—Criminal Trial.**

If the evidence of an approver is discarded, it must be discarded as a whole and the defence cannot base arguments on it any more than the prosecution. [P 263 C 2]

(c) **Penal Code, S. 302—Whether fatal blow was delivered by either of two accused or approver not known—Accused held guilty of abetment of murder—Penal Code, S. 109.**

It was found that two accused and the approver conspired to commit theft and in pursuance of that conspiracy to kill H in order to enable them to commit theft but there was no direct evidence as to who dealt the fatal blow,

Held: that the accused are guilty of abetment of murder under S. 302 read with S. 109. [P 264 C 1]

*K. N. Lal and H. L. Nandkeolyar—*for Appellants.

*Asst. Govt. Advocate—*for the Crown.

Judgment.—In a trial with the aid of assessors, the appellant Sheo Barhi has been found guilty of murder under S. 302 and the appellant Rajnarain Lal of abetment of murder under S. 302 read with S. 109 and both have been sentenced to death by the Sessions Judge at Arrah, who has referred the sentence for confirmation by this Court. The two appellants were also by the unanimous verdict of a jury found guilty, the former of theft under S. 379 and of abducting in order to murder under S. 364, I. P. C. and the latter of abetment of these two offences, but no separate sentences were passed under those sections.

On an appeal to this Court there was agreement between the two learned Judges composing the Bench that the convictions under S. 364 and 364 read with S. 109 must be set aside, but a disagreement with regard to the convictions of the two appellants on the charges of murder and abetment of murder respectively. There having been a disagreement the appeal has come before me for decision.

I may say at the outset that with regard to the charges of theft and abduction and the abetment of the same, the two learned Judges of this Court being agreed that the convictions under S. 379 and S. 379/109 must be upheld

and those under S. 364 and S. 364/109 must be set aside. I have no hesitation in accepting their decision on these charges, since the evidence to support the charges of theft is absolutely clear while there are possible misdirections in the charge to the jury with regard to the extent to which an approver's evidence may be relied on. The convictions under Ss. 379 and 379/109 are upheld and those under Ss. 364 and 364/109 set aside.

The case as put forward by the prosecution has been detailed in the judgment of the learned Sessions Judge. Shortly stated it is as follows. Ramjanam and Jogendra were mail peons at the Dehri post office while Sheobasant Garari was telegraph messenger there. The appellant Sheo Barhi, a carpenter who had nothing to do with the post office used to visit the mail peons' quarters and suggest to Ramjanam, Jogendra and Sheobasant that they should steal the money from the post office mail bags. He held out to them as a reward that he would get them work in Bengal. Ramjanam gave up his post on May 3rd and was succeeded as mail peon by Raj Narain, whom Sheo Barhi approached with his proposal to rob the mail bags. The mail bags were taken every evening from the Dehri post office at about 6-30 p. m. by the mail peons whose duty it was to hand the bags over to the mail sorter of the train which arrived at Dehri railway station at 8-16 p. m. The mail peon would receive from the mail sorter in exchange the mail bags for Dehri post office, which he would place in the station mail box and lock them up for the night, taking them out and delivering them at the post office next morning. If the mail peon brought the Dehri post office bags to the station too late to catch the 8-16 train he locked them up in the station mail box to await the next day's train.

Sheo Barhi, Sheo Basant and Raj Narain made a plan that Jogendra, when taking the mail bags should miss the train and that after he had put the bags in the station mail box they should by means of a duplicate key, unlock the box, take out the bags and divide their contents. Raj Narain obtained the key and Sheo Barhi got it copied.

On May 15th, Jogendra was dismissed and the deceased Harsulal was appointed

in his place as mail peon. Though Sheo Barhi visited Harsulal he did not get him to miss the train. Failing to prevail upon Harsulal, Sheo Barhi, Raj Narain and Sheo Basant agreed to decoy him away and kill him and then take the mail bags and their contents.

On 28th May last the mail to be despatched from the Dehri post office was a particularly valuable one, the registered and insured parcels and letters contained Rs. 4,310 and they were fastened up in four mail bags. These bags were handed over to Harsulal to take to the railway station at 6-30 p. m. and he set out. Raj Narain left the post office a little later, and Sheobasant after getting two telegrams at 7-15 to deliver to the addresses also left the office. Harsulal did not meet the train at 8-16 p. m. nor were the mail bags found in the mail box in the station. Next morning as Harsulal did not appear and no mail bags had been delivered, report was made to the police and to the Inspector of Post Offices. At 10 a. m. on 29th Mahesh Dusadh and Sunder Ahir, (P. Ws. 23 and 24) found two bags stuck to a bamboocraft in the canal. These were taken to the post office and were found to be bags which had contained the mail but which had been broken open. Next morning at about 9 a. m. Harsulal's dead body was found floating in the canal further north from the place where the bags were found. An incised gaping wound was found on the back of the upper part of the neck stretching from the left ear across the back of the neck; the cervical vertebrae, the pharynx and the spinal cord were cut.

Investigation was going on when, on 31st constable Ramparekha Ram received certain information which led to the discovery, in the house of a prostitute, of money and articles which had been contained in the mail bags, and to the arrest of Sheo Barhi. Sheo Barhi was thereafter used as a decoy with the result that Rajnarain disclosed where he had hidden in the ground his share of the contents of the mail bags and Sheo Basant gave information which led to the production of his share of the booty namely Rs. 820.

There can be no doubt that, as has already been found, Sheo Basant, Sheo Barhi and Raj Narain committed theft of the mail bags. The question is

whether they murdered or abetted the murder of Harsu Lal in order to commit the theft. Sheo Basant has been granted a pardon and has given evidence as an approver. Were his story to be accepted as true there could be no doubt about the complicity of the appellants in the murder. But the evidence of an approver must be corroborated in material particulars and those materials particulars should connect the accused persons with the crime. We have to see firstly whether under these conditions Sheo Basant's evidence can be admitted and secondly if not whether there is sufficient evidence, discarding that of the approver to bring home the guilt of murder to the appellants.

Now the finding that has been arrived at without any reference to the approver's evidence that the appellants committed theft of the mail bags is strongly corroborative of the story told by Sheo Basant in the witness box, so far as it relates to a conspiracy between Sheo Barhi, Rajnarain and Sheo Basant to commit theft of the mail bags. The theft can hardly have happened without a preliminary arrangement between those who took part in it. In addition we have the independent evidence of Jogendra supported by that of his father that Sheo Barhi approached him with a suggestion to steal the contents of the mail bags. Sheo Basant has in no way sought to exculpate himself so far as the conspiracy to commit theft and the theft itself is concerned. He does not exculpate himself either so far as regards conspiring to commit murder, though he exculpates himself so far as the actual murder is concerned.

Sheo Basant's account of how he received two telegrams for delivery at 7 p. m. and delivered them at 9'45 p. m. and 10'30 p. m. is amply corroborated and though this evidence does not implicate the accused it tends to show the truth of the story told by the approver in its details. The evidence of Guru Halwai (P. W. 33), Ramdas Paneri (P. W. 34), Muhammad Ismail (P. W. 35) and Satdeo Sahu (P. W. 36) if it is believed corroborates the story of Sheo Basant, that Sheo Barhi, Sheo Basant and Rajnarain were together with Harsulal at the Halwai's and Paneri's shop that evening and this

evidence may be said to affect the appellants by tending to connect them with the crime, since the association was shortly before the theft was committed. It is objected that these witnesses should not be believed to be stating the true facts because they did not come forward to tell what they had seen until a few days after the murder and because there are discrepancies as to who bought the sweets and as to who was carrying the mail bags. The witnesses are independent men who have no reason to concoct a story against the appellants and the discrepancies are not of much importance.

It has been further suggested that Sheo Basant's story should not be believed because he has failed satisfactorily to explain how Harsulal was so detained as to miss the train the distance to the railway station being so short and how it was that he did not deliver the telegrams till so late. It is true that the explanation of the delay is meagre and wanting in detail but we know for certain that Harsulal started with the mail bags at 6-30 p. m. and that he did in fact miss the mail. We know from independent evidence, that Harsu with the appellants spent some of the time at the Halwai's and the pan seller's shops. Whether the mail bags ever reached the station and were locked up in the mail-box and then taken out we cannot know for certain. It may be that Sheo Basant took a more active part in the theft and in luring Harsu to his doom than he likes to confess. It has been suggested that the story of getting a duplicate key for the lock must be untrue because the postal authorities whenever a key is missing have to send the lock to Patna. It is obvious that this does not mean that it is impossible to copy the key, but that just because it is possible to copy a key, it is found safer to send to Patna for a new lock with a different key so that if there has been theft of the key with the purpose of copying it, the duplicate key cannot be of any use.

The position is that the story of the approver so far as a conspiracy to commit theft and the actual theft of the contents of the mail bags is concerned is corroborated by the evidence circumstantial and direct which has led to the finding that the appellants actually did

commit theft of the mail bags and as I have said before there must have been some conspiracy or arrangement to commit the crime. Jogendra and his father support the story that Sheo Barhi was instigating the mail peons to commit theft, there is evidence to show that before the theft the three men were as stated by the approver with Harsulal and that Harsulal then had the mail bags in his possession. In my opinion there is enough material evidence tending to implicate the two appellants with regard to a conspiracy to commit theft and the actual theft to corroborate the approver's story and to show that it can be relied on so far as the charge of theft is concerned. That being so, there seems to me to be insufficient ground for discarding that part of the story of the approver which concerns a conspiracy to murder and the events leading up to the murder. If the approver's story is believed there can be no doubt that the two appellants were rightly convicted of murder. •

The two learned Judges, however, who first heard the appeal have agreed in discarding the approver's evidence and it is necessary to determine whether apart from that evidence there is sufficient evidence to satisfy the Court that the appellants brought about the death of Harsulal. •

The circumstantial evidence in this case is such as would ordinarily lead a reasonable man to believe that the appellants were responsible for the death of Harsulal. We know that Harsulal on the evening of 28th left the post office at 6-30 p. m. with the mail bags in his possession; we know that the bags were found floating in the canal next day, having been opened and their contents extracted, and that the dead body was later found floating in the canal with a murderous wound on the neck and lastly we know that the greater part of the money which had been contained in the bags was found in the possession of the appellants. Furthermore Rajnarain produced the money he had obtained as his share from a hole dug in the bank of the canal in which the bags and dead body were found floating. As I have said, any reasonable man would conclude from the above circumstances that the men who committed the theft

from the mail bags carried by Harsulal were the men who killed Harsulal in order to abstract the contents from the mail bags.

It has been urged before me that the circumstances suggest that Harsulal was a fellow conspirator with the appellants in the theft and that he also received a share of the contents of the mail bags, and that, if that is so, it is unlikely that his fellow conspirators murdered him, and the possibility is that someone else killed him in order to rob him of the share he had received. The grounds on which, learned counsel based this suggestion are, the statement by the approver that Sheo Barhi told his fellow conspirators that Harsulal would be easier to draw into the conspiracy than Jogendra, because he had been at the school of Sheo Barhi's grandfather, and the statement that Sheo Barhi began to visit the quarters of Harsu, but more especially the statement of the approver that the booty was divided into four shares, Sheo Barhi taking two as being the ringleader and the person who by killing Harsu had enabled the theft to be committed. It is contended that the division into four shares would point to the fact that there were four men who shared the spoils and that Harsulal was the fourth man. Now all these grounds are based on statements made by the approver in his evidence before the Court, if that evidence is discarded no notice can be taken of the statements. If the evidence is discarded it must be discarded as a whole and the defence cannot base arguments on it any more than the prosecution.

It is further argued that unless Harsulal had joined the conspiracy he could not have missed the train since he had so much time within which to reach the station. If the approver's evidence is discarded we have nothing to show when exactly Harsulal met his death except the evidence that he was seen with the appellants and Sheo Basant at about 7-30 or 7-45 p. m. that night. It may be that he was taken to the canal and killed soon after that, and thus the mail bags never reached the station or it may be, as is the case of the prosecution, that he was persuaded by some inducement to miss the train, put the bags in the station mail box, and then go with the appellants to the canal

bank. The facts remain that he had the mail bags, missed the train and was killed that night. There is no evidence at all that Harsulal joined in the theft of the mail bags. Nor is there any evidence that any one else than the appellants and Sheo Basant knew anything about the conspiracy or could be aware that Harsu had received a share of the money and was worth robbing. The strong circumstantial evidence provided by the finding of the stolen property in the hands of the appellants is further strengthened by the evidence of the witnesses who depose to having seen Harsu with the mail bags in the company of the appellants and Sheo Basant at 7-30 or 7-45 p. m. in the evening of the murder. I have already stated that I can see no good reason to distrust the evidence of these witnesses. Their evidence was not shaken in cross-examination, and the discrepancies in it were not such as would induce me to believe that the witnesses were telling a concocted story.

In my opinion the circumstantial evidence is so strong to show that it was the appellants who brought about the death of Harsulal that there could not be formed in the mind of any reasonable man any reasonable hypothesis to the contrary. I find that both of the appellants must be held liable for the murder of Harsulal.

The evidence of the approver being discarded there is no direct evidence to show who actually struck the blow which killed Harsu. That the two appellants conspired with Sheo Basant to commit theft and in pursuance of that conspiracy to kill Harsulal in order to enable them to commit theft I have no doubt and I find both appellants guilty of abetment of murder under S. 302 read with S. 109. There are no extenuating circumstances, the murder had been thought out and premeditated and was a particularly cold blooded one. The appellants are liable to and deserve the punishment inflicted in cases of murder.

In the case of Sheo Barhi, I find no reason for not inflicting the extreme penalty. He had nothing to do with the post office and it is clear from the evidence of Jogendra that he was the prime mover in the conspiracy. I uphold the sentence of death passed upon him by the Sessions Judge. In the case of

Rajnarain who is a youth of 18 years of age, the probability is that he was tempted and led on by Sheo Barhi and Sheo Basant. For the above reason I substitute for the sentence of death passed upon him a sentence of transportation for life.

M.N./R.K.

Order accordingly.

1930 Cr. Cases 264

(Patna)

ADAMI AND CHATTERJI, JJ.

Judagi Mallah—Accused.

v.

Emperor

Death Reference No. 8 of 1929 and Criminal Appeal No. 59 of 1929, Decided on 12th April 1929, made by Sess. Judge, Muzaffarpur, on 12th March 1929.

(a) Penal Code, S. 300—**Man striking another with knife in throat—Knowledge that blow is sufficient in ordinary course to cause death must be imputed to him.**

A man who strikes another man with a knife in the throat must know that the blow is as imminently dangerous that it must in all probability cause death and the injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. [P 267 C 2]

(b) Penal Code, S. 86—**Drunkenness not sufficient to incapacitate accused from forming intent necessary to constitute crime—Accused is liable for criminal act.**

Evidence of drunkenness falling short of proved incapacity in the accused to form the intent necessary to constitute the crime and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts. *Director of Public Prosecutions v. Beard*, (1920) A. C. 479, *Ref.*

[P 268 C 2]

(c) Penal Code, S. 86—**Ordinary drunkenness makes no difference to knowledge with which man is credited.**

Ordinary drunkenness makes no difference to the knowledge with which a man is credited and if an accused knew what the natural consequences of his act were, he must be presumed to have intended to cause them: 38 *Mad.* 473, *Poll.* [P 268 C 2]

(d) Penal Code, Ss. 302 and 86—**Brawl between accused and deceased, both drunk—Accused was struck first—Accused striking deceased in throat by knife and running about saying he had committed crime for which he was going to be hanged—Deceased bigger man than accused—Extreme penalty held not called for.**

In the course of drunken brawl accused was struck by the deceased and knocked down, whereupon the accused struck the deceased with a knife in the throat, which resulted in killing the deceased. After committing the crime the accused ran about saying that he had killed the deceased and was going to be hanged. Of the two, the deceased was the bigger man.

Held: that the accused had knowledge and intention which would make him liable under S. 302 and was guilty of murder, but the case was one in which extreme penalty was not called for. [P 269 C 1]

A. D. Patel—for Accused.

Government Advocate—for the Crown.

Adami, J.—Judagi Mallah has been found guilty by the Sessions Judge of Muzaffarpur of the offence of murder and has been sentenced to death. That sentence comes before us for confirmation.

The appellant Judagi Mallah and Deonarain the deceased were cousins living at a village called Chimanpur. They were both boatmen and had been working in Calcutta up to a week before 12th December. Early on the morning of 12th December, one Hira came to Deonarain's house to realize a debt owing to him. It appears that Hira, Judagi and Deonarain had a meal together in the morning at which they drank toddy and then went into the bazar and afterwards Deonarain proceeded to the ghat with Hira while Judagi came back. Deonarain accompanied Hira across the river and then came back. At sunset that evening Dasrath, also a relation, met Deonarain at the ghat and asked him where he had been and what he was doing and then accompanied him towards his home. On the way they first went to one grog shop and drank toddy and then proceeded to another shop belonging to Kanhai at a bandh not far from the house of Deonarain. There Kanhai brought them toddy to drink. Meanwhile Deonarain's wife became disturbed at the failure of Deonarain to return and went to Judagi's house which was close to her own and asked Judagi what had become of her husband. Judagi said he did not know but probably her husband would be returning. She went back and again after sunset went to Judagi's house and again made inquiries and then Judagi promised to go and see if Deonarain happened to be at the toddy shop. He set out and the next we hear is that, while Deonarain and Dasrath were drinking toddy from the pot which Kanhai had brought them, Judagi came up and took hold of the pot from which Deonarain was going to drink. Deonarain became angry at this action of Judagi and abused Judagi. Judagi seems to have returned the abuse and then a

quarrel arose in the course of which Deonarain knocked Judagi down. Dasrath at the time tried to interfere and to separate the two men and then went off a few paces away to ease himself. While he was doing this he saw Judagi strike Deonarain with a knife in the throat. Deonarain fell down dead. Thereupon, according to Dasrath and other witnesses, Dasrath began to shout that Judagi had killed Deonarain, whilst also, according to the witnesses, Judagi ran about saying that he had killed Deonarain and was going to hang for it. Dasrath went off and met Niranjana and with him visited Domi, who is the leading man of the village and a panch as also a Municipal Commissioner. They were telling Domi what had happened when Judagi and his mother Mt. Kumri came along and stated to Domi that Judagi had committed the offence and they asked his forgiveness; in fact these two, according to the prosecution, confessed Judagi's offence and asked Domi to save Judagi. Domi, however, told Dasrath and Niranjana that they must go off to the police station. These two went off, and, on the way, visited a man called Kashi Tewari, who also told them to go to the police station. The two men went to the outpost which, according to the Head Constable's diary, they reached at midnight and told the Head Constable that Deonarain had been killed. The Head Constable, according to his own evidence and the station diary, deputed a constable Rajmahal to the police station which was half a mile away and the Head Constable and other constables started at midnight in search of the accused. According to the same diary at 12-30 the Head Constable with a constable set out for the police station together with Judagi the accused. Meanwhile just after Deonarain had been killed there had been the outcry which I have mentioned in the village which attracted several women to the spot where Deonarain was lying. One Lala Pasi (P. W. 11) said that he could not come because he was a leper, nor did his wife go there, prosecution witness 12. Dasrath had told Mt. Debia (P.W. 15) and she with Mt. Jamuni (P.W. 14) came up to the spot where Deonarain was lying. The aunt of Judagi, Mt. Dumri, had come up as also the mother of Deonarain. Water was sent for and

a lota was brought from Judagi's house and an attempt was made to give water to Deonarain. He, however, was dead. Then Mt. Sundari, Judagi and Kumri carried the body to the house of Mt. Sundari, the wife of Deonarain. At 1 a. m. the party composed of constables Rajmahal, Mohamad Sadique, Dasrath, Niranjan, Kumri, Judagi and others reached the police station and there Mt. Sundari laid an information which was recorded by the Sub-Inspector. In that information she told how her husband had failed to return before sunset and Judagi had said he was going to look for him, and then an hour afterwards after she had gone to sleep she heard a cry from Mt. Debia calling her to run to the spot, and found her husband lying wounded and dead. She told how they carried the body to her house and how Judagi after carrying the body to the house had gone back to his own home. The information then stated that Judagi was dead drunk. Then the information proceeds as follows:

"Now I have learnt from Dasrath Sahai that at a pahar after sunset he was going along the bandh to his house when he saw a struggle going on between my husband and Judagi on the bandh, full particulars regarding which will be stated by Dasrath himself. Therefore I think that Judagi has killed my husband."

The information then tells of some quarrel which Judagi had with Deonarain. Judagi was arrested, but the Sub-Inspector tells us that until 1 p. m. the next day he was not in a fit state to give any statement owing to his drunkenness. He had been arrested and he and his aunt Mt. Kumri were charged but the case was not prosecuted against Mt. Kumri.

The learned Sessions Judge agreeing with three of the four assessors has found the appellant guilty of the offence of murder. He has believed the witnesses who had given evidence to the effect that they heard Dasrath directly after the murder saying that it was the appellant who had killed Deonarain and other witnesses who say that Judagi himself went about confessing his guilt. The learned Judge also relied on the evidence of Domi before whom a confession was made. The learned Sessions Judge has considered the point that in the *saneha* as recorded at first in the police outpost the name of the person who had killed Deonarain was not given.

He has come to the conclusion that though the Head Constable committed a very serious offence by interpolating the name of Judagi in the entry in the police diary, still, in his opinion, the omission of the name was merely due to carelessness. He believed that the name of Judagi was in fact given to the Head Constable at the outpost. It is really difficult to understand the entry in the station diary which purported to have been made at midnight. It is quite plain that the Head Constable was incompetent and one can see from his evidence that this view ought to be taken of his capabilities.

Mr. Patel, learned counsel on behalf of the appellant, argues that up to 1 a.m. it had not been decided that the death of Deonarain was to be attributed to Judagi and that it was only when Sundari was in the course of giving her first information that it was suggested to her that Judagi was the man who had killed Deonarain. I have quoted above the passage from the first information relating to her knowledge which she acquired from Dasrath. In her evidence Mt. Sundari adheres to the statement that it was during the time that she was giving her information that she learnt from Dasrath how he had been going along the bandh when he saw a struggle which ended in the death of Deonarain. Mr. Agarwala the Assistant Government Advocate explains this as meaning that though she knew that it was Judagi who had killed her husband, she did not know until she was giving her information any details of the manner in which her husband met his death.

Now it may be that Sundari did not know who the actual murderer of her husband was; she would naturally be in a distressed state of mind, as she herself says, and paid little attention to what was being shouted or what was being said. As a matter of fact Dasrath himself says that he did not tell her and he went off with Niranjan to Domi's house; it is quite possible that Sundari did not realize what was said about Judagi for Dasrath had gone off and also Judagi had gone away and was no longer telling people that he had committed the murder. However that may be, we have the statement in the first information that it was Judagi who killed

Deonarain and we have also the evidence which the learned Sessions Judge and the assessors in the Court below believed, that Judagi admitted that he had killed Deonarain and that directly after the killing of Deonarain Dasrath told the various witnesses that it was the appellant who had caused his death. There is no reason to disbelieve the story of Domi and the other witnesses. Domi is a man of some position and it is not shown that he is in any way interested except for the fact that he signed one of the kabalas which is said to have caused some trouble between Judagi and Deonarain. As a matter of fact that dispute between Judagi and Deonarain had been compromised the day before. Nor does the fact that a man attests a document signify that that man must have a bias in favour of the person who executed the document. There is also no reason to disbelieve the witnesses who are not related to or of the same caste as Deonarain. There are witnesses of various castes and Lala who is a Pasi admits that he heard Dasrath calling out that Judagi had killed Deonarain with a knife. I see no reason to disbelieve either Lala or his wife Mt. Chulhia. Several witnesses were tendered by the prosecution but the defence did not cross-examine them. Kanhai, it is true, denies that he supplied Deonarain and Judagi with toddy but it is easy to see that it would be unsafe to admit that he did supply it since by supplying it at night and out of his house he would be breaking his license and would be liable to get into trouble.

A good deal has been made of the delay in lodging the first information. The occurrence was supposed to have taken place at 9 p. m. while the first information was not lodged till 1 a. m. Dasrath and Niranjani have explained how a great part of the time was taken up, but beyond this the probability is that there having been a drunken brawl the villagers were not anxious to make any report at first to the police, and it was for this reason that they went to Domi who was the leading man in the village. Even when Domi told them to go to the police station they went off to Kashi Tewari who is the next most important man there. He also told them to go to the police station and it seems

that it was after this further instruction that they went off to the outpost.

Mr. Patel has said everything that could be said on behalf of the appellant and has made the most of the palpable fault in the station diary of the outpost, but I cannot see that this trouble with regard to the station diary really can affect the case considering the reliable evidence we have of the guilt of the appellant. It is quite clear from the evidence that both Deonarain and Judagi had been spending the day in drinking. We know that Deonarain had visited at least two toddy shops in addition to the drinking of toddy at his own house. Judagi we do not know so much about in regard to his movements during the day, but we do know that when he came to the police station he was quite drunk, so much so that he was not fit to make a statement till 1 p. m. next day.

On the evidence we are quite convinced that it was true that the appellant caused the death of Deonarain. A knife with which the murder is alleged to have been committed was found by the Sub-Inspector in the house of Judagi in the room occupied by Judagi's aunt Mt. Kumri. There was a mark on the handle which the Sub-Inspector thought to be blood but the Chemical Examiner has declared that it was not a mark of human blood. Whether this knife was used in the murder or it was another knife, it is clear from the medical evidence that sharp cutting knife was used and the carotid artery was cut causing death.

The first question which arises is whether the offence is the offence of murder or culpable homicide not amounting to murder. The evidence of Dasrath which has been believed is that a knife was used by the appellant. A man using a knife and stabbing another man in the throat with that knife must be taken to have known and intended that the blow should be fatal. Mr. Patel argues that there was no intention of causing death because these two men were friends. Now even friends in a drunken brawl may cause each other's death. Apart from the question of drunkenness, however, I should hold that the man who strikes another man with a knife in the throat must know that the blow is so imminently dangerous that it must in all probability cause death and the in-

injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.

The question then arises whether the fact that the appellant was drunk and also the fact that according to the evidence he had been knocked down by the deceased before he struck the blow can have the effect of reducing the offence.

We have been referred to various cases on the question of the effect of drunkenness in the gravity of an offence. These cases have been discussed in the case of *Director of Public Prosecutions v. Beard* (1). The conclusions which were drawn in that case by their Lordships were stated under three heads. The first head was :

"that insanity, whether produced by drunkenness or otherwise is a defence to the crime charged. The distinction between the defence of insanity in the true sense caused by excessive drinking, and the defence of drunkenness which produces a condition such that the drunken man's mind becomes incapable of forming a specific intention, has been preserved throughout the cases. The insane person cannot be convicted of a crime; *Folstead v. The King* (2) but, upon a verdict of insanity is ordered to be detained during His Majesty's pleasure. The law takes no note of the cause of the insanity. If actual insanity in fact supervenes, as the result of alcoholic excess, it furnishes as complete an answer to a criminal charge as insanity, induced by any other cause. In the early cases of *Burrow* (3), and *Rennie* (4), Holroyd, J., refused to regard drunkenness as an excuse unless it had induced a continuing and lasting condition of insanity. But in *Reg. v. Davis* (5) where the prisoner was charged with wounding with intent to murder, Stephen, J., thought (and I agree with him) that insanity even though temporary was an answer. The defence was that the prisoner was of unsound mind at the time of the commission of the act, and the evidence established that he was suffering from delirium tremens resulting from over-indulgence in drink."

Stephen, J., said :

"But drunkenness is one thing and the diseases to which drunkenness leads are different things and if a man by drunkenness brings on a state of disease which causes such a degree of madness even for a time which would have relieved him from responsibility if it had been caused in any other way then he would not be criminally responsible. In my opinion in such a case the man is a madman, and is to be treated as such, although his madness is only temporary If you think there was a distinct disease caused by drinking but

differing from drunkenness and that by reason thereof he did not know that the act was wrong you will find a verdict of not guilty on the ground of insanity."

"To the same effect is a decision of Day, J., in *Regina v. Baines* (*Taylor's Medical Jurisprudence*). The defence was that the prisoner was insane when the murder was committed. The evidence proved that the prisoner had on several occasions been under treatment for delirium tremens. He had one attack a week before, and another two days after committing the crime. Day, J., held that it was immaterial whether the insanity was permanent or temporary. The question was whether there was insanity or not, and the learned Judge ruled that if a man were in such a state of intoxication that he did not know the nature of his act or that his act was wrongful, his act would be excusable on the ground of insanity."

The second conclusion is :

"that evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent."

The third conclusion is :

"That evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts."

In my opinion the present case comes under the purview of this third conclusion. We have nothing to show that the accused was incapable by reason of drunkenness to form the intent necessary to constitute the crime. The fact is according to the evidence, that after he committed the crime he ran about saying that he had killed this man and was going to be hanged. He said that he had done a wrongful act.

In the case of *Mandru Gadaba* (6), it was held by Ayling, J., that ordinary drunkenness makes no difference to the knowledge with which a man is credited and if an accused knew what the natural consequences of his act were he must be presumed to have intended to cause them.

We are satisfied that in the present case the appellant had the knowledge and the intention which would make him liable under S. 302 and therefore therefore he is guilty of murder.

The last question is whether in the circumstances the extreme penalty should be imposed. In my opinion this is a case in which the extreme penalty

(1) [1920] A. C. 479.

(2) [1914] A. C. 584=83 L. J. K. B. 1192=80 T. L. R. 469=58 S. J. 584=24 Cox. C. C. 243=78 J. P. 213=111 L. T. 218.

(3) [1823] 1 Lewin 75.

(4) [1825] 1 Lewin 76.

(5) [1881] 14 Cox. C. C. 563.

(6) [1915] 38 Mad. 479=30 I. C. 451=16 Cr. L. J. 627.

is not called for. The death of the deceased was caused in the course of a drunken brawl and, though, it is true that Judagi may have started the quarrel by trying to take the pot of toddy from Deonarain, we find from the evidence that Deonarain knocked him down and beat him and that Deonarain was the bigger man of the two. Taking all the circumstances together I would reduce the sentence from a sentence of death to a sentence of transportation for life.

Chatterji, J.—I agree. The first thing to consider is whether it was the accused who killed the deceased. The evidence of Dasrath is that there was a quarrel between the accused and the deceased over a pot of toddy and the latter threw down the former on the ground and fisted him, and the accused, after having been separated by the witness, inflicted the fatal blow with a pointed knife into his throat. There is no suggestion of any enmity between this witness and the accused. It is said by learned counsel for the appellant that the witness is himself the murderer and that he implicated the accused in order to save himself. But why should he kill the deceased, the feelings between the two having been cordial. In the next place, if really he was the murderer why would the neighbours of the accused Judagi support him in his statement, that he at once shouted that the accused had killed Deonarain, especially when the witness Dasrath was a stranger to this place. I see no reason why the testimony of this man who has been believed by the learned Sessions Judge and three of the assessors, should be distrusted. In the next place his evidence as I have indicated is corroborated by neighbours who heard the shouting of the witness that the accused had killed the deceased. The depositions of Niranjani, Domi and Kashi fully corroborate this part of the case, besides some of the neighbouring females. Domi Choudhury is a Municipal Commissioner of Lalganj and a person of some position and influence in the locality. The accused approached this Domi and said "I have done some wrong but I may be excused." This statement of the accused in fact indicates an acknowledgment of the commission of the crime imputed to him. Lastly a knife which showed some signs of being

washed off but had some marks of blood in the corner was found in an unusual place in the house of the accused.

The three points which are urged against the prosecution case are: (1) that there was a delay of about three hours in the lodging of information before the police; (2) that there was an omission of the name of the accused in the sanaha by Dasrath and (3) that the widow of the deceased did not hear the name of the assailant till 1 a. m. when the first information report was lodged. All these points have been fully discussed by the learned Sessions Judge and carefully dealt with by him, and I am in complete agreement with the reasons given by him.

The only eyewitness, Dasrath, was not a resident of this village, and it is natural to expect that he would approach the residents of this place before going to the outpost or thana. Then when the matter was the result of a drunken brawl people would naturally hesitate whether it should be reported to the police, and it has further to be remembered that the young widow had to be looked after. The delay is not so serious as to throw any suspicion on the case for the eyewitness gave out the name of the assailant to independent persons some of whom admittedly hold responsible and respectable position in society.

The Head Constable, who entered the sanaha at 12 midnight explains that he omitted the name of the accused by mistake. This explanation would seem to receive support from the subsequent entries of 12 a. m. and 12-30 p. m. In the former it is stated that the Head Constable started in search of the accused and in the latter that Judagi the accused was marched off to the thana. These entries clearly show that the name of the accused had been given to the Head Constable. It is, however, unfortunate that this man tried to make a false entry in the original entry in order to cover up his foolish mistake. Judagi's name was mentioned at 1 a. m. when the first information was lodged at the thana and I fail to see why his name should not have been given an hour earlier. As to the third point, one must take into account the feeling of a young Hindu widow when confronted with the suddenness of the crime and the corpse of her deceased husband and it would be natural for her not to make any inquiry

or be able to talk to others or to pay attention to what they were saying. The Sub-Inspector's deposition shows that she was much distressed and found it difficult to make a statement when lodging her first information. I am satisfied on a careful consideration of the entire evidence that the deceased came by his death by the blow of the accused.

The crucial question in the case is whether the accused is guilty of murder under S. 302 or of culpable homicide not amounting to murder under S. 304. As laid down in S. 86, I. P. C., voluntary drunkenness by itself is no excuse for the commission of an offence. Though the accused may have been drunk at the time of the commission of the offence, the position will have to be considered from the aspect that he was a sober man. The nature of the wound inflicted in the present case and the character of the weapon used are such that a sober man would know that the act is so imminently dangerous that it must in all probability cause death. The offence, therefore, comes, in my opinion, within the substantive portion (Cl. 4), S. 300, I.P.C. But there are some extenuating circumstances in the present case which ought to be taken into account in considering whether the extreme penalty of the law should be imposed. The evidence of Dasrath is that Deonarain the deceased hit the accused Judagi first and threw him down. Then it must also be borne in mind that Judagi had no motive in causing Deonarain's death. Both had gone to Calcutta together and returned from that place at the same time only a week before the occurrence. On that day both ate and drank together as friends, and if really Judagi intended to cause the death of Deonarain he would have waited a few minutes and inflicted the blow after the departure of Dasrath, who did not belong to that village and would have left him afterwards. The evidence of the Sub-Inspector shows that the accused was drunk when the accused was brought to him. He tried to record the statement of the accused but he was too drunk to answer. The act appears to have been committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel while the accused was in a state of intoxication. Although drunkenness by itself does not excuse the commission

of an offence, this along with other circumstances may well be taken into account in considering the nature of the penalty to be inflicted. In view of all the circumstances of the case, I agree with my learned brother that this is a fit case in which the accused should be sentenced to transportation for life.

V.B./R.K.

Sentence reduced.

*** 1930 Cr. Cases 270**

(Patna)

WORT, J.

Emperor

v.

Lal Mohammad—Accused.

Criminal Ref. No. 11 of 1929, Decided on 19th September 1929.

(a) Criminal P. C., S. 307—Verdict of jury such as would not be come to by reasonable man—Reference is competent.

It is not in every case if the verdict of the jury does not commend itself to the Sessions Judge that he is entitled to refer the case to the High Court. The principle is that where the verdict is a verdict which would not be come to by a reasonable man then a reference would be competent: 13 *Mad.* 343 and *A. I. R.* 1929 *Pat.* 313, *Ref.* [P 271 C 1]

*(b) Criminal P. C., S. 307—Sole prosecution witness unreliable from point of view of Judge—Jury considering his evidence and giving different verdict from Judge—Reference held competent.

Where Sessions Judge is of opinion from the demeanour and the evidence of the witness that the witness is unreliable and the witness is the only witness on which prosecution relies and on whose evidence jury have based their verdict, it is not incompetent to make reference to High Court. Such a case is quite distinguishable from the case where the Sessions Judge takes a view of the evidence quite different from one which jury have taken. [P 272 C 2]

Government Pleader—for the Crown.

Bashiruddin and N. Hasan—for Accused.

Judgment.—This is a reference under S. 307, Criminal P. C., by the learned Sessions Judge of Shahabad.

A preliminary objection is taken by the learned Government Pleader on the ground that the reference is not competent for the reason that, as the letter of reference indicates, the learned Judge was merely of a different opinion on the evidence from that of the jury who tried the case. It is argued that the mere fact that the Judge disagrees with the view taken by the jury of the evidence does not make it a matter for a reference under S. 307 of the Code. It is unnecessary perhaps for me to state the principles which have been discussed in many cases, and it will be sufficient for me to say that it is not in every

case in which the verdict of the jury is one which does not commend itself to the Sessions Judge, that he is entitled to refer the case to the High Court. The cases of the different High Courts perhaps do not agree in every detail in their decisions, but substantially the principle applicable in cases under S. 307 is that where the verdict is a verdict which would not be come to by a reasonable man then a reference under S. 307 is competent. Perhaps I have stated the extreme principle, but there is abundant authority for the proposition which I have stated. *

However, in cases where, as in this case, the jury has convicted and the learned Sessions Judge is of the opinion that the accused should be acquitted, it is perhaps easier to apply the principles than in a case where the jury have acquitted and the Sessions Judge would convict the accused. It is quite clear in the first place that where there is no evidence against the accused person, then it is the manifest duty of the trial Judge to refer the matter to the High Court. That, of course, is perhaps an extreme case and as I have stated one in which there is no difficulty in applying the true principle.

Now the facts of this case in that connexion are those that there is substantially only one witness of the prosecution in this case, that is to say, if that witness is disbelieved then the prosecution must inevitably fail. If she is to be believed, then the verdict of the jury in this case convicting the accused is justified. I ought to mention perhaps at this stage that there was a jury of five of whom four were Hindus and one was a Mahomedan. There was a verdict of the jury which was not unanimous, four being in favour of conviction and one of acquittal. Exactly which of these jurors held those views does not appear. The accused person is a Mahomedan.

Now, the learned Sessions Judge in his letter of reference states the reasons why the evidence of Mt. Chandan Kuer, who was the victim of the crime if such was committed and who is the only witness for the prosecution on the main part of the case, should not be believed. Now, in the first place it appears that she made a statement on oath to Mr. Gomes. That statement is wholly in-

consistent with the evidence which she gave in Court. Her explanation of it is that she was induced, if not threatened, by the accused and thus she came to make the statement which she did before Mr. Gomes which if true would show that the accused was quite innocent of the offence of abduction with which he is charged in this case. The statement by her before the Court, as I have stated, is wholly inconsistent with her former statement. In Court she alleges that the accused Lal Mohammad induced her on 11th March of this year to leave Arrah and go with him on the representation that he was about to take her to her daughter who was living at Amritsar. For the purpose of this judgment it is unnecessary for me to state in detail the facts of the case, but what did in fact happen was that she left Arrah with the accused: that fact cannot be denied. She eventually arrived at Patna City where she stayed for some weeks. She also stayed under the protection of the accused person at Buxar. In her evidence she claims to have protested on leaving Arrah and in fact on the journey to Patna she complained to the accused person that whereas she thought she was going to Amritsar, that is, in westerly direction, she was in fact travelling in easterly direction. She stated that the accused explained to her that the better way to get to Amritsar was through Patna by the Punjab Mail.

Now, I mention those facts in connexion with the statement by the learned Judge in the letter of reference that the witness was not to be believed. He comes to the conclusion that the evidence is inconsistent for the reasons stated in his letter of reference, with the suggestion of an intrigue between the accused person and Mt. Chandan Kuer. Now of that quite clearly there is no evidence. There may be suspicion of it and it seems to me that one of the grounds, the most substantial for that suspicion, is the fact which I think must be admitted on all hands that Mt. Chandan Kuer left Arrah with the accused person admittedly after a conversation which lasted only a few minutes and incidentally a conversation which was the first that Mt. Chandan Kuer had ever had with the accused in the course of her life. This was a circumstance which led the learned Judge to believe

that the story which she told before the Sessions Judge and the jury is not to be believed.

I come back to the point at which I started, namely, whether having regard to these circumstances the argument put forward by the Crown that this reference is not sustainable is good or not. What is the position when, as in this case, there is in the opinion of the Judge no evidence upon which the accused can be convicted? The learned Judge not only from the evidence but I should suppose from the demeanour of the witness herself in the box holds that she is a woman who is not to be believed. It is true that in his summing up to the jury he has pointed out in a very emphatic manner that in his opinion this woman is not a witness of truth, and in fact in spite of that direction the jury have convicted the accused person by a majority as I have already stated. Now one case has been referred to in this connexion: *Queen-Empress v. Gururadu* (1). In that case the jury had found the prisoners guilty of theft. The learned Acting Sessions Judge in that case was of the opinion that although he did not think the evidence justified the conviction it was not incumbent upon him to refer the case to the High Court as there may be more probably an appeal. The learned Judges who decided that case stated that under S. 307 discretion is left to the Judge to refer the case to the High Court, for it is only when he disagrees with the verdict of the jury:

"so completely that he considers it necessary for the ends of justice to submit the case to the High Court,"

that he should do so. The Court adds:

"This discretion should, however, always be exercised when the Judge thinks that the verdict is not supported by the evidence. It is the only way in which the miscarriage of justice by a perverse verdict of a jury, which is of too frequent occurrence, can be remedied by the High Court."

I have quoted that case having regard to the statement made regarding it in the case of *Ramdas Rai v. Emperor* (2). I very respectfully disagree with the learned Judge who decided this case in making the observation which he made in the judgment beyond the necessity of case. The principle which was laid down (and this part of the judgment is not quoted in the case of *Ramdas Rai*)

by the Madras High Court was that where the Judge disagrees with the verdict of the jury:

"so completely that he considers it necessary for the ends of justice to submit the case to the High Court,"

he should do so. The point, therefore, is: at what state of the evidence is the Judge justified in saying that in the interest of justice the matter should be referred to the High Court? It is open to this Court to say that the reference is competent when the Sessions Judge, as in this case, states that the only witness upon which the prosecution must rely in order to succeed is not a witness to be relied upon. In my judgment it is impossible to say that in a case of this kind, where the learned Judge has the advantage, which this Court has not, namely, of observing the demeanour of the witness and at the same time hearing her evidence and comes to the conclusion that it is not to be believed, a reference in those circumstances is incompetent. I repeat that in circumstances of that kind it is impossible to uphold that view. The view which I have expressed indicates that this case is quite different from a case where the learned Judge merely takes a view of the evidence as a whole different from the view which the jury are supposed to have taken in the matter. It is, in my judgment, almost impossible where, as in this case, the sole witness has made two conflicting statements to come to a conclusion whether the first statement or the second statement is a true one. Where there is a conviction in those circumstances, in my judgment, the verdict of the jury is one which can hardly be sustained.

Having regard to my view as to the competency of this reference it seems unnecessary for me to add anything as regards the opinion of the jury and the evidence in the case. I have already expressed my view of the opinion stated by the learned Judge. I will satisfy myself by stating that this case when once it is found that the reference is competent is to be dealt with by the Court in the same manner as an appeal and that I must state that the evidence upon which the prosecution relied in this case did not justify the conviction which has been recorded by the jury.

In these circumstances the reference is accepted, and the accused is acquitted
V.B./R.K. Accused acquitted.

(1) [1890] 13 Mad. 343=2 Weir 389.

(2) A. I. R. 1929 Pat. 313=8 Pat. 344.

*** 1930 Cr. Cases 273**
(Madras.)

BEASLEY, C. J., AND CORNISH, J.
Muthuswami Servaigaran and another—Petitioners.

v.

Thangammal Ayyar—Respondent.

Criminal Revn. No. 273 of 1929 and Criminal Revn. Petn. No. 243 of 1929, Decided on 11th October 1929, against order of Addl. Dist. Mag. Tanjore, D/-23rd February 1929.

*** Criminal P. C., S. 144—High Court can revise order under S. 144 provided revisional jurisdiction is exercised within 2 months of order.**

The effect of the omission of Cl. (3), S. 435 is that now under the present Code High Court has power to revise orders under S. 144, and in order that the High Court may revise the order the revisional jurisdiction must be exercised within 2 months of the passing of the order. (*Case-law discussed*). [P 277 C 1]

K. S. Jayarama Ayyar and S. Rangachari—for Petitioners.

K. S. Sankara Ayyar—for Respondents.

Public Prosecutor—for the Crown.

Order.—This Criminal Revision Petition has been posted before us for a decision upon two preliminary points.

The facts are that the Sub-Divisional Magistrate of Pattukottai in exercise of his powers under S. 144, Criminal P. C., directed the petitioners to vacate the Nagaram palace building forthwith on the ground that the occupation caused annoyance and obstruction to the zamindari and was likely to cause an immediate disturbance of the public tranquillity and a riot. In accordance with this order that palace was vacated and an application was subsequently made under sub-S. 4, S. 144, Criminal P. C., to the Additional District Magistrate of Tanjore to rescind the order of the Sub-Divisional Magistrate of Pattukottai. This application he rejected. The original order was dated 23rd January 1929, and the order rejecting the petition was on 23rd February. The petitioners then presented this revision petition. When it came on for hearing before Reilly, J. in view of the question raised, namely, whether the High Court has power to interfere in revision with orders under S. 144, Criminal P. C., and the importance of that question he directed that the petition should be heard by a Bench of two Judges. Another question raised before him was whether the petition is

out of time because orders under S. 144, Criminal P. C., are in force only for two months. This question also has been left for this Bench to decide.

Dealing with the latter question first, on the assumption that the Sub-Divisional Magistrate acted within his jurisdiction in passing the order, it cannot be questioned that, as the two months have now elapsed since the order was passed, the High Court has nothing to revise. The question as to whether or not the Sub-Divisional Magistrate had jurisdiction to make the order is one of the matters raised in the petition but we are not disposing of that question here as that is not one of the preliminary questions we have to decide. In view of the fact that the High Court has now no order to revise the determination of the larger and more important question as to whether such orders are revisable would be unnecessary but for the fact that two petitions which came on recently for hearing before Ananta-krishna Ayyar, J., were ordered to stand over pending the decision by us of this point and we accordingly allowed the matter to be argued.

It is necessary, first of all, to trace the history of Ss. 144 and 435, Criminal P. C. In the Code of 1864 S. 62 corresponds to the present S. 144 and S. 404 corresponds to S. 435. S. 404 reads as follows.

"The Sudder Court may, on the report of a Court of Session or of a Magistrate, or whenever it thinks fit, call for the record of any criminal trial or the record of any judicial proceeding of a criminal Court, other than a criminal trial, in any Court within its jurisdiction, in which it shall appear to it that there has been error in the decision on a point of law, or that a point of law should be considered by the Sudder Court and may determine any point of law arising out of the case, and thereupon pass such orders as the Sudder Court shall seem right."

The earliest decision upon the point we had to decide was under the Code of 1861 and that was *Abbas Ali Choudhury v. Illim Meach* (1). That was a decision of a Full Bench, of the Calcutta High Court which decided, Phear, J., dissenting, that an order passed by a Magistrate under S. 62, Criminal P. C. is not of the nature of a judicial proceeding and therefore cannot be interfered with by the High Court under S. 404 of that Code. Couch, C. J., in his

(1) 14 W. R. Cr. 46.

judgment on p. 51 in referring to S. 62 says :

"The language of it seems to point out that it was intended to give the Magistrate a power to be exercised with the utmost promptitude ; and, if he should make an order which he had no authority to make, and the party on whom that order is made should not obey it, and be convicted, its legality may then be tried. That is the ground upon which I have always been of the opinion that this is not a judicial proceeding."

In the Code of 1872 S. 518 corresponds to S. 144 of the present Code and S. 520 states that orders made under S. 518 are not judicial proceedings. This latter section was obviously the result of the decision of the Full Bench of the Calcutta High Court already referred to. Under the Code of 1872 we have two decisions upon this point, namely, *E. V. Ramanuja Jeeyarswami v. Ramanuja Jeeyar* (2), a decision of Innes and Muthuswami Iyer, JJ., in which it was held that proceedings under S. 518 of that Code are not revisable by the Courts as such orders were expressly declared in that Code to be not judicial proceedings and *Sundaram v. Queen* (3), where at p. 222 Sir Charles Turner stated:

"It should always be borne in mind that orders under S. 518, Criminal P. C., of 1872 are not judicial proceedings, and if the High Court has power to correct them otherwise than indirectly which is doubtful, that power can rarely be exercised in time to prevent hardship. The law in sanctioning this imperfectly controlled power is careful to provide it shall be committed only to Magistrates whose discretion is presumably guaranteed by their responsible position or by selection."

The next decision is one under the Code of 1882 and it is a decision strongly relied upon by Mr. Jayarama Ayyar in support of his argument that proceedings under S. 144 of the Code are judicial proceedings. That is *Queen Empress v. Tirunarasimhachari* (4) in which it was held by Sir Arthur Collins, C. J., and Parker, J., that a Magistrate making an enquiry before issue of an order under S. 144 of the Code is acting in a stage of a judicial proceeding and has, therefore, jurisdiction to direct the prosecution of witness for giving false evidence before him at such enquiry. Under the Code of 1882, differing from the Code of 1872, proceedings under S. 144 were stated to be not proceedings. In that case Sir Arthur Collins stated :

"The difficulty arises from the variation in language between S. 297 of the old Code and S. 485 of the present Code. Under the old Code powers of revision were granted to the High Court in judicial proceedings only, and the enacting of S. 520 would seem to imply that, but for that section orders under S. 518 would be "Judicial proceedings."

Section 485 of the present Code enables the High Court to call for the record of "any proceeding before any inferior criminal Court" and, therefore, orders under S. 144 would certainly be subject to revision, were it not for the proviso in Cl. 3 of the section. Under S. 4 of the present Code "Judicial proceedings" is defined to be

"any proceeding in the course of which evidence is or may be legally taken."

It seems to us impossible to deny that a Magistrate acting under S. 144 may legally take evidence before issuing an order From this it would appear that both under the old Code and under the present Code these urgent orders were regarded as in their nature "judicial proceedings." the only difference being that, whereas under the Old Code, S. 520 somewhat inaccurately declared them not to be judicial proceedings for the purpose of ousting the High Court's powers of revision under S. 297 of the present Code equally bars the High Court's jurisdiction without making an illogical declaration.

Sir Arthur Collins therefore took the view that when in the Code of 1872 proceedings under S. 518 were declared not to be judicial proceedings it was not because they were not judicial proceedings but because it was intended to prevent these orders made upon sudden emergencies from being the subject of revision and the Code of 1882 by stating that they were not proceedings more accurately described them. The next Code to be considered is that of 1898 and it is similar to the Code of 1882 in that by sub-S. (3), S. 435, orders made under S. 144 are not proceedings within the meaning of S. 435. On the 1898 Code there is a decision in *Arunachalam Pillai v. Ponnusami Pillai* (5) of Sadasiva Iyer and Napier, JJ. which is strongly relied upon by Mr. Jayarama Ayyar in support of his argument. In that case it was held that the High Court has no appellate or revisional

(2) [1881] 8 Mad. 354.

(3) [1882] 6 Mad. 293 (F.B.)

(4) [1896] 19 Mad. 18.

(5) [1918] 42 Mad. 64—35 M. L. J. 454—3 M. L. W. 422—43 I. C. 573—(1918) M. W. N. 324.

Power to interfere with the orders of a Public servant except in so far as they are orders passed by the public servant in his capacity of a Court subordinate to the High Court and that an order passed by a Sub-Magistrate under S. 144, Criminal P. C., is an order made by him in his capacity as a Court and he is also acting as a Court when he grants or refuses sanction for a prosecution for the disobedience of such order. In that case the order passed under S. 144 of the Code had been disobeyed but the Stationary Sub-Magistrate passed an order refusing sanction to prosecute the person who had disobeyed the order and Napier, J., on p. 424, says:

"We are clear that the Stationary Sub-Magistrate in passing this order refusing sanction was acting judicially, for the original order which it was alleged was disobeyed was an order passed under S. 144, Criminal P. C. These orders have always been treated as judicial orders and we cannot separate the authority issuing the order from the authority granting sanction for disobedience of it."

When Napier, J., stated that these orders have always been treated as judicial orders he was referring to the numerous cases to which our attention has been drawn where the High Court has interfered with orders passed under S. 144 of the Code on the ground that the Magistrate had no jurisdiction to pass such orders. The High Court obviously could not in the face of the Code revise those orders but interfered on the question of want of jurisdiction alone under S. 15, Charter Act and S. 107, Government of India Act. As he points out in his judgment the High Court could have no appellate or revisional power if the Magistrate acts administratively and it is only where he acts judicially that the High Court can possibly interfere under the Charter Act or the Government of India Act. We have therefore this position that the High Court has always been acting under its inherent powers and interfering with Magistrates who have acted under S. 144 without jurisdiction but has been expressly prevented from revising the orders of these Magistrates under S. 435. It is argued from this by Mr. Jayarama Ayyar that it was not because such orders were not in the nature of judicial proceedings that the power of the High Court to revise them was ousted but because it was undesirable that the discretion of Magis-

trates acting very often on a sudden emergency should be revised by the High Court and that whereas in 1872 such "proceedings were said not to be judicial proceedings" in 1882 they were said not to be proceedings within the provisions of S. 435 and the same under the Code of 1898, that bar to the High Court has now been removed by the Code of 1923 where sub-S. (3), S. 435, has been omitted.

We now come to the Code of 1923. But before doing so there is another case to which reference has been made which, although it was decided in 1923, was before the Code of that year came into force. That is *Nataraja Pillai v. Rangasami Pillai* (6), a decision of Ayl- ing and Ramesam, JJ. The facts in that case were that a Sub-Divisional Magistrate passed an order under S. 144, Criminal P. C., prohibiting certain persons from interfering with a religious ceremony. On disobedience of that order he sanctioned their prosecution for an offence under S. 188, I. P. C., and it was held that the Magistrate was not, when passing the order under S. 144, Criminal P. C., acting as a Court within the meaning of Cl. (7), S. 195, Criminal P. C., but was only acting as a public servant and hence the proper appellate authority to revoke the sanction was not the Sessions Court, but the District Magistrate as provided by Cl. (6), S. 195. The decision of Sadasiva Iyer and Napier, JJ. in *Arunachalam Pillai v. Ponnusami Pillai* (5) was not followed. The Court followed the Calcutta Full Bench case and also relied on *Sundaram v. Queen* (3). But that was a decision under the Code of 1872 which expressly stated that proceedings under the corresponding section to S. 144 were not judicial proceedings and the Full Bench in that case could not possibly therefore have held the proceedings were judicial proceedings. Moreover the judgment in *Nataraja Pillai v. Rangasami Pillai* (6) does not deal with the other aspect of the case presented by Napier, J., namely that such orders must be judicial orders and not administrative for otherwise the High Court could not interfere in those cases where the Magistrate has acted without jurisdiction whereas the High Court has

invariably done so under the Charter Act and the Government of India Act. No doubt most of the orders passed by a Magistrate do not in the least seem to be judicial proceedings, and Ayling, J., gives such an instance on p. 59. Then came the Code of 1923 and there sub-S. (3) to S. 435 is omitted and one question to be considered by us is what is the effect of that omission? There have been two decisions with regard to this question under that Code: *Vedappan Servai v. Periannam Servai* (7) and *S. Alaga Thevar v. G. A. Baker* (8). The former decision is one of Ramesam, J., and the latter is one of Reilly, J., following *Nataraja Pillai v. Rangaswami Pillai* (6) already referred to. In *Vedappan Servai v. Periannam Servai* (7), Ramesam, J., held that no revision lies to the High Court against an order passed under S. 144, Criminal P. C., as the Magistrate acting under that section is not a Court and the amendment of S. 435, Criminal P. C., by the omission of Cl. (3) from that section has not the effect of permitting a revision to the High Court from such an order, though it has the effect of permitting a revision from an order under S. 145. On p. 623, Ramesam, J., states:

"it seems to me that as to S. 144, Cl. (3), S. 436 was somewhat redundant and only made matters clear. Even without it, it is doubtful whether S. 435 applies. There is nothing in S. 144 to indicate that the Magistrate acting under that section is a Court as in the case of S. 145."

He was referred to a decision of the Privy Council in *Clarke v. Brojendra Kishore Roy* (9) but in his opinion that case did not help the petitioner because it only showed that in some parts of the Code the words "Courts" and "Magistrates" are used interchangeably and that under S. 96 a Magistrate issuing search warrants was acting as a Court but this did not conclude the matter as to S. 144. The Privy Council case is reported in *Clarke v. Brojendra Kishore* (9), and, in our view, it is a decision strongly in support of Mr. Jayaram Ayyar's contention. There the District Magistrate issued a search warrant in connexion with the investigation of some offence. A suit for tres-

pass against him was instituted but it was held by the Privy Council that by S. 36, Sch. 3 and S. 96, Criminal P. C., the power of issuing a search warrant was among the "ordinary powers" of the District Magistrate and therefore under S. 105 he had power to direct a search to be made in his presence if he thought it advisable to do so. Lord Macnaughten in delivering the judgment of the Judicial Committee referred to S. 36, Cr. P. C., which is as follows:

"All District Magistrates, Sub-Divisional Magistrates and Magistrates of the first, second and third classes have the powers hereinafter respectively conferred upon them and specified in the Sch. 3. Such powers are called their "ordinary powers."

Section 36 is in Chap. 3 which is headed "Powers of Courts." When Sch. 3 is referred to it will be seen that under part 4 of that schedule which is headed "ordinary powers of a Sub-Divisional Magistrate" Cl. (6) is power to make orders under S. 144. On p. 966, Lord Macnaughten states:

"For the sake of brevity the Code uses the terms "Court" and "Magistrate" generally if not always, as convertible terms."

It is impossible to avoid the conclusion that this case decides that every act done by a Magistrate in pursuance of the powers given to him by S. 36 and Sch. 3 is done by him as a Court particularly when it is remembered that the chapter is headed "Powers of Courts." The present Code like the Code of 1898 and that of 1882 merely speaks of "proceedings" and not "judicial proceedings" so that it is not necessary really to consider anything more than the power of the High Court to revise a "proceeding before an inferior criminal Court." Although judicial proceedings are defined in the Code as including "any proceeding in the course of which evidence is or may be legally taken on oath" it was admitted in argument before us that it may sometimes be necessary for the Magistrate before issuing an order under S. 144 to take evidence on oath so that even if that test is applied, it would appear that these proceedings may be judicial proceedings. It is quite true that in the Calcutta Full Bench case such proceedings were held not to be judicial proceedings but that decision was not unanimous and it was undoubtedly in consequence of it that the Code of 1872 described such proceedings as not judi-

(7) A. I. R. 1928 Mad. 1108=52 Mad. 69.

(8) [1228] 55 M. L. J. N.

(9) [1712] 89 Cal. 953=16 I. C. 501=39 I. A. 143 (P. C.).

cial. The decision of the Full Bench of this Court in *Sundaram v. Queeni* (3), could not have been otherwise than it was as we have already stated, because the Code of 1872 stated that such proceedings were not judicial proceedings. There is also the other description to be applied namely "proceedings of an inferior Criminal Court." The Privy Council case, in our view, makes such proceedings, proceedings of a Court, so that that description is also applicable. If this is so, then we are bound to take a different view to that of Ramesam, J., in the case in *Vedappan Servai v. Periannan Servai* (7), where he says that Cl. (3), S. 435 was redundant. What is the effect of the omission of that clause in the present Code? We cannot say that that omission was unintentional. We have to take the Code as it is. Up to the present Code, from 1872 until 1923, a ban was placed upon the High Court's power of revision with regard to proceedings under S. 144. Now that ban has been removed. It may have been unintentionally removed but we are not concerned with that. We must hold that the effect of that omission is that the ban is removed and that the High Court has now power to revise such orders. We are aware that, if this decision is right, it may lead to most unfortunate consequences. It is obvious that the Magistrate has most frequently to act in an emergency and that it will be a disaster, if, when he does make an order, a criminal revision petition is at once presented to the High Court and a stay order applied for. We come to the decision we have with great regret and only say that, if Cl. (3), S. 435 was omitted by mistake we hope that legislature will as soon as possible restore it at any rate as far as S. 144, Criminal P. C., is concerned. Petition is dismissed as the order expired before the petition was presented.

P.R.S./V.B.

*Petition dismissed.***1930 Cr. Cases 277**

(Patna)

WORT, J.

Bhagirath Bhagat—Petitioner.

v.

Ram Narain Sahu—Opposite Party.

Criminal Revn. No. 477 of 1929, Decided on 20th September 1929.

(a) Criminal Trial—Stay — Pending civil

litigation on same matter criminal prosecution should not invariably be stayed.

There is no invariable rule that a criminal proceeding should be stayed pending the result of civil litigation which deals with the same matter. It must be assumed that each Court must be allowed to proceed with the business on its file without any intervention of this kind.

(b) Criminal P. C., S. 476—Parties to prosecute matter contemplated by S. 476 is reprehensible—Court alone should in such matter take action.

Although criminal procedure allows it, it is very reprehensible course for the parties in a litigation to prosecute a criminal matter of the kind contemplated by S. 476. If it is obvious to Subordinate Judge that a criminal offence had been committed, then undoubtedly it is his duty to proceed in bringing the culprit to justice. [P 278 C 1]

(c) Criminal Trial—Prosecution under S. 476—Fact that appeal is preferred against civil case which may reverse finding does not stay prosecution.

Where a civil Court finds a document to be forged and criminal prosecution is started against the party with reference to the forged document, the mere fact that an appeal has been preferred in the civil case which may possibly reverse the finding of the trial Court, is no ground for staying prosecution.

B. P. Jumar—for Petitioner.*S. P. Verma*—for Opposite Party.

Judgment.—This rule was issued to show cause why the proceedings taken against the applicant based on an allegation of forgery should not be quashed. At the present moment it has reached the stage when notices have been issued to the applicant to show cause why he should not be prosecuted. The principle which governs a matter of this kind has been laid down in a number of cases, some of which are referred in the judgment in *Hriday Narain Singh v. Emperor* (1) and it only need be stated that the principle is that there is no invariable rule that a criminal proceeding should be stayed pending the result of civil litigation which deals with the same matter. In this case the applicant produced certain documents before the Subordinate Judge and although he got a modified decree before the learned Judge the Court came to the conclusion that these documents were forged, that there were interpolations by the accused. It is stated that there is an appeal pending before this Court which may result in the finding of the learned Subordinate Judge being reversed. That, however, is not a ground for staying the proceeding as has been stated in the case.

(1) A. I. R. 1929 Pat. 500.

I have quoted in the criminal revision case to which I have referred. It must be assumed that each Court will do justice and also each Court must be allowed to proceed with the business on its file without any intervention of this kind. In any event in my judgment the stage at which these proceedings have reached is not a stage at which I can interfere.

I would like to express a very strong opinion that, although the Criminal Procedure Code allows it, it is a very reprehensible course for the parties in a litigation to prosecute a criminal matter of this kind. If it had been obvious to the learned Subordinate Judge that a criminal offence had been committed, then undoubtedly it was his duty to proceed as the law allows him to proceed in bringing the culprit to justice. The Court in this case has allowed one of the parties to the civil litigation to move in the matter, the course which, in my judgment, is not to be encouraged. With these observations I must discharge the rule.

V.B./R.K.

Rule discharged.

1930 Cr. Cases 278

(Patna)

COURTNEY-TERRELL, C. J. AND
CHATTERJI, J.

Banslochan Lal—Accused.

v.

Emperor—Opposite Party.

Criminal Revn. No. 246 of 1929, Decided on 2nd August 1929.

(a) Police Act (1861), S. 29—Police Manual Part 1, R. 278—Court officer must keep diaries in his possession and should refuse request of the accused for them.

The meaning of R. 278 is that the Court officer is to keep the diaries in his own possession and that if the accused or his agent call for the diary in any circumstances other than those mentioned in the earlier part of para. (b) of the rule the Court officer should refuse to comply with the request. [P 280 C 2]

(b) Police Act (1861), S. 29—Construction—"Rules and Regulations," refer to those framed by competent authorities—"Lawful order," refers to any order lawfully given by any officer—Offences under S. 29 include any "violation of duty."

Section 29 is to be construed quite widely. The words "rules and regulations" refer to such rules and regulations as are properly framed by competent authorities, that is, to say by the Inspector General. So also the words "lawful order" refer to any order which any officer may lawfully give to any individual or specific body of individuals under his command. Offences under S. 29 are not limited to

the wilful breaches or neglect of a rule or regulation or a lawful order but include any "violation of duty": 2nd Cr. L. J. 465, Rel. on. [P 280 C 2]

(c) Police Act (1861), S. 29—Police Manual Part 1, R. 803—Police diaries are included in "document or information."

The words "document or information" used in R. 803 are comprehensive enough to include the police diaries, although they have been specifically dealt with under R. 278. [P 280 C 2]

(d) Police Act (1861), S. 29—Police Manual Part 1, R. 261-A—Rule is enabling one.

Rule 261-A is merely an enabling rule except that in the case of a Magistrate who institutes a prosecution he must be the Magistrate of the District: 1 W. R. 5 CrL. and 9 W. R. 86 CrL. Dist. [P 281 C 1]

(e) Police Act (1861), S. 29—Offence of police officer continues till diary remains in mukhtar's hands—Mukhtar is, therefore, liable as abettor under S. 29.

A mukhtar who is allowed to have possession of the diary by the Police Officer is guilty of the abetment of the offence under S. 29, Police Act, as the offence continues so long as the diary is in mukhtar's hand. [P 281 C 2]

(f) Criminal Trial—Sentence—Allegation of entire concoction of the prosecution story—No evidence elucidated in cross-examination—Advocate raising contention on clients instructions—It is a good ground for aggravation of sentence—Legal practitioner raising contention without reasonable cause is guilty of grossest professional misconduct (*Obiter*)—Legal Practitioner's Act, S. 13.

Per Courtney-Terrell, C. J.—In a clear case where an advocate on the direct instructions of his client argues that the prosecution story is an entire concoction on the part of the police and no evidence whatever elucidated in cross-examination or offered by examination-in-chief is ever produced in support of this argument the Court should take this into account as a circumstance of aggravation in awarding the sentence. Where such suggestion is made by the legal practitioner without reasonable cause the legal practitioner is guilty of grossest professional misconduct. [P 282 C 1]

(g) Practice—Criminal Trial—Advocate beginning attack in cross-examination upon prosecution involving dishonourable conduct—Court should ask assurance as to his grounds—Assurance, if refused cross-examination as to the point should be stopped—Assurance, if given but subsequently found false advocate's conduct should be brought to High Court's notice (*Obiter*).

Per Courtney-Terrell, C. J.—It is the duty of the tribunal if it has any suspicion when an advocate begins an attack upon a prosecutor or witness by way of so called "suggestions" involving dishonourable conduct to demand from the advocate an assurance that he has good grounds for making the suggestion. If the assurance is not received the cross-examination on those lines should be stopped promptly. If the assurance is given and if it should appear at the termination of the trial that no such ground has existed the tribunal

should bring the conduct of the advocate to the notice of the High Court. [P 282 G 1, 2]

A. Imam, H. L. Nandkeolyar and B. P. Sinha—for Petitioner.

C. M. Agarwala—for the Crown.

Courtney-Terrell, C. J.—This is a petition for the revision of a decision of the Sessions Judge of Shahabad, convicting the petitioners Banslochan Lal a mukhtar practising at Bhabhua, and Barmeshwar Nath Varma, a Court Sub-Inspector employed at the same place. The facts are as follows: At Bhabhua there were two factions which I will term *A* and *B* respectively of the Moslem community. Between these factions litigation and criminal cases had taken place. One Khurshed Mian a member of faction *A* had lodged a first information accusing one Sher Muhammad and several others of faction *B* of rioting. The matter was investigated by the police, a charge-sheet was prepared and the charge-sheet together with the case diaries were sent to the petitioner Barmeshwar Nath Varma. The Sub-Divisional Officer fixed 5th June 1928, for the hearing. The petitioner Banslochan Lal was employed to defend the accused. On 4th June, the Inspector Zeaur Rahman acting on information received at the thana went accompanied by two Sub-Inspectors and a constable to the house of the Court Sub-Inspector. There he found the petitioner mukhtar together with another mukhtar. The petitioner Banslochan had in his hands the case diary and was taking notes from it. The Court Sub-Inspector was away in another part of the house but he appeared after a few moments, and explained that in his absence the mukhtar had taken the case diary. It is clear, however, that he had without permission from superior authority and on his own responsibility allowed the mukhtar to see the case diary and take the notes. The other mukhtar has since been acquitted. The Court Sub-Inspector and the two mukhtars were taken before the Sub-Divisional Officer of Arrah and a charge-sheet was prepared by the police. This charge-sheet contained amongst other things charges under S. 29, Police Act, 1861. The Magistrate, however, charged the Sub-Inspector under Ss. 409 and 217, I. P. C., and the petitioner Banslochan Lal was charged with abetment under

Ss. 409 and 114; also under Ss. 217, 114 and 379, I. P. C. The trial Court convicted the accused under all these sections. The petitioners were ordered to be detained until the rising of the Court. The petitioner Banslochan Lal was sentenced to pay a fine of Rs. 300 and the petitioner Barmeshwar Nath Varma to pay a fine of Rs. 250.

On appeal to the Court of Sessions the Judge held on the facts that there could be no conviction under Ss. 409, 217 or 379, I. P. C. But he himself framed a charge under S. 29, Police Act, as against the Court Sub-Inspector and as against the mukhtar under S. 29, read with S. 114, I. P. C. He convicted the petitioners under these sections, and he reduced the sentences to fines of Rs. 150 in respect of each of the accused. He found that there had been a breach of Rr. 278 and 803, Police Manual, Part 1.

Section 29, Police Act is as follows:

"Every police officer who shall be guilty of any violation of duty or wilful breach or neglect of any rule or regulation or lawful order made by competent authority, or who shall withdraw from the duties of his office without permission, or without having given previous notice for the period of two months, or who being absent on leave, shall fail, without reasonable cause, to report himself for duty on the expiration of such leave or who shall engage without authority in any employment other than his police duty, or who shall be guilty of cowardice, or who shall offer any unwarrantable personal violence, to any person in his custody, shall be liable on conviction before a Magistrate, to a penalty not exceeding three months pay, or to imprisonment, with or without hard labour, for a period not exceeding three months, or to both."

The first point taken on behalf of the petitioners is that Rr. 278 and 803, held to have been broken are not statutory rules or regulations and that the meaning of the words "made by competent authority" implies that the rules referred to in S. 29 must be such only as have such statutory authority. Now under S. 12 of the same Act it is enacted as follows:

"The Inspector-General of Police may from time to time, subject to the approval of the Local Government, frame such orders and rules as he shall deem expedient relative to the organization, classification and distribution of the police force, the places at which the members of the force shall reside, and the particular services to be performed by them; their inspection, the description of arms, accoutrements and other necessities to be furnished to them; the collecting and communicating by them of intelligence and information; and all such other orders and rules relative to the police force as the Inspector-General shall, from time

to time, deem expedient for preventing abuse or neglect of duty, and for rendering such force efficient in the discharge of its duties."

If such rules have received the approval of the Local Government it is clear that they are rules to which S. 29 applies. At the head of the volume of rules contained in the Police Manual (among which Rr. 278 and 803 are to be found) there appears a preface signed by the Officiating Chief Secretary to the Government of Bihar and Orissa. It is as follows:

"The Lieutenant-Governor in Council has, in exercise of the powers conferred by the sections mentioned on the margin of the paragraphs or sub-paragraphs of this manual which are marked with an asterisk, or a single or double dagger, made or approved the orders and rules contained in those paragraphs or sub-paragraphs in supersession of all orders and rules heretofore made under those sections.

2. The remaining paragraphs of the manual, though not having statutory force, are binding on all police officers, as well as on all other officers of Government to whom they refer.

3. Only those rules or orders have been framed as statutory rules or orders to which it seemed necessary or desirable to give legal effect; but there are many others contained in the manual which might have been issued as statutory rules or orders had it been deemed necessary to issue them in that form."

In the margin of Rr. 278 and 803, there is no "asterisk or single or double dagger." It is difficult to understand why the preface was framed in this way and no explanation of it is forthcoming. All that was required was the approval by the Government and para. 2 of the preface clearly indicates that whether or not it was the intention of the Government to give to any particular rules and regulations the status of statutory rules it is very obvious that all the rules have received the approval of the Government and are intended by the Government to be binding upon all police officers. R. 278 is divided into three paragraphs and the first two only are material. R. 278, para. (a) is as follows: "The original file of case diaries is attached to the charge-sheet: see R. 177 (a). The diaries shall remain in the personal custody of the Court Officer, but he shall make them over to the prosecuting officer, who shall make his notes on the margin and keep the diaries with him for guidance. At the conclusion of the case, the Court officers shall return the original diaries to the police station from which they were sent up."

Paragraph (b) starts with a summary of the law relating to the use of case diaries in a criminal Court and concludes with the sentence:

"The accused and his agent are not entitled

to call for or use the diary in any other circumstances."

It is said that there is here a mere statement of law without any express prohibition upon a police officer from shewing the case diary to the legal adviser of the accused. In my opinion this view is quite unsound. The meaning of the rule is that the Court officer is to keep the diaries in his own possession and that if the accused or his agent call for the diary in any circumstances other than those mentioned in the earlier part of para. (b) the Court officer is to refuse the request. There has therefore been a distinct breach of this rule by the Court Sub-Inspector. R. 803 is as follows:

"A police officer may not, unless generally or specially empowered by the Local Government in this behalf communicate directly or indirectly to Government servants belonging to other departments or to non-official persons, or to the press, any document or information which has come into his possession in the course of his public duties or has been prepared or collected by him in the course of these duties, whether from official sources or otherwise."

It is urged that the custody of the case diaries having been specifically dealt with under R. 278 the words "document or information" in R. 803 do not include the case diaries. In my opinion this argument is untenable. The words "document or information" are quite comprehensive.

In my opinion S. 29 of the Act is to be construed quite widely. The words "rules and regulations" it is true clearly refer to such rules and regulations as are properly framed by a competent authority that is to say, by the Inspector-General. The words "lawful order" refer to any order which any officer may lawfully give to any individual or specific body of individuals under his command and I agree with the judgment of Adami, J., in the case *Mohamed Yusuf v. Emperor* (1). I would further point out that offences under S. 29 are not limited to the wilful breaches or neglect of a rule or a regulation or a lawful order but include any "violation of duty." A consideration of the statute as a whole indicates that as opposed to the constitution of a military force which provides for punishment to be inflicted by military officers for violation of duty or breach of orders the constitu-

tion of the police force under the Act is such that punishment by imprisonment or or fine is to be inflicted by the civil Magistrate before whom the offender is to be brought ; and provided that the rule or regulation has been properly framed and approved by the Local Government or, on the other hand, that the order if it be an order was lawful a breach is an offence under the section and furthermore any violation of duty is similarly punishable. It may well be that in any particular case the offence may be so trifling that the Magistrate may say that it should not have been brought before him but should have been dealt with departmentally. The offence, however, committed by the petitioner Barmeswar was a serious offence.

The second point taken by the petitioners was that the conviction not being by the Magistrate but by the Sessions Judge it cannot stand because of the words in S. 29.

"shall be liable on conviction before a Magistrate."

Reference is also made to R. 261 (a) of the Police Manual which is as follows :

"Superintendents and the Principals of the Police Training College and Constables of Training Schools are empowered to order the prosecution of police officers under S. 29, Act 5 of 1861, but no Magistrate except the Magistrate of the district, may exercise the power of instituting prosecutions under this section."

It is not denied and we are satisfied that the prosecution in this case was ordered by a Superintendent. The rule is merely an enabling rule except that in the case of a Magistrate who institutes a prosecution he must be the Magistrate of the district ; and an appellate Court has all the powers of the Court from which the appeal lies.

Two cases were relied upon to support the contention of the petitioners. The first is the case of *Indrobeer Thaba* (2) where the accused under S. 29 of the Act was committed straight to the Court of Sessions on the charge and it was held that Sessions Judge had no power to try such cases. In the case of *Bhaobun Singh* (3) the person charged under S. 29 was also committed direct to the Sessions and a similar decision was arrived at. In this case, however, the accused were tried

on the facts before the Magistrate and a charge sheet was submitted which included charges under S. 29. He merely failed to convict the accused under the proper section. In my opinion the cases cited have no application.

It was contended on behalf of the mukhtar that the whole of the offence of the Court Sub-Inspector, if any, was committed before the mukhtar began noting from the diary and that there cannot be an abetting of an offence after it has been committed. In my opinion a complete answer to this contention is to be found in the fact that the Court Sub-Inspector by allowing the mukhtar to have possession of the diary was committing an offence which continued so long as the diary was in the mukhtar's hands.

I would therefore decline to interfere with the convictions.

A rule was issued against the petitioners to show cause why the sentences should not be enhanced. We have carefully examined this aspect of the matter. The police officer has been under suspension for a considerable period with all the disadvantages appertaining to that position and it is possible that he may receive further departmental punishment. The mukhtar on the other hand, has not yet been dealt with under the Legal Practitioners Act and it will be for the Sessions Judge to consider the matter and to decide whether or not to make a formal reference to the High Court. In the particular circumstances of this case the punishments inflicted by the Sessions Judge appear to us to be adequate.

There remains another aspect of this matter involving a very important point of principle to which I desire to call the attention of criminal tribunals and legal practitioners for their guidance, and it received illustration in this case. After the submission of the points of law on behalf of the petitioners, the junior advocate on their behalf proposed to enter into a discussion of the facts taking advantage of the principle that since there was a rule for enhancement he was entitled to show that the accused should not have been convicted. For this purpose he offered to demonstrate from the evidence that the whole case had been concocted by the Inspector and

(2) [1964] 1 W. R. Cr. 5.

(3) [1968] 9 W. R. Cr. 26.

the Sub-Inspectors who arrested the petitioners. I pointed out to the learned advocate that he was quite at liberty to take this course but should it fail and should we come to the conclusion that the aspersions on the character of these police officers were without foundation, this circumstance would gravely aggravate the original offence and that the sentence would in that case be substantially enhanced. An adjournment for consideration was granted after which Sir Ali Imam, leading counsel for the petitioners, appeared and stated that after consultation it had been decided not to go further into the facts and he confined himself to other and quite legitimate arguments against the rule for enhancement. It is extremely common for advocates for the defence to argue that the prosecution story is an entire concoction on the part of the police and in the vast majority of cases no evidence whatever elucidated in cross-examination or offered by examination-in-chief is ever produced in support of this argument. Now either the contention is raised on the direct instructions of the client or it is deliberately raised by the advocate without any instructions at all. In the former case the accused has added to the heinousness of the offence with which he is charged by a baseless accusation of outrageous conduct on the part of the police or other prosecutors. In a clear case of this kind the tribunal should take this into account as a circumstance of aggravation in awarding the sentence. In the latter case, that is to say where the suggestion is made by the legal practitioner without reasonable cause, the legal practitioner is guilty of the grossest professional misconduct. Moreover cross-examination on these lines is often grossly abused and it is the duty of the tribunal if it has any suspicion when an advocate begins an attack upon a prosecutor or a witness by way of so called "suggestions" involving dishonourable conduct to demand from the advocate an assurance that he has good grounds for making the suggestions. If the assurance is not received the cross-examination on these lines should be stopped promptly. If the assurance is given and if it should appear at the termination of the trial that no such ground had existed the tribunal

should bring the conduct of the advocate to the notice of the High Court. I make these observations in order that a check may be placed upon a growing and serious evil and without reference to the particular facts of this case.

Chatterji, J.—I agree to the order proposed by the learned Chief Justice for the reasons given by him.

V.S./R.K. *Application dismissed.*

* 1930 Cr. Cases 282

(Sind)

PERCIVAL, J. C., AND BARLEE, A. J. C.
Nur Khan and others—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 158 of 1929, Decided on 8th October 1929, from judgment of Addl. Sess. Judge, Hyderabad.

(a) Criminal Trial—Practice—Conflict between two theories—One favourable to accused should prevail.

Where a Court is unable to say which of the two theories is the more likely one, it is bound to take the view which is most favourable to the accused. [P 285 C 1]

* (b) Penal Code, Ss. 34 and 302—Joint commission of murder—Absence of finding of common intention—None can be convicted of murder.

In a case of murder in the absence of a finding of common intention on the part of several accused persons, none of them can be found to be guilty of murder without finding that he is the man who actually struck the fatal blows. [P 285 C 1]

(c) Criminal Trial—Practice to be followed in committal proceedings.

Per Percival, J. C.—In committal proceedings the Magistrate has only to find out whether there is a prima facie case for committal or not, and the committal proceedings should not be treated too much like a final trial; nor is it necessary for the Magistrate to write out a judgment on the question whether the case is true or false. [P 285 C 2, P 286 C 2]

(d) Criminal Trial—Preference should be given to committal proceedings.

Per Percival, J. C.—Preference should be given to committal proceedings over other cases, especially so in murder cases. [P 286 C 1]

(e) Criminal P. C., S. 208—Prosecution need not get recorded every jot of evidence in committal proceedings.

Per Percival, J. C.—In committal proceedings there is no obligation on the part of the prosecution to get recorded by the committing Magistrate every jot and tittle of the evidence which they intend to place before the Sessions Court. [P 286 C 2]

P. J. Wania—for Appellants.

C. M. Lobo—for the Crown.

Barlee, A. J. C.—The facts of this case may be stated shortly as follows: The appellant Khan and two others

Nur Khan his brother-in-law and Jehan Khan son of Allahrakho were committed to the Sessions Court of Hyderabad on charges under Ss. 302 and 201 I. P. C. in connexion with the death of one Mewo who was a cousin of the three accused.

The prosecution story was that Mewo was on terms of criminal intimacy or at any rate was suspected of being so with one Mt. Khanu who was the wife of the third accused Jehan Khan. These three accused lived at the village of Nur Khan and the evidence with the map shows they lived in separate huts within one small compound. Just outside that compound was the house of the deceased Mewo and at a short distance to the West was the hut of their cousin called Achar, who is the principal witness for the Crown. Achar has deposed that on the night of 9th October he was sleeping alone and that at about midnight the deceased Mewo came to him and asked him for a loan of a pair of shoes. He gave him his shoes and went to sleep again. Some three hours later he was again awakened by cries of "murder, murder" which came from the direction of Nur Khan's house. He says that he recognized the voice of Mewo. He ran in direction of Nur Khan's house and there saw the accused Nos. 2 and 3 striking Mewo; Jehan Khan was sitting on Mewo. Khan was striking him with an axe and Nur Khan was inciting them to strike. He himself saw three blows being struck. He challenged them and they told him to go away and he stood at a distance by the outer entrance of the enclosure. He then saw the accused Jehan Khan and Khan the present appellant carrying the corpse of Mewo wrapped in a sheet and suspended from a wooden pole. He then went to his uncle Khuda Baksh and his cousin Piaro, the father and brother of the deceased Mewo, and told them that Khan and Jehan Khan had murdered Mewo and carried away his corpse. They all three went to Nur Khan and met him. The other two accused Jehan Khan and Khan were not present. They questioned Nur Khan and he confessed that they had committed the murder, because of a woman and asked them to save him.

After that they followed some bargaining, for Nur Khan offered two girls

in marriage as compensation for Mewo. But this arrangement came to nothing because, when Jehan Khan and Khan returned about three hours after sunrise they refused to give up the body. Accordingly Achar, Khuda Baksh and Piaro left them and went in search of the body. They tracked the foot prints of the accused and the blood marks which had fallen on the ground at various places, and eventually discovered the body lying naked in a jungle about a mile and a half from the scene of the offence. Achar says that it was then noon (Katcha Manjhand). There he left Khuda Buksh and Piaro beside the corpse and he himself went to their Zamindar Sher Mahomed. He reached Sher Mahomed at about sunset, 4 or 5 miles away and informed him of the whole incidence. Sher Mahomed advised them to make a report to the police and he did so.

The report (Ex. 6) purports to have been made at 9 p. m. on 10th October, the day of murder. It is fairly long and gives the story of Achar much as he afterwards gave in Court. The police thereupon made enquiry and in the course of that enquiry the accused Jehan Khan and Khan produced from a heap of manure a bundle of clothes and pair of shoes which were identified as the clothes of the deceased, and the shoes belonging to Achar which he had lent to the deceased shortly before the murder. The case was challaned and it came on for trial in the Court of Sessions. The accused pleaded "not guilty" but the learned Sessions Judge agreeing with the assessors, was of opinion that accused 2 the present appellant was guilty of murder and sentenced him to be hanged. Accused 1 Nur Khan was sentenced under Ss. 302 and 114 for abetment of murder to three years rigorous imprisonment while Jehan Khan was sentenced to five years' rigorous imprisonment under S. 201 for concealment of the offence.

We have nothing to do with the conviction and sentence of Nur Khan and Jehan Khan but I may point out that if Nur Khan was rightly convicted under S. 302 read with S. 114 the minimum sentence to which he was liable was transportation for life.

The evidence for the prosecution consists of the deposition of Achar and the

corroborative evidence given by Khuda Bux and Piaro the father and brother of the deceased. There was besides the evidence of the tracker and Mashirs that the prints led them from the compound of the three accused to the place where the body was found and that blood was found on the way; and evidence that subsequently accused 2 and 3 produced the clothes belonging to the deceased.

There can be little doubt that Mewo was killed in the compound of the three accused and that his body was carried by Jehan Khan and Khan and disposed of by them. Apart from the evidence of Achar there is the evidence of Khuda Bux and Piaro, who attempted in the Sessions Court to favour the accused, who were their near relations (presumably being unwilling to lose other members of the family besides the deceased) which establishes the fact that early in the morning of 10th October Achar had come to them and informed them of the murder, that they went to Nur Khan, and that he admitted that Mewo had been killed. The actual scene of the murder must have been in the accused's compound for the men who carried the body away started from that compound. There was no sign of blood at the scene of the offence pointed out by Achar but that is accounted for by the fact that the ground was covered with manure. It may seem curious that the large quantity of blood which must have shed when an artery had been severed should have left no sign, nevertheless we have no reason to suppose that the evidence as to the place of the crime is not true. There is, therefore, a clear case against the accused Jehan Khan and Khan under S. 201. But the question is whether Khan has been rightly convicted of the offence of murder.

Now the learned Sessions Judge has summed up the evidence against him at lines 240/250 of his judgment. He says that there is the direct evidence of Achar, the corroborative evidence of Khuda Buksh, Piaro, Tajo and Sher Mahomed, the evidence of the foot prints, the production of the blood stained clothes of the deceased, the finding of the blood stained hatchet which was recognized by Achar as belonging to Khan and the evidence of motive. But apart from the evidence of Achar, none of the evidence shows that it was the

accused Khan who actually killed Mewo. As I have said Khuda Buksh and Piaro and the other men merely prove that Mewo was killed on that night in that place; but not that Khan killed him; and the other evidence merely proves that the body was disposed of.

The first and the most important point then for consideration in this case is whether the evidence of Achar is so probable that we can believe without corroboration. We have given our best consideration to this matter, and we feel that we cannot agree with the learned Additional Sessions Judge. There are several weak points in Achar's evidence which have been brought out by the pleader who has argued this appeal. But the most important point is that his house where he was sleeping was 800 feet in a direct line from the place where he afterwards saw Mewo lying dead and that he had to travel over 1,000 feet by the route which he took. This being so we find it very difficult to understand how he was able to arrive on the scene in time to see the murder committed when he had to travel between 300 and 400 yards in the dark after he heard the cries of murder, murder. We do not doubt that he did wake up and did go to the scene but when we come to the question whether he saw the blows by which Mewo was killed, we feel considerable doubt and naturally the accused must have benefit of that doubt.

The next question is whether even if Achar did not see the actual blows struck, the circumstances established shifted on to Khan's shoulders the burden of proving his innocence. He was found according to our view standing with his relations Nur Khan and Jehan Khan beside the body of Mewo who had just been killed. One of them must have killed him; possibly all; and the question is whether there is reason to suppose that Khan must have had a hand in the crime. Now in considering this question we have to remember that we are absolutely in the dark as to what happened between midnight and 3 a. m. It appears that Mewo had gone out somewhere. A man does not borrow shoes at midnight unless he has to use them at once. That is as much as we can assume. Then at 3. a. m. he

was killed in the compound of the three accused but we do not know how he came to be there. •

A suggestion is that he had gone after the wife of Jehan Khan. There is no suggestion that he had been lured there by the three accused and the probability is that he was caught either with the wife of Jehan Khan as the accused are said to have admitted or while attempting to enter her house. If that be so one or two things must have appened. Either the man who caught him seized him, dragged him outside the compound and then with the help of his relatives executed him deliberately or he slew him at once. We are unable to say which of these theories is the more likely and we are bound then, to take the view which is the most favourable to the accused and to hold that the deceased was attacked and killed as soon as he was caught. This being so, there can be no finding of a common intention on the part of the three accused persons and in the absence of the common intention it is impossible to find the appellant guilty of murder without finding that he was the man who actually struck the fatal blows.

For this reason we are unable to agree with the learned Additional Sessions Judge that the guilt of the appellant Khan has been established. The deceased Mewo was killed obviously by one of the three persons who resided in that compound on which he was trespassing. But there is no reason to suppose that the man who killed him was Khan.

In view of this finding we set aside the conviction and sentence under S. 302 and convict Khan of an offence under S. 201 which he has been clearly proved to have committed. The sentence of Jehan Khan was five years by the Additional Sessions Judge but we think that was rather lenient and we do not consider ourselves bound to follow his example. We sentence Khan to rigorous imprisonment for seven years.

Percival, J. C.—I should like to add a few remarks only on the subject of the committal proceedings in this case. The offence which was one of murder, was committed on 9th October 1928 and by 8th January 1929 which is in itself a fairly considerable time, namely three months, the whole of the evidence produced by the prosecution and the exa-

mination of the accused had been completed. On 8th January after the completion of this evidence the case was "put off to 15th January 1929 for arguments." The record shows the subsequent proceedings before the learned committing Magistrates of whom they were three in succession. I do not quote the diary in full but merely state briefly what was done at each of the subsequent hearings:

15th January 1929: Magistrate on leave.

29th January 1929: Magistrate ill.

30th January 1929: Police Prosecuting Inspector absent.

11th February 1929: Accused's pleader absent.

26th February 1929: Accused's pleader absent.

5th March 1929: Heard accused's pleader. Put off to 11th March 1929.

11th March 1929: Magistrate ill.

18th March 1929: Magistrate on leave.

20th March 1929: Magistrate busy with other case.

22nd March 1929: Magistrate busy with other cases.

23rd March 1929: Magistrate ordered that two witnesses Khuda Baksh and Piaro whose examination had been completed on 22nd November 1928 (that is four months previously) should be recalled for examination in connexion with their statements made under S. 164, Criminal P. C.

28th March 1929: These witnesses were examined accordingly.

2nd April 1929: Heard the Police Prosecuting Inspector.

4th April 1929: Accused further examined.

6th April 1929: Put off to 8th April for orders.

8th April 1929: Committal order.

It will be seen that for three months the case was delayed although according to my view there was really no need for any further evidence at all before the committing Magistrate. It is to be remembered that in committal proceedings the Magistrate has only to find out whether there is a prima facie case for committal or not. I do not wish to make any pronouncement on the subject of the cases in which the Magistrate should commit and of those in which he should discharge the accused. There have been a number of rulings on this point for the guidance of the Magistrate. But it does appear that in the *moffussil* in Sind committal proceedings are treated too much like a final trial. In this particular case preference was given to other cases even though the committal proceedings had already been delayed for nearly 5½ months and nothing more was wanted but the writing of the committal order. I do not desire to take to task any particular Magistrate con-

cerned in this case but it seems to me that there is a practice of hearing the committal proceedings as if they were civil proceedings in which delays of months are of no great importance. I am of opinion that, especially in murder cases preference should be given to committal proceedings over other cases; and in particular that no undue postponement should be given in order to write the committal order. In this particular case I do not see how the question whether the accused should be committed or not could have presented any difficulty. It was a murder case and as has been pointed out in the judgment of the learned Additional Sessions Judge there was evidence of an eyewitness of the alleged murder and there was corroborative evidence of other witnesses. There was also evidence of footprints, of bloodstained clothes, of the discovery of a bloodstained hatchet, and of motive. Now this evidence might or might not be sufficient for the conviction of the accused by the Sessions Court but it does not appear that there could be any difficulty in the committal proceedings in deciding that such a case should be committed to the Sessions.

Seeing that in the Presidency proper committal proceedings lasting even three months would be considered most exceptional yet in Sind we find committal proceedings lasting not merely three but even six months. I am aware of the fact that Magistrates are over-worked in Sind; but that is all the more reason why they should get rid as soon as possible of cases that are obviously destined for the Sessions Court. The result of the delay in committal proceedings is that when the cases come before the Sessions Court they are very stale and are likely to have become spoilt. Whether the accused are guilty or whether they are not guilty such delays are of course very undesirable. If the accused are innocent they will have been kept unnecessarily for a long time as under-trial prisoners; while if they are guilty the prolonged delay may have seriously affected the prosecution case. One cannot lay any hard and fast rule regarding committal proceedings. But it is remarkable that the nearer the Court is to head-quarters the more brief are the committal proceedings. I understand from the learned Public Prosecutor that

in Karachi when the case is clearly one for committal to the Sessions the proceedings are usually of a brief character and the same thing applies to the Bombay City. But in the moffussil in Sind for some reason or the other they are very protracted proceedings. In this particular case I have no fault to find with the committal order itself of the Magistrate. But I may note in this connexion that certain Magistrates seem to think that a committal order is in fact a "judgment." That is to say that the Magistrate has to write a judgment on the question whether the case is true or false. This, however, is not necessary in committal reports. The Magistrate has only as indicated above to find out and state, whether there is a prima facie case against the accused requiring his committal to the Sessions or not.

There is one other point which may be mentioned namely that S. 208, Criminal P. C., provides that the Magistrate must :

"take in manner hereinafter provided all such evidence as may be produced in support of the prosecution or on behalf of the accused, or as may be called for by the Magistrate."

It is to be noted that the Magistrate is obliged to take all such evidence as may be actually "produced" before him by the prosecution or by the accused. In this connexion I may note that in this particular instance the learned Additional Sessions Judge has observed in regard to a Zamindar witness :

"It is true that he did not give all the details in the Committing Magistrate's Court where he merely said that Achar informed him that the two accused had killed Mewo at the instigation of Nur Khan. The explanation of this is that in the inquiry before the Committing Magistrate it was not thought necessary to go into the small details. The witness is a respectable man paying land assessment of Rs. 10,000 and 12,000 and there is no reason to disbelieve him."

I quite agree with the learned Additional Sessions Judge on this point. I am of opinion that there is no obligation on the part of the prosecution to get recorded by the Committing Magistrate every jot and tittle of the evidence which they intend to place before the Sessions Court.

V.S./R.K.

Sentence altered.

*** 1930 Cr. Cases 287**

(Lahore)

JAI LAL, J.

Mutalli—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 995 of 1929, Decided on 6th December 1929, against order of Addl. Dist. Magistrate, Shahpur, D/- 9th August 1929.

*** Penal Code, S. 307—Important consideration under S. 307, is intention or knowledge of accused and circumstances under which offence is committed—Nature of injury is not necessarily guiding consideration.**

Section 307 makes a distinction between an act of the accused and its result if any. Such an act may not be attended by any result so far as the person assaulted is concerned but still there may be cases in which the culprit would be liable under S. 307. If a person knows that certain result will ensue from his act he must be deemed to intend such result by doing the act. Further it is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in S. 307: 15 Bom. L. R. 991, Dist. [P 288 C 1, 2]

Amin Chand—for Appellant.

Mulk Raj Chhibrar—for the Crown.

Judgment.—Mutalli appellant has been convicted under S. 307, I. P. C., and has been sentenced to seven years' transportation. The prosecution case is that the convict who is aged about 18 was betrothed to Mt. Rahmon who also is of about the same age, but the match was not approved by some relations and consequently it was broken off and the girl was married to another person called Maulu. This caused resentment in the mind of the appellant who, on 9th April 1929, early in the morning when it was still dark armed himself with a chhuri and went to the house of Mt. Jallo, mother of Mt. Rahmon, where the latter was sleeping along with her mother, younger sister, and a brother and struck her on the left side of the neck with a chhuri causing, according to the doctor, a deep incised wound on the left side of the neck six inches long cutting all the muscles on this side and also cutting the ear into two. The hurt, in the opinion of the doctor, was grievous. It is alleged that there were two other men with the accused but they have apparently not been sent up for trial, for reasons with which we

are not concerned. The prosecution witness, the inmates of the house, state that a lantern was burning inside when the accused entered armed, as described above, and that an outcry was raised by Mt. Jallo and her children but before Mt. Rahmon was able to leave her bed the accused had succeeded in causing her the injury with the chhuri. The outcries of the inmate brought some of the neighbours to the scene of the crime before whose arrival the accused ran away but was seen by them when running away.

The above facts are deposed to by Mt. Jallo, Mt. Rahmon, Mt. Bano, younger sister of Mt. Rahmon and their brother Shera. Ghulam Rasul and Maulu corroborate their statements in material details.

The accused produced a number of witnesses in support of his plea of alibi but their testimony has been held by the trial Magistrate to be unreliable and interested. With this conclusion I agree.

I, hold, therefore, that it has been amply proved by the evidence on the record that the accused, early in the morning of 9th April entered the house of Mt. Jallo with the intention of causing injury to Mt. Rahmon and actually did cause her injury with the chhuri. It is no doubt true that in the first information report as well as in their depositions in Court the prosecution witnesses say that the accused was armed with a chhavi but when they were shown the weapon of offence produced in Court, that is the chhuri, they described it as a chhavi. It is, therefore, apparent that they did not know what a chhavi was and have wrongly named chhuri as a chhavi.

The main contention of the appellants' counsel before me is that an offence under S. 307, I. P. C., has not been established on the facts found by the Magistrate, and in support of this contention reliance is placed on a judgment of a Division Bench of the Bombay High Court, *Mertin v. Emperor* (1), in which it was held that when the accused, the husband of the injured woman, struck a blow with a hatchet on the neck caused her simple injury he could not be held guilty of an offence under S. 307 but must be convicted

(1) [1912] 15 Bom. L. R. 991—11 I. C. 331—14 Cr. L. J. 641.

under S. 324, I. P. C. The full circumstances of the assault and the motive which led to it, however, are not mentioned in the judgment and it is, therefore, difficult to hold that the observations of their Lordships in that case apply to the facts of the present case.

Section 307 lays down that whoever does any act with such intention or knowledge and under such circumstances, that if he by that act caused death, he would be guilty of murder, shall be punished for an attempt to murder, and, if hurt is caused to any person by such act, the offender shall be liable to enhanced punishment as described in the section. Now, it would at once be observed that the important consideration in each case is the intention or knowledge of the accused and also the circumstances under which the offence is committed. The nature of the hurt caused to the victim is not necessarily a guiding consideration as to the applicability of the section to the act of the accused.

It may be mentioned that the counsel for the appellant contended before me that in the opinion of the doctor the injury caused amounted to grievous hurt whereas it really was not so. I do not, however, intend to go into this question because in my opinion, it is immaterial in this case, in view of what I am presently about to hold, whether the injury caused amounted to a simple or a grievous hurt. S. 307 makes a clear distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned still there may be cases in which the culprit would be liable under S. 307, for an instance may be mentioned the case of a person who shoots at another with a loaded gun or pistol, and it may be that owing to the culprit not having aimed properly the person assaulted be not injured at all, in such a case if the Court is able to find that the intention of the assailant was to cause the death of the other person, he must be convicted under S. 307 for an attempt to murder because a person must be presumed at least to know that by firing a loaded gun or pistol at another person he is likely to cause his death and there can be no manner of doubt that if death is caused

in such circumstances the offence committed by him would amount to murder.

It is further to be observed that if a person knows that certain result will ensue from his act he must be deemed to intend such result by doing the act. Further it is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assailed. What the Court has to see is whether the act, irrespective of its result was done with the intention or knowledge and under the circumstances mentioned in S. 307. This is apparent from the second part of S. 307, which makes the convict liable to enhanced punishment if hurt is caused to the victim.

Now, having regard to the observations made above, the only possible inference under the circumstances disclosed in this case is that the appellant in this case was actuated by feeling of resentment caused by the breaking off of his betrothal with Mt. Rahmon and her marriage with another person and deliberately arming himself with a chhuri when it was still dark entered her house and struck her on the neck and caused her an injury; and, therefore, he intended to cause her death or at least he had the knowledge that the result of his act would be the death of Mt. Rahmon. It is clear that he would have been liable to be punished for murder if Mt. Rahmon had died as a result of the injuries caused to her. I hold, therefore, that the appellant has been rightly convicted under S. 307, I. P. C.

He is, however, a young man being about 18 years of age and though the assault by him on Mt. Rahmon was deliberate and was committed under aggravating circumstances I consider that having regard to his age he is entitled to some leniency in the matter of sentence. In my opinion a sentence of four years' rigorous imprisonment would suffice in this case. I maintain the conviction and accept the appeal to this extent that the sentence of the appellant Mutalli is reduced to four years' rigorous imprisonment.

P.N./R.K.

Sentence reduced.

* 1930 Cr. Cases 289

(Labore)

BROADWAY AND AGHA HAIDAR, JJ.

Arjan Singh and another—Accused-Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 337 of 1929, Decided on 30th May 1929, from an order of Sess. Judge, Jullundur, D/- 11th March 1929.

(a) Evidence Act, S. 24—Retracted confession corroborated by production of articles is sufficient to warrant conviction.

A confession, although retracted at the very first possible moment, is sufficient to warrant conviction if corroborated by the production of articles for which the accused can offer no explanation. [P 20 C 1, 2]

* (b) Criminal P. C., S. 164—Confession resiled from before Magistrate appended his certificate but after admitting correctness and affixing thumb mark—Confession is not admissible.

A Magistrate complying with necessary formalities recorded the statement of the accused and had the necessary thumb mark affixed on it on his admitting its correctness. He then proceeded to append his certificate and while the certificate was being written, the accused stated that the statement was made at the instance of police. On his persisting in that statement he recorded further statement on which the accused clearly stated that the statement was made at the instance of police:

Held: that the accused must be regarded as having made no confession inasmuch as although statement had been recorded fully and correctness admitted, the requirements of S. 164 had not been fully complied with by Magistrate before the accused resiled. [P 290 C 2]

(c) Evidence Act, S. 30—No corroboration to connect accused with crime—Confession of co-accused cannot be considered.

In the absence of any corroboration connecting an accused with the commission of offences the confession of a co-accused cannot be taken into consideration against him. [P 290 C 2]

Kesar Singh—for Appellants.

Sundar Das for Govt. Advocate—for the Crown.

Broadway, J.—Arjan Singh and Mt. Jiwani have been sentenced to death for the murder of one Nagar Singh husband of the latter. They have appealed and the case is also before the Court under S. 374, Criminal P. C.

It appears that on the night of 12th January 1929, lohri night, Nagar Singh was in his house with his wife Mt. Jiwani. About midnight Wazir Singh, Nagar Singh's brother, who was sleeping in his own house in the same courtyard, was aroused by hearing the cries of

Mt. Jiwani. He went towards her house and found the door chained from outside. He entered and was about to make a light when Mt. Jiwani asked him to cover her up first as she was naked. Being unable to find a match in the darkness Wazir Singh returned to his own house and from there brought a lighted diwa having first covered Jiwani up with a lihaf. On his return with the light he found his brother lying on the ground dead, weltering in blood. Mt. Jiwani was on her cot in a state of nudity. Her wrists were tied across her chest with a string and a safa was tied to the sides of the bed, thus restraining her movements. She was not gagged and her feet were not tied. On being questioned she stated that some eight or ten men of whom she named Harnam Singh, Bishan Singh and others had come there that night, knocked up Nagar Singh and had then set on to him, and killed him, held her down, trussed her up, robbed her of certain ornaments, i. e., phul and balas and certain garments. After their departure she had raised the alarm. Other people arrived on the scene and the same story was told to them. Accordingly Wazir Singh proceeded to the police station some eight miles away and made a report there at 11 a. m., on 13th January 1929. The Police went to the spot, sent for the persons named and held an investigation. The story told by Mt. Jiwani appeared to the investigating officer as very improbable. On 16th January Mt. Jiwani made a certain statement to the police which led them to send for Arjan Singh who is a collateral of the deceased and lives close by. On 17th January Arjan Singh made a statement and produced a gandas, a phul and balas and some woman's clothes which were blood-stained. The Imperial Serologist's report is that all these articles are stained with human blood. It is said that Mt. Jiwani in the presence of respectable witnesses recognized the ornaments found as well as the clothes as being hers.

On 22nd January Mr. Bishambar Dial Singh, First Class Magistrate, happened to arrive at Mauza Shah Kot on tour and the police took advantage of his presence there to place the two appellants before him in order that their

statements might be recorded. Accordingly the said Magistrate recorded the statement of Arjan Singh after carefully and fully complying with the provisions of S. 164, Criminal P. C. He was then returned to custody. In this statement Arjan Singh confessed his having murdered the deceased and admitted that the motive was to get rid of him inasmuch as Mt. Jiwani had contracted an intimacy with the deponent. The Magistrate then proceeded to record the statement of Mt. Jiwani. He complied with the necessary formalities and recorded her statement, read it out to her and had her thumb mark affixed on it on her admitting its correctness. He was then proceeding to append the certificate which was necessary under S. 164, Criminal P. C. While this certificate was being written Mt. Jiwani stated to the Magistrate that she had made the statement at the instance of the police who had promised that she and Arjan Singh would be set free if she made that statement. The Magistrate, very properly held his hand, and questioned her asking her again and again whether she had spoken the truth and on her persisting in her retraction and her allegations as to the statement having been made at the instance of the police he, instead of signing the certificate recorded her further statement. In this statement Mt. Jiwani clearly stated that the previous statement had been made by her at the instance of the police. The Magistrate then sent for Arjan Singh and recorded his statement asking him if the statement made by him was true. The record shows that the appellant Arjan Singh after thinking for a time made the same assertion as had been made by Mt. Jiwani to the effect that the statement was not true and had been made at the instance of the police.

The evidence on the record shows that Arjan Singh himself produced a bloodstained gandasa, a phul and balas and certain blood-stained garments belonging to a woman. It is in evidence that Mt. Jiwani identified the jewellery and the clothes as her property. In these circumstances, so far as the case of Arjan Singh is concerned his confession, although retracted at the very first possible moment, is corroborated by the production of articles for which he can

now give no explanation, more especially the gandasa. He has contented himself by denying that he produced these articles. In these circumstances although there was a very early and prompt retraction of the confession the corroboration afforded by the production of the gandasa and the other articles is to my mind sufficient to warrant the conclusion arrived at by the learned Sessions Judge that Arjan Singh was responsible for the death of Nagar Singh.

The case of Mt. Jiwani is on a somewhat different footing. She must be regarded as having made no confession inasmuch as although her statement had actually been recorded and its correctness had actually been admitted by her, the requirements of S. 164 had not fully been complied with by the Magistrate when she resiled from her statement. In these circumstances I consider that this confessional statement of Mt. Jiwani cannot be admitted in evidence. This being the case there is no real evidence left on the record to warrant a definite conclusion, that she joined Arjan Singh in killing her husband or was privy to the murder prior to its commission. I do not lose sight of the fact that Arjan Singh's confession may be taken into consideration against this appellant. The circumstances of the case are, however, such that in the absence of any corroboration connecting Mt. Jiwani with the commission of the crime I cannot regard Arjan Singh's confession as sufficient to bring Mt. Jiwani's guilt home to her. That she assisted Arjan Singh by giving him her ornaments and her blood-stained clothes is, I think, beyond question. Her lying story as to how her husband was murdered is a most suspicious circumstance. At the same time it seems to me that her lying story and the assistance given to her paramour are consistent and compatible with her having had no knowledge that the murder was to be committed that night and with having been in no conspiracy to murder her husband. It is possible even probable, that Arjan Singh came to the house that night, found Nagar Singh in a drunken sleep, slew him and then called on Mt. Jiwani to assist him in covering his tracks, which Mt. Jiwani, probably very gladly, agreed to do. In these circumstances this appel-

lant is, I think entitled to the benefit of this doubt. I would, therefore, dismiss the appeal of Arjar Singh and confirm the sentence of death passed on him, but would accept the appeal of Mt. Jiwani, set aside her conviction and sentence and direct her release.

Agha Haidar, J.—I agree.

V.B./R.K.

Order accordingly.

1930 Cr. Cases 291

(Lahore)

TEK CHAND, J.

Emperor

v.

Alia—Respondent.

Criminal Rown. No. 808 of 1928, Decided on 11th January 1929, reported by Sess. Judge, Ferozepore.

(a) Criminal P. C., S. 562—S. 562 is not enacted with intention of letting off every juvenils offender—Attendant circumstances should be considered along with age, character and antecedent of offender.

Section 562 has not been enacted with the intention of letting off without imprisonment every juvenile offender on his first conviction for an offence described in the section, regardless of the circumstances in which the crime was committed. S. 562 itself is clear on this point and Magistrates, before applying the section, should carefully take into consideration the attendant circumstances, along with age, character and antecedents of the offender. There can be no manner of doubt that S. 562 has no application to the case of a youth, who grapples with another and after having been separated by others turns back with rage on his adversary, and inflicts a heavy lathi blow on him, killing him almost instantaneously, and later on speaks of his act in a spirit of truculent braggadocio threatening to kill those who attempt to arrest him. If such a person were to be released on probation, the very object with which this salutary provision of the law was enacted would be defeated, and an impression created in the minds of young men that they can commit at least one serious offence with impunity. [P 292 C 1]

(b) Criminal Trial—Where it is doubtful how death was caused injuries on body of deceased are of great importance and assistance in coming to conclusion.

In cases where it is doubtful whether death of the deceased was due to strangulation or due to a blow with a lathi, the nature of injuries found to exist on the body of the deceased is a matter of great importance and is generally of considerable assistance in determining the truth or otherwise of the account of the incident as given by the eyewitnesses and coming to a conclusion as to how death was caused. [P 292 C 2]

D. R. Sawhney—for the Crown.

Ghulam Mohyuddin—for Respondent.

Order.—The respondent Alia, a Teli, youth, 15 or 16 years old, of mauza Mohal, has been found guilty by the Sub-

Divisional Magistrate, Fazilka, of an offence under S. 304-II, I. P. C., for having caused the death of one Sultan by a blow inflicted with a heavy lathi on the back of the neck of the deceased. Having regard to the age of the respondent, and the fact that this was his first offence the learned Magistrate has released him on probation of good conduct under S. 562 (1), Criminal P. C., on his entering into a bond for Rs. 2,000, with two sureties, to appear and receive sentence when called upon during three years from the date of the conviction. On being moved by the father of the deceased the Sessions Judge, Ferozepore, has forwarded the proceedings to this Court under S. 438, Criminal P. C. He has recommended that if the conviction is to be maintained, the sentence should be enhanced. The learned Public Prosecutor has appeared before me in support of this recommendation, while Mr. Ghulam Mohyuddin, who represents the respondent, has urged under S. 439 (6) that on the evidence on the record the respondent ought not to have been convicted at all, and that, in any case, if the conviction is to be upheld, the sentence passed by the learned Magistrate was just and proper in the circumstances.

Now I have no hesitation in saying that on the findings of the learned Magistrate, the sentence passed by him is manifestly inadequate, and that if I were to maintain the conviction, I shall be constrained to sentence the respondent to a substantial term of imprisonment. The story as given by the alleged eyewitnesses, which has been accepted by the learned trial Magistrate, is that on 16th September 1927, Sultan, deceased, with his cousins was grazing his flock of sheep in the field of his maternal uncle, Fateh Mohammad (P. W. 6), when Alia, respondent, and his cousin, Gudda, took their flock to the same field. On Sultan objecting to the respondent bringing his sheep there, an altercation ensued and they grappled with each other. They were, however, separated by Nura (P. W. 3), Khushia (P. W. 4), Sadiq (P. W. 5), Nizam and Bashir, who were sitting close by and who advised both parties to take away their sheep, but Alia turned back in rage and struck a blow with a bamboo lathi on the neck of Sultan, who fell down immediately and died soon after. Alia made good his

escape carrying the lathi in his hand. Kasim Ali (P. W. 12), who had seen the respondent running through his courtyard, on being informed later of the incident, followed him on a pony, armed with a gun and accompanied by one Mohammad Khan and succeeded in overtaking him at a distance of a mile-and-a-half on the other side of the village. When Qasim Ali advanced towards the respondent, the latter flourished his stick at him and said "I have killed one and I will kill you now," but Kasim Ali threatened to fire at him and eventually succeeded in capturing him.

Now, if this story is to be believed, and it has been believed by the learned Magistrate—it is obvious that the beneficent provisions of S. 562 cannot be invoked in favour of the offender. The only reason given by the learned Magistrate for applying that section to this case is that the respondent was a boy 15 or 16 years of age, and that this was his first offence. But it must be borne in mind that S. 562 has not been enacted with the intention of letting off without imprisonment every juvenile offender on his first conviction for an offence described in the section, regardless of the circumstances in which the crime was committed. The section itself is clear on this point and Magistrates, before applying the section, should carefully take into consideration the attendant circumstances, along with the age, character and antecedents of the offender. There can be no manner of doubt that the section has no application to the case of a youth, who grapples with another and after having been separated by others turns back in rage on his adversary, and inflicts a heavy lathi blow on him, killing him almost instantaneously, and later on speaks of his act in a spirit of truculent braggadocio threatening to kill those who attempt to arrest him. If such a person were to be released on probation, the very object with which this salutary provision of the law was enacted would be defeated, and an impression created in the minds of young men that they can commit at least one serious offence with impunity. I, therefore, agree with the learned Sessions Judge, that if the finding is to be maintained, the appropriate punishment must be a substantial sentence of imprisonment.

The main question for consideration, however, is whether the conviction is justified on the record. The story for the prosecution as given above is supported by the evidence of four eyewitnesses, Sadiq alias Pula, son of Ali Mohammad (P. W. 1), Nura (P. W. 3), Khushia (P. W. 4) and Sadiq, son of Suleman (P. W. 5), all of whom depose that they saw the respondent inflict the fatal blow on the neck of the deceased. There is also the evidence of Ghulam Mohammad (P. W. 2), father and Fateh Mohammad (P. W. 6), maternal uncle, of the deceased, that as soon as they reached the spot on receipt of information of the attack on Sultan, they were informed by the aforesaid persons that the respondent had killed the deceased. All these witnesses are, however, closely related to each other and are under the influence of Fateh Mohammad (P. W. 6), who admittedly had civil litigation with the father of the respondent some years ago and who had been sentenced to five years' rigorous imprisonment in a riot case, in which Ghulam Mohammad (P. W. 2), father of the deceased, and Nura (P. W. 3) had also been convicted. Their evidence must, therefore, be accepted with a great deal of caution, even though the first information report was made without any undue delay. Moreover, none of these witnesses has any satisfactory explanation to offer why they and the other persons present at the time did not attempt to capture or pursue the culprit. It seems strange that these six persons should have allowed a youth like the respondent to run away without making any attempt to catch hold of him.

In such cases the nature of the injuries found to exist on the body of the deceased is a matter of great importance and is generally of considerable assistance in determining the truth or otherwise of the account of the incident as given by the alleged eyewitnesses. It is, however, unfortunate that in this case the two medical witnesses who were examined at the trial are not agreed in their opinion. The Assistant Surgeon (P. W. 14), who conducted the post-mortem examination of the body of Sultan on 17th September, was of opinion that he had died of strangulation, and not as a result of a lathi blow on the neck. As his conclusion was in conflict with the evidence of the alleged eyewitnesses, the District

Magistrate, Ferozepore, on the matter coming to his notice, ordered the body to be exhumed in the presence of the Civil Surgeon (P. W. 13), the Naib-Tahsildar of Fazilka and a number of other officials. Owing to the decomposed condition of the body and the liquefaction of the important organs, it was not possible for the Civil Surgeon to express a definite opinion as to the cause of death, but he was inclined to the view that the deceased had not been strangled to death and that it was possible that the severe congestion on the back of the neck was due to a blow on the neck.

There being a conflict of medical opinion it is necessary to examine the evidence of the two doctors in some detail. It may, however, be mentioned at the outset that the genuineness of the record, made by the Assistant Surgeon, of the injuries on the body of the deceased and of the state of the internal organs is not challenged on behalf of the Crown. It is conceded that the record is accurate, but it is contended that the conclusions, which the Assistant Surgeon deduced therefrom as to the cause of death are inaccurate, and for this purpose reliance is placed on the evidence of the Civil Surgeon.

Now, as stated already, the Civil Surgeon examined the exhumed body six days after the death. He has deposed that when he saw it, "decomposition was advancing" and "mature maggots were creeping in" the brain, the cord and lungs had 'melted away'; the liver was :

"decomposing and there was no trace of the respiratory organs from which it could be found that the death was due to stoppage of respiration."

There was no skin on the front part of the neck, but the skin on the back and sides of the neck was supple and the underlying tissues still showed signs of congestion. He has also admitted that from :

"the appearance it was not possible to find out the cause of death on account of the decomposition and the liquefaction of the important organs."

It is obvious that much weight cannot be attached to the opinion of the Civil Surgeon, based as it is, on an examination of the body in the condition described above. He, however, concluded that death was not caused by strangulation, but was probably due to com-

pression of the brain, caused by the effusion of blood, because (i) the back of the neck showed severe congestion of the deeper tissues, and (ii) the underlying skin was supple and not "hard and leathery," as, in his opinion it should have been if the deceased had been strangled to death. As to (i) the Civil Surgeon has, however, himself stated that its existence did not exclude the possibility of death by strangulation as originally congestion might have been uniform all round the neck, and that he could not say that it was not so, owing to the disappearance of the skin on the front side, at the time of his examination. It may be stated that in the notes of the post-mortem examination made by the Assistant Surgeon it is clearly stated that there was a continuous horizontal bruise 1" x 10" round the neck. The existence of the congestion on the back of the neck, does not, therefore, militate, in any way against the hypothesis that the deceased was strangled to death. Nor does the other circumstance relied upon by the Civil Surgeon that the skin underlying the bruise round the neck was not "hard and leathery" but supple, appear to be of any value. It is stated in Lyon's Medical Jurisprudence in India (8th Edn.) at p. 277 that in cases of strangulation : "the hard yellow brown parchmenty appearance of the skin in the course of the mark is more seldom met with. Whether the mark will be parchmentized or not depends entirely on the nature of the ligature. If this is hard and rough, such a mark will result. In strangulation, more frequently than in hanging, the ligature employed is a soft one such as a handkerchief, or other piece of cloth, and this is the reason for the frequent absence of the parchmentized mark."

Similarly Dr. Modi in his Text-book of Medical Jurisprudence and Toxicology says at p. 131 :

"The base of the (ligature) mark which is known as a groove or furrow, is usually pale with reddish and ecchymosed margins. It is rarely hard, yellow and parchment like as in hanging."

The learned Public Prosecutor has not drawn my attention to any authority to the contrary and I must hold that the reasons given by the Civil Surgeon in support of his conclusion are not convincing.

Let us now examine the external and internal appearances shown in the Assistant Surgeon's notes of the post-mortem examination. These are :

(a) a continuous horizontal bruise 1" broad and 10" long round the neck at the level of the wind-box, showing a distinct ligature mark ;

(b) a bruise 8" x 3" on the back of the neck ;

(c) marks of violence on the front and the side of the chest, there being bruises on the supraclavicular region of the neck and on the right and left side of the thorax on the mid-ribs ;

(d) effusion of bloody serum in both the pleura, (about 1 lb. in each) and about 10 oz. in the pericardium ;

(e) acute venous congestion of both the lungs and the spleen ;

(f) extensive ecchymosis of the soft tissues below the bruises above-mentioned ; and

(g) effusion of blood below the scalp and also over the brain below the membrane.

It is hardly necessary to point out that (a), (d), (e) and (f) are typical symptoms of asphyxial death by strangulation. If any authority is needed, reference may be made to Taylor's Principles and Practice of Medical Jurisprudence (8th Edn.) and Lyon's Medical Jurisprudence in India (8th Edn.), p. 277. In the former work it is stated at p. 609 of Vol. 1 that when sub-pleural, sub-pericardial and sub-meningeal bleedings are present, we may legitimately say that :

"death has almost certainly taken place from asphyxia."

The learned author also says at p. 658 that in the majority of cases of death by strangulation intense venous congestion of the lungs is found, and that the spleen is usually congested. It is also stated that the brain is occasionally congested, but more commonly is in its natural state. On the same page an instance is cited of an admitted case of strangulation in which "blood was found effused in the brain." That the deceased died of strangulation is further supported by the existence of the injuries described in (c) above, which clearly indicate that the assailant, after having overpowered the deceased, sat on his chest and pressed him with his knees, elbows and hands: See Cox's Medical Legal Court Companion 2nd Edn., p. 106. The learned Public Prosecutor relies, however, on injury (b) as indicating violent impact of a hard substance on the back of the neck,

but this, as suggested by the Assistant Surgeon, could have been caused by the back of the neck pressing against a hard substance when he was being strangled. The Civil Surgeon also has explained that the existence of this injury is not necessarily inconsistent with death by strangulation.

The Civil Surgeon has, however, emphasized the absence of (a) the protrusion of the eye-balls and the tongue, (b) lividity of the face and the upper limbs and (c) congestion of the larynx and trachea as negating the theory of strangulation. But as pointed out by Taylor (Vol. 1 at p. 656) these external signs are not essential features of death by strangulation and "may be entirely absent" in some cases : see also Lyon, p. 278.

After a careful perusal of the evidence on the record, I am of opinion, that the external and internal appearances found on the body undoubtedly point to the conclusion that Sultan met with his death by strangulation, and that the story related by the so-called eyewitnesses which as shown already has otherwise also a ring of improbability about it cannot be accepted.

Before concluding, one other matter requires notice. It has been strongly urged by Mr. Ghulam Mohyuddin that the learned Magistrate has acted improperly in attributing corrupt motives to the Assistant Surgeon and in referring in his judgment to the so-called "lengthy accounts" given by the constables Ude Chand (P. W. 7) and Ghulam Mohyuddin (P. W. 8) and by Nizam (P. W. 11). He has read to me the depositions of these witnesses and has rightly pointed out that none of them gave direct evidence relating to this matter, but that the insinuations made by them are based solely on hearsay and as such ought not to have been allowed to go on the record. The learned Public Prosecutor concedes that these statements are inadmissible and were wrongly admitted on the record and referred to in the judgment. It is significant that not a single question even remotely suggesting any corrupt practice was put to the Assistant Surgeon either on behalf of the prosecution or by the Court, though he was twice examined at the trial.

For the foregoing reasons, I hold that the guilt of the respondent has not been

established, and I accordingly quash the conviction, acquit him and direct that the bond executed by him be cancelled forthwith.

R.M./R.K.

Revision dismissed.

1930 Cr. Cases 295

(Lahore)

EFORDE AND TEK CHAND, JJ.

Mohamad Ahsan and another—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 693 of 1929, Decided on 20th October 1929, from order of Sess. Judge, Jhelum, D/- 3rd July 1929.

Penal Code, S. 396—Where dacoity is proved to be committed by five persons and only four are identified, they are guilty though fifth is not traced.

Where it is fully established that a dacoity was committed by a party of five persons one of whom committed a murder and the identity of four of them is established beyond question, the fifth remaining unidentified the four accused are equally guilty under S. 396, though it is not possible to trace and identify one of the culprits. [P 296 C 2]

Mohammad Shafi and Ghulam Mohy-uddin—for Appellants.

Abdul Rashid—for the Crown.

Judgment.—Four persons, Mohammad Ahsan alias Mulla of Khour (District Attock), Fazal Din carpenter of Shakarpari (District Attock), Ali Akbar Mughal of Sadharyal (District Attock) and Karim Bakhsh alias Kariman Awan of Maira Aku (District Rawalpindi) were tried under S. 396, I. P. C. for having along with Mohammad Zaman approver (P. W. 146), committed a dacoity on 5th August 1928 at about 8 p. m. in the house of Ladha Shah (P. W. 130) at mauza Padhri in the Jhelum District, in the commission of which one Gian Chand was murdered by one of the dacoits. The learned Sessions Judge has acquitted Kariman accused and has convicted Mohammad Ahsan, Fazal Din and Ali Akbar under S. 396, and has sentenced each of them to death. Mohammad Ahsan and Ali Akbar have preferred a joint appeal (Criminal Appeal No. 623 of 1929) and Fazal Din has appealed separately (Criminal Appeal 715 of 1929). Both the appeals have been heard together and will be disposed of in one judgment.

The case for the prosecution is given in detail in the statement of Mohammad

Zaman, approver, (P. W. 146) who belongs to mauza Shakarpari, where Fazal Din appellant also lived. Briefly stated, it is, that on the morning of 3rd August 1928, Fazal Din appellant asked the approver to join in a dacoity which was in contemplation, and the latter agreed. In the afternoon they both left Shakarpari for Rawalpindi, Mohammad Zaman taking with him a revolver and a number of loaded cartridges. They stopped for the night at a sarai in Rawalpindi and were met by Mohammad Ahsan appellant, who informed them that Ali Akbar and Kariman would join them at Topi Rakh with a rifle. Next morning Mohammad Zaman, Fazal Din and Mohammad Ahsan took a lorry for Gujar Khan and as previously arranged, Ali Akbar and Kariman joined them near Topi Rakh. They had with them a khokha in which a rifle had been concealed. They spent some time at Pindi Matte Khan and then proceeded to Missa Koswal, where they took the train to Tarakki, arriving there on the early morning of the 5th. They then walked to Domeli and stopped at a well where they discussed the plans of the dacoity.

After spending some time at mauza Thapla they reached Padhri at about 8 p. m. and proceeded straight to the house of Ladha Shah. Ali Akbar noticed some one coming towards them and fired at him but missed. On getting on the roof of Ladha Shah's house, the approver fired twice in the air to threaten the inmates of the house and to let the villagers know that they were armed. Shortly after Ali Akbar also fired twice or thrice from the roof. The other dacoits caught hold of Ladha Shah, beat him with sticks and demanded the keys from him. Ladha Shah raised an outcry which attracted a number of persons towards his house. As they approached the house, Ali Akbar fired at them killing one Gian Chand and wounding Dul Raj (P. W. 131). The villagers, finding that the dacoits had firearms with them, dispersed. The dacoits ransacked the house, broke open an iron safe, rifled the boxes and other receptacles, and having taken away a large number of gold and silver ornaments worth several thousands of rupees and sovereigns, currency notes and cash, made good their escape. While, they were running away, Ram Chand (P. W. 143),

hurled stones at them but none of them was hurt. Ali Akbar fired at him but he escaped unhurt. After going about 400 yards from Padhri they threw away the empty money bag (Ex. P. 19) the small tin box (Ex. P. 87) and certain other useless articles and adjusted the load among themselves. A short distance further, Fazal Din threw into a pond a screw-driver (Ex. P. 2) with which he had tried to batter the door of the house of Ladha Shah. They then proceeded by a circuitous road to Tarakki, where they took the train on the morning of the 6th sitting in separate compartments. They detained at Gujar Khan, from where Ali Akbar took them to the Dhok of Jamedar Nadir Khan (P. W. 117). They had their meals there and divided the booty among themselves. After the division they went away one by one.

In the meantime, on 6th August at 8 a. m. a report of the occurrence had been made at the Police Station, Domeli, by means of a rukka which had been sent by the lambardars of Padhri. The police took up the investigation in right earnest and arrested the appellants, Kariman and the approver at different places on the 17th and 18th.

That a daring dacoity was committed on the evening of 5th August in the house of Ladha Shah and in the commission of dacoity one of the dacoits fired at Gian Chand and killed him, is beyond dispute. The evidence on the record leaves no doubt on these points and further establishes that Mohammad Zaman, approver was one of the dacoits. This evidence has been carefully analysed by the learned Sessions Judge and as his findings have not been challenged before us it is not necessary to set it out in detail. The important question for determination is how far the statement of the approver has been corroborated by independent testimony as regards the complicity of the three appellants, or any one of them, in the crime. It is no doubt true that Ladha Shah

the other Padhri witnesses are able to identify the approver or any of the appellants and their evidence is of no assistance in determining the identity of the culprits, but, the prosecution contend that the matter is put beyond doubt by the recovery of stolen property from each of them, and also

the testimony of disinterested and independent witnesses who had seen the appellants and the approver going to and back from Padhri shortly before and after the occurrence. (After discussing the corroborative evidence and holding that the approver's statement identifying Ali Akbar, Mohammad Ahsan and Fazal Din accused with the offence had been amply corroborated, his Lordship proceeded as follows:) It was urged by the counsel for Ali Akbar that as the approver had stated that the crime had been committed by him and the three appellants conjointly with Kariman, but as Kariman had been acquitted by the Sessions Judge, the three appellants could not be convicted under S. 396. This argument is, however, devoid of force and I have no hesitation in rejecting it. The learned Sessions Judge has found, and his finding is fully supported by a mass of evidence, that the party which committed the crime in the house of Ladha Shah on the night in question consisted of five persons. The identity of four of them has been established beyond question, but it could not be said with certainty whether their fifth associate was Karim Bakhsh or some other person and the learned Judge gave him the benefit of the doubt and acquitted him. The burglary having been committed by five persons and it being proved that in its commission one of the party murdered Gian Chand it is clear that all the appellants are equally guilty under S. 396, even though it has not been possible to trace and identify one of the culprits. I would, therefore, affirm the conviction of each of the appellants under that section.

The crime was carefully planned and cleverly executed and might have remained undetected but for the circumstance that one of the culprits was suffering from leucoderma. There are no extenuating circumstances, and there is nothing to distinguish between the degree of guilt of the various appellants. It is no doubt true that it was Ali Akbar, who actually fired the fatal shot but there is abundant evidence that the dacoity had originally been planned by Mohammad Ahsan and Fazal Din, and that it was at their suggestion that Ali Akbar and the approver had taken the firearms with them. I can, there-

fore, see no reason for commuting the sentence in the case of any of the appellants.

I would dismiss the appeals and confirm the sentences of death passed against Ali Akbar, Mohammad Ahsan and Fazal Din.

R.M./R.K.

Appeals dismissed.

1930 Cr. Cases 297

(Lahore)

ZAFAR ALI AND ADDISON, JJ.

Fazaldin—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 780 of 1929, Decided on 28th October 1929, from an order of Sess. Judge, Lahore, D/- 28th July 1929.

Penal Code, S. 302—Fact that accused sets up false defence that he never knew deceased even when evidence shows that deceased was last seen alive in his company and his disappearance immediately after murder is sufficient to bring home offence to him.

Where the evidence against the accused is that the deceased was last seen alive in his company and that the accused disappeared immediately after the murder and the accused sets up a palpably false defence that he did not know the deceased and was never in her company, these facts and circumstances are sufficient to bring the offence of murder home to the accused. [P 298 C 1]

Har Parshad—for Appellant.

Des Raj Sawhney—for the Crown.

Judgment.—On the morning of 13th September 1925, a woman with wounds on her abdomen, neck, etc., was found lying dead on the roof of a kothri (small room) in the compound of the shrine of Data Ganj Bakhsh at Lahore. That very day it transpired that the woman had a companion with her of the name of Fazal Din, who called her his wife, that they had rented the kothri from Haji Ghulam Fakhruddin (P.W. 12)—a majawar of the shrine—only two or three days previously, and that before that they had occupied a room in the house of one Sawan (P.W. 10) at the Akbari Gate, Lahore. Sawan gave the information that Fazal Din was a resident of village Tarsikka in the Amritsar District. Further in the room which Fazal Din had occupied in the house of Sawan the police found among others the following articles:

(1) a pass book bearing the name of Fazal Din son of Labhu Shah, resident of Tarsikka (appellant);

(2) a letter from the Commanding Officer of Platoon 2/13, Frontier Force, New Delhi Cantonment to soldier No. 4036, Fajja Khan of Mauza Tiska Jandiala, District Amritsar;

(3) a silver medal with soldier No. 4036 and the name Fajja Khan engraved on it;

(4) a gold medal with the soldier No. 4036, and the name Fajja Khan inscribed on it.

Fazal Din absconded and was not got hold of for three years. In September 1928, he was arrested by the Gurdaspur police in connexion with a burglary and was then sent to Lahore to be dealt with for the murder in question. He has now been tried by the learned Sessions Judge of Lahore who has, in agreement with the four assessors, found him guilty and sentenced him to death.

That Fazal Din came to Lahore in company with the woman and lived in the house of Sawan is fully established by the evidence of Sawan (P.W. 10), his wife Mt. Zebo (P.W. 11) and Maula Bakhsh (P.W. 8) who lived in that very house. Their evidence receives support from the discovery of the medals, etc., in the room which Fazal Din had occupied for 18 or 19 days. Fazal Din admitted that he was a sepoy in the 1-56 Rifles, that his number in the regiment was 4036, and that the medals were his and had been awarded to him. He was duly identified in an identification parade held in the Borstal Jail at Lahore by Sawan, Mt. Zebo and Maula Bakhsh. It was Sawan who had obtained for him from the mujawar of the shrine, Haji Ghulam Fakhruddin (P.W. 12) the kothri in question. There can thus be no manner of doubt that Fazal Din appellant came to Lahore in company with the deceased, and that they both lived in a room in the house of Sawan for 18 or 19 days and then hired the kothri at the shrine and began to live there.

Further, the kothri in question was one in a row of kothris of which one was in the occupation of Mt. Barkate (P.W. 16). Mt. Bhuri (P.W. 15), too lived in the compound of the shrine. They both deposed that on the fateful night Fazal Din and the woman slept on the roof of their kothri. They identified Fazal Din in Court but Mt. Barkate (P.W. 16) was not present when

the identification parade was held and Mt. Bhuri had failed to identify him in that parade. Thus Mt. Barkate's ability to identify Fazal Din was not tested and Mt. Bhuri had failed in the test. It cannot, however, be doubted that these two women were in a position to observe that the man and the woman who had hired the kothri were sleeping on the roof of it, and whether they could, after the lapse of three years, identify them or not, the fact that they had seen them there could not have been effaced from their memory on account of the painful sight beheld by them the next morning. In these circumstances it may safely be presumed that the man and the woman that were seen by them on the roof of the kothri overnight were no other than Fazal Din and the deceased.

Thus the evidence against the appellant briefly is that the deceased was last seen alive in company with the appellant, that he disappeared immediately after the event and that instead of accounting for his disappearance he has set up a palpably false defence that he did not know the deceased, never came to Lahore with her, and never lived in the house of Sawan. These facts and circumstances, in our opinion, are sufficient to bring the offence home to him.

We, therefore, dismiss the appeal and confirm the sentence of death.

R.M./R.K. *Appeal dismissed.*

1930 Cr. Cases 298

(Lahore)

FFORDE AND ADDISON, JJ.

Bhagat Singh and another—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 748 of 1929, Decided on 13th January 1930, from order of Sess. Judge, Delhi, D/- 12th June 1929.

Penal Code, Ss. 300 (4) and 307—Accused knowing that their act is imminently dangerous and is likely to cause death are guilty—Mere fact that they had no deliberate intention of killing any particular individual does not take their case outside Cl. (4), S. 300.

From the definition of murder in Cl. (4), S. 300 it follows that if a person does an act of the nature described in the clause, he is guilty of an attempt to murder. [P 299 C 2]

Any person of average intelligence knows that the explosion of a bomb in a crowded room, however carefully it may be thrown, is an imminently dangerous act such as he must

be deemed to know would in all probability cause death or at least such bodily injury as is likely to cause death. Accused, described by their counsel as persons of exceptional intelligence must, therefore, be presumed to know that their act was dangerous and likely to cause death. The fact that accused had no deliberate intention of killing any particular individual does not take their case outside Cl. (4), S. 300, when they had no excuse for running the risk. It is no excuse to say that they were sincerely and passionately actuated by the desire to alter the present order of things. The defence of an anarchist is no defence to the charge. [P 300 C 1]

(b) Explosive Substances Act (1908), S. 3—Word "maliciously" in S. 3 is used in legal sense.

"Malice" in the legal acceptance of the word is not confined to personal spite against individuals but consists in a conscious violation of the law to the prejudice of another. In its legal sense it means a wrongful act done intentionally without just cause or excuse. It is in the legal sense that the word "maliciously" is used in S. 3. *Bromage v. Prosser*, 1 B. & C 247, Rel. on. [P 300 C 2]

(c) Criminal Trial—One offence punishable under two provisions of law—Only one punishment can be imposed—Penal Code, S. 71.

Where there is one offence punishable with two different provisions of law, one punishment only can be lawfully imposed. [P 300 C 2]

Asaf Ali—for Appellant 2.

Abdul Rashid and Suraj Narain—for the Crown.

Fforde, J.—This is an appeal by Bhagat Singh and B. K. Datta against the judgment and sentence of the learned Sessions Judge who convicted them of attempted murder within the meaning of S. 307, I. P. C., and also of an offence under S. 3, Explosive Substances Act (6 of 1908) which provides punishment for unlawfully causing an explosion likely to endanger life or property. The facts are shortly these :

On 8th April 1929, at about noon, two bombs were thrown in quick succession in the Legislative Assembly Hall just as the President had risen to make an announcement regarding the Public Safety Bill. The first bomb exploded in close proximity to seats Nos. 4-B, 5 and 33. Almost immediately afterwards a second bomb exploded at seat 146 which is one of the seats nearest to the visitors' gallery. Six persons were injured by fragments of these bombs, namely, Sir Bomanji Dalal who received eight wounds, Sir George Schuster who was injured on the back of the right upper arm, in which three small fragments of metal were found

buried, and Messrs. S. M. Roy, A. P. Dube, P. R. Rao and Shankar Rao, all of whom received minor injuries. Immediately after the bombs had exploded two pistol shots were heard which, it is alleged, were fired by the appellant Bhagat Singh, but in regard to this incident no charge has been brought.

The bombs were thrown from a place in the public gallery above the Government benches. That these bombs were thrown by the appellants has been established beyond any possibility of doubt. Both the appellants admitted in the Sessions Court that they threw these bombs, and the appellant Bhagat Singh, who has refused to be represented by counsel, has repeated that admission in his address to this Court. The case of the appellant Datta, however, who is defended by Mr. Asaf Ali, is, firstly, that it has not been proved that he threw one of the bombs in question and secondly, that, if he did so, the bomb was so constructed, and thrown in such a manner as to avoid injury to any person. This latter defence is the one also adopted by Bhagat Singh. They contend that they cannot be found guilty of an attempt to murder inasmuch as the bombs which they threw were deliberately constructed to avoid killing anyone or even causing hurt, and that they were deliberately thrown into a vacant space within wooden barriers protecting the desks and benches where the members sat, with the object of avoiding hurt to any member. They allege that these acts of theirs were for the purpose of drawing attention to their political views which they correctly describe as revolutionary.

That the bomb which exploded first was thrown by Bhagat Singh has been established beyond any doubt. It was this explosion which injured Sir George Schuster and Mr. P. R. Rao. It has also been conclusively proved that the second bomb was thrown by Datta, and caused injuries to Messrs. S. N. Roy and A. P. Dube. S. Sobha Singh who was standing in a portion of the visitors' gallery almost exactly opposite to the place from which the bombs were thrown, has deposed that at the time of the occurrence he was looking at the opposite gallery watching some friends of his who were there with whom he

had an appointment for lunch. He was watching them closely so that he should not miss in the crowd. He actually saw Bhagat Singh throw the first bomb and Datta the second. He could not see their faces clearly at the time they threw the bombs, but he ran round immediately after the explosion and saw the two people whom he had seen throwing the bombs, in the custody of the police. After the explosions the appellants were standing somewhat isolated and quite unperturbed.

In my opinion, quite independently of the admissions of the appellants themselves, the evidence of the prosecution witnesses has established the fact that Bhagat Singh did throw the first bomb and Datta the second.

Mr. Asaf Ali has argued, on behalf of Datta, that the convictions under Ss. 307, I. P. C., and S. 3, Explosive Substances Act, cannot legally be upheld. His argument, which applies to the defence of both appellants, is that there was no intention on their part to cause the death of any person and, therefore, they cannot be convicted of an attempt to murder within the meaning of S. 307, I. P. C. The learned counsel, however, has not been able to get over the definition of murder contained in Cl. 4, S. 300, I. P. C., which provides that culpable homicide is murder:

"If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such an act without any excuse for incurring the risk of causing death or such injury as aforesaid."

It follows that if a person does an act of the nature described in this clause but death is not caused, he is guilty of an attempt to murder.

That the appellants knew that in throwing these bombs they committed an act which was so imminently dangerous that it must in all probability cause death, or such bodily injury as was likely to cause death, cannot be seriously doubted. The casings of the bombs in question were made of cast iron of considerable thickness and the force of the explosions shattered these casings into 150 pieces. One fragment has been proved to have travelled a distance of 40 ft. piercing the roof of the ceiling and lodging behind it. Seat 146, on which the second bomb exploded, was

shattered to pieces though the wood work was of teak some inch and a half thick. There can be no doubt at all that had one of the heavier fragments of metal struck any person on the head the probabilities are that he would have been killed. The defence that these bombs were designedly constructed with a weak charge, and were deliberately thrown at places where they could do no injury, is not compatible with the proved facts of the explosions. The appellants have been described by Mr. Asaf Ali as persons of exceptional intelligence, and it seems to me clear that anyone of even average intelligence, must have known that the explosions of such a missile in a crowded room, however carefully it might have been thrown, is an imminently dangerous act such as they must be deemed to know would in all probability cause death or at least such bodily injury as was likely to cause death. The fact that the appellants had no deliberate intention of killing any particular individual does not take their case outside Cl. 4, S. 300, I. P. C. They had no excuse for incurring the risk. It is no excuse to say that they were sincerely and passionately actuated by the desire to alter the present order of things. That Bhagat Singh is a sincere revolutionary I have no doubt, that is to say, he is sincere in the illusion that the world can be improved by destroying the social structure as it now stands and substituting for the rule of law the unrestrained will of the individual. That has always been the defence of the anarchist. But it is no defence to the charges upon which he and his co-appellant have been convicted. I am satisfied that both the appellants have been rightly convicted of the offence under S. 307, I. P. C.

It is in my judgment equally clear that they are liable under S. 3, Explosive Substances Act (6 of 1908). That section reads as follows:

"Any person who unlawfully and maliciously causes by any explosive substance an explosion of a nature likely to endanger life or to cause serious injury to property shall, whether any injury to person or property has been actually caused or not, be punished with transportation for life or any shorter term, to which fine may be added, or with imprisonment for a term which may extend to ten years, to which fine may be added."

Bhagat Singh has objected, as has counsel for the other appellant, that the

term "malicious" as it appears in this section cannot be applied to them as they were not actuated by any malice towards any individual in the Legislative Assembly. It may be that they were not actuated by malice in the sense in which that term is popularly understood, that is to say, they may not have been inspired by vindictiveness against any particular person, but the acts for which they have been convicted were most certainly "malicious" in the legal sense of that term. "Malice," as Lord Campbell observed:

"in the legal acceptance of the word, is not confined to personal spite against individuals, but consists in a conscious violation of the law to the prejudice of another."

and Bailoy, J., remarked in *Bromage v. Prosser* (1) (at p. 255):

"Malice in common acceptance means ill will against a person, but in its legal sense it means a wrongful act, done intentionally without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice because I do it intentionally and without just cause or excuse."

It is in that legal sense that the word "maliciously" is used in S. 3, Explosive Substances Act.

In my judgment the acts of the appellants came clearly within S. 3 the Act 6 of 1908.

The learned Sessions Judge finding the appellants guilty under both these penal provisions has sentenced them each to transportation for life. Where there is one offence punishable under two different provisions of law one punishment only can be lawfully imposed, and in this case only one punishment has been imposed. It is true that the penalty is the maximum under the respective sections under which they have been convicted but it must be remembered that it was only by sheer good fortune that nobody was killed by the explosions.

I am unable to hold that the sentence imposed by the learned Sessions Judge is, under the circumstances, excessive, and I would accordingly dismiss the appeal of both appellants.

Addison, J.—I concur.

R.M./R.K. . . . *Appeal dismissed.*

(1) 4 B. & C. 247=6 D. & R. 276=3 L. J. (O.S.) K. B. 203=1 Car. & P. 475.

1930 Cr. Cases 301

(Lahore)

BROADWAY and TAPP, JJ.

Emperor

v.

Mohammad Yusuf—Accused—Respondent.

Criminal Appeal No. 798 of 1929, Decided on 19th December 1929, from order of Sess. Judge, Jhelum, D/- 25th May 1929.

Criminal Trial—Admission of guilt in statement by accused only basis of conviction—Statement should be accepted in entirety and benefit of mitigating circumstances therein should be given—Penal Code, S. 300.

When the only account of what happened on the night of murder is given by the accused himself and it is his admission contained in that statement that forms the basis of his conviction, the statement should be accepted in its entirety and if it establishes any mitigating circumstance the accused should be given the benefit of it. [P 803 C 2]

Abdul Rashid—for the Crown.

L. Saunders and Bishan Narain—for Respondent.

Broadway, J. — Mohammad Yusuf, a sepoy in the 1/16th Punjab Regiment stationed at Jhelum, was sent up for trial charged with having murdered his wife Mt. Akbar Jan and his mother-in-law Mt. Fatteh Begam, on the night of 6th March 1929. He was acquitted by the learned Sessions Judge, and against this acquittal the Crown has preferred an appeal under S. 417, Criminal P. C.

Mr. Abdul Rashid has supported the appeal on behalf of the Crown while Mr. Saunders addressed the Court on behalf of the respondent.

The case for the prosecution is that Mohammad Yusuf was living in the lines of his regiment at Jhelum in March with his wife and mother-in-law. Mt. Akbar Jan, the wife, was said to be of loose habits, and her mother, Mt. Fatteh Begam, encouraged her immorality. Mohammad Yusuf remonstrated with her but in vain. On the night of 6th March somewhere about 9 or 10 p. m., the two women prepared to go away. Mohammad Yusuf asked his mother-in-law not to take his wife away and received abuse in reply which abuse was echoed by his wife. Thereupon Mohammad Yusuf struck both the women with a dang knocking them down and then proceeded to use a knife on them.

This statement of the prosecution

case is to be found in a confession made by Mohammad Yusuf to Abdul Ali, Magistrate at about noon on 17th March 1929. It should be noted, however, that in this confession no mention is made of the use of a knife. All that Mohammad Yusuf then stated was that he dealt blows to the women with a dang causing their death. He concluded by saying:—

"I do not know how many blows I dealt at each of them as I was in a fury of rage."

The medical evidence clearly shows that the immediate cause of death in the case of Fatteh Begam was the cutting of her throat, and in that of Akbar Jan the cutting of the blood vessels of the neck.

The learned Sessions Judge has found that the confession was duly recorded. After a careful consideration of the circumstances under which it was recorded he says:

"There was, of course, no legal flaw in the recording of the confession. The formalities of the law were duly observed. There is no evidence that the confession of the accused was the result of any inducement, as alleged by the accused in his statement. But all the same, beyond the retracted confession of the accused, there is absolutely nothing on record to connect him with these murders."

Later on he says:

"Thus though there are no circumstances established which should vitiate the confession, there are no circumstances which would lend support to the confession so as to justify a conviction on such a confession."

Now, according to Subedar Allah Ditta, Mohammad Yusuf came to him, at about 11-30 p. m. on the night of 6th March and woke him. The witness asked him what he wanted at that hour of the night and Mohammad Yusuf told him that he had murdered his wife and his mother-in-law and wanted the Subedar to accompany him to the spot. Allah Ditta went to the family quarters of the respondent taking Havaldar Sohaj Khan with him. At the same time he sent a sepoy to inform Subedar-Major Lal Singh. On arriving at Mohammad Yusuf's quarters the witness noticed a lot of blood in the verandah which had apparently flowed out of the inner room where the dead bodies were lying. He also noticed a knife lying on the ground and a khunda. Subedar-Major Lal Singh appeared on the scene and asked the witness why he had been sent for, whereupon he was told that Mohammad Yusuf had reported having murder-

ed his wife and mother-in-law. The Subedar-Major ordered the doctor and Jamadar Jagat Singh to be sent for, took steps to have the corpses guarded and sent Mohammad Yusaf to the quarter guard, information also being sent to the Adjutant.

This story is borne out in all particulars by Subedar-Major Lal Singh (P. W. 10.). The Adjutant, Captain Wilcock, was put in as a witness and stated that, about 23-45 hours he received information of this occurrence from Havaladar Sahib Dad while he was at the mess. He went to the spot and found Subedar-Major Lal Singh and Subedar Allah Ditta there already. Mohammad Yusaf was not there. He did not go inside the house and therefore did not see the dead bodies. He was informed of the confession made by the respondent and ultimately reported the matter at the police station by letter. This letter has been placed on the record and is to the following effect—

"At Jhelum, on the evening of 6th March 1921, I received the report that S-poy Mohammad Yusaf of D. Company (orderly of Lieutenant S. J. White) had after a quarrel with his wife and mother-in-law murdered them at 23-45 hours. After changing his clothes, he at once confessed this fact to the Senior Indian Officer of his Company, Subedar Allah Ditta, and to the Subedar Major Lal Singh."

On being questioned as to the details of this letter Captain Wilcock says that he was positive that Subedar Allah Ditta told him that Mohammad Yusaf had confessed. He was not positive whether Subedar-Major Lal Singh said the same thing but he believed that to be the case.

As already stated the police arrived on the scene and took up the investigation taking the respondent into custody, and the next day placed him before a Magistrate when his confession was duly recorded.

Before the Committing Magistrate the confession was retracted, and the respondent's story was that he was living quite happily with his wife and mother-in-law in the lines, that his wife was absolutely chaste and that there was no quarrel between them, that he had left them alive in his quarters when he went and on his return found them dead. He admitted having gone to Subedar Allah Ditta, but denied having made over a knife to him, or produced

any clothes or khunda before the police. He also denied having made any confession to Subedar-Major Lal Singh and stated that the statement made by him to the Magistrate on 7th March had been made on the inducement of the Sub-Inspector that he would be let off. Finally, he said that Subedar Allah Ditta was responsible for the fabrication of this case against him because he was his enemy. To this statement he adhered at the trial adding that the relations between himself and his wife were cordial, that he had recently gifted his land to her an act which enraged his reversioners.

He produced three witnesses in his defence. The first one Lance Naik Fazal Ilahi merely says that in his presence and hearing the respondent made no statement to his officers. D. W. 3, Lal Khan says that he was the orderly of Subedar Allah Ditta, that Mohammad Yusaf had come to him on the night of the occurrence and told him that some one had killed his wife and mother-in-law and that Allah Ditta should be informed. Without waiting, however, for the orderly to arouse Allah Ditta, Mohammad Yusaf himself went and called him. Thereupon Lal Khan went to sleep and took no further interest in the proceedings. D. W. 2, Allah Dad, a shop-keeper in the Regiment, stated that Mohammad Yusaf came to him at 10 p. m. on the night of the occurrence and asked for some milk saying that he had been reading the Holy Quran which delayed him. This milk he took away, but a few minutes later he returned and gave back the milk saying that he did not require the milk, and his wife and mother-in-law had been murdered and that he was going to report the matter to Subedar Allah Ditta.

It is obvious that the evidence produced by the respondent is of no assistance whatever in the matter, and the case rests entirely on the evidence for the prosecution. It seems to me that the learned Sessions Judge is wrong when he says that the only evidence against the respondent consists of his retracted confession. Firstly, there is the circumstance that he was alone with his wife and mother-in-law in the quarters at night. Secondly, there is the fact that the two women were undoubtedly struck with the khunda produced

and had their throats cut with the knife. Thirdly, it seems very clear that the women were not killed by anybody coming into the lines from outside. There are no indications whatever of the presence of any outsiders, and it is further clear that no alarm or outcry was raised. Had anybody come from outside and committed the murders the khunda and knife, which undoubtedly had been used, would not have been left behind, seeing that the assassin or assassins had not been disturbed in any way. Then fourthly, there is the undoubted fact that Mohammad Yusuf went and reported the matter to Subedar Allah Ditta. The only cause for enmity that has been suggested is that Allah Ditta admits in cross-examination that he wanted to get his son married to the daughter of Sardar Khan, brother-in-law of Mohammad Yusuf, but Mohammad Yusuf objected. He says that the relations between him and Mohammad Yusuf were not strained on this account. Allah Ditta has consistently stated that Mohammad Yusuf told him that he had killed his wife and mother-in-law.

Next fifthly, there is the statement made to Subedar-Major Lal Singh. This witness undoubtedly is entirely disinterested and has sworn that Mohammad Yusuf confessed to him that he had killed his wife and mother-in-law. The learned Sessions Judge appears to have doubted the correctness of the statement because he says that, when this confession was made to him, Subedar Allah Ditta was present but that Allah Ditta denied the fact at the trial. It is perfectly clear that Allah Ditta did his best at the trial to assist the respondent as far as he possibly could. Subedar-Major Lal Singh's evidence appears to be perfectly straightforward and I have no doubt whatever that he is speaking the truth when he states that the respondent admitted to him that he had killed his wife and mother-in-law.

Sixthly, there is the fact that Mohammad Yusuf was placed in the quarter guard. Had he made no admission of guilt, there is no reason whatever why he should have been taken into custody.

Seventhly, there is the production of the bloodstained clothes which he had taken off before he went to Subedar Allah Ditta.

Finally, there is the confession made

before the Magistrate on 7th March. It is true that he had in police custody been for a few hours, but that by itself is no reason to create any doubt as to the genuineness of the confession. The Sub-Inspector was not put any questions in regard to any inducement offered by him and having regard to the fact the respondent had already admitted his guilt to his superior officers the probability of the Sub-Inspector having offered any inducement to the respondent to repeat his confession is to my mind too remote to create any suspicion. Indeed, it seems to me that the very fact that Mohammad Yusuf in his confession to the Magistrate omitted all references to the knife, which was undoubtedly used, is a strong indication that the confession was entirely a voluntary one and made without any inducement or tutoring whatever.

It has been shown that the respondent had recently gifted his land to his wife. This fact, when taken into consideration in the light of his confession really strengthens the case for the Crown. It would seem that the respondent was doing all he could to induce his wife to live with him amicably and had gone so far as to gift his land to her just before the occurrence.

In my judgment the opinion of the two assessors, Dhera Shah and Raja Waliyat Khan, was correct, and Mohammad Yusuf is undoubtedly responsible for the death of his wife and mother-in-law.

I would, therefore, accept this appeal and convict Mohammad Yusuf of the murder of these two women.

There remains the question of sentence. The only account of what occurred that night is that given by Mohammad Yusuf himself. It is his admission of guilt contained in that account that forms the basis of his conviction and I consider that his statement should be accepted in its entirety. It would, therefore, appear that Mt. Akbar Jan was a woman of unstable character and that she was being encouraged in her behaviour by his mother-in-law. Mohammad Yusuf had apparently done all he could to induce his wife to lead a sober and proper life and as an inducement in that direction, had recently gifted his land to her. When, therefore, in spite of all his efforts and

the final sacrifice of his land, his mother-in-law, probably after a quarrel, informed him that she was taking her daughter away with her, it is perhaps not surprising that Mohammad Yusaf became enraged and in his rage lost complete control of himself and caused the death of these two women. That he did lose complete control of himself is to my mind evidenced very strongly by the fact that in his confession on 7th March, he stated that he had dealt blows with his dang to both the women but did not know how many blows he inflicted on each owing to the rage in which he was. Indeed, it seems to me that the omission to mention the knife was not deliberate but was due to the fact that, having lost all control of himself, Mohammad Yusaf did not really know what he actually had done. In these circumstances I do not consider it necessary to pass a sentence of death, and would therefore, sentence him to transportation for life.

Tapp, J.—I concur.

R.M./R.K.

Appeal allowed.

1930 Cr. Cases 304

(Lahore)

SHADI LAL, C. J.

Partap Singh and others—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Case No. 1631 of 1929, Decided on 3rd January 1930.

Criminal P. C., S. 345 (2)—Duty of granting permission to compromise is upon trying Magistrate and cannot be assigned to District Magistrate or Police.

According to law the Magistrate trying the case has to exercise his own discretion as to whether a compromise is to be allowed or not in a challan case. He is wrong when he refers the case to the District Magistrate. The duty of granting the permission is cast by the legislature upon the Magistrate trying the case and that duty cannot be assigned either to District Magistrate or to the Police. [P 304 C 2]

Mukund Lal Puri—for Petitioners.

Report.—In a case under S. 325, I. P. C., pending in the Court of the Tehsildar of Garhshankar, a compromise was arrived at between the parties. Two petitions were presented to the Court, one for obtaining the permission of the Court as required by law and the other containing a statement as to the compromise. The Court recorded the statements of the parties and referred

the application for permission to compromise to the District Magistrate with a recommendation that the permission sought for might be allowed. The learned District Magistrate sent the case to the Public Prosecutor with the following note :

"As the case is a challan, it is apparently for the Public Prosecutor to say whether he wishes to withdraw the prosecution or whether he does not."

The learned Public Prosecutor suggested that the case might be referred to the Superintendent of Police for his opinion as to whether he had any objection to the compromise. The learned District Magistrate then ordered that the case must go on unless the Superintendent of Police chose to withdraw it. The accused have now come up to this Court on the revision side.

According to law, the Magistrate trying the case has to exercise his own discretion as to whether a compromise is to be allowed or not. He was, quite wrong in referring the case to the District Magistrate. The order passed by the learned District Magistrate is clearly ultra vires. I submit the record to the High Court and recommend that the order may be set aside and the trying Magistrate left to exercise his own discretion in the matter.

Order.—The trial Magistrate was clearly of the opinion that the case under S. 325, I. P. C., should be compounded, but he was entirely wrong in referring the matter to the District Magistrate. S. 345, Sub-S. (2), Criminal P. C., lays down that an offence under S. 325, I. P. C., may, with the permission of the Court before which a prosecution for the offence is pending, be compounded by the person to whom hurt is caused. It is clear that the duty of granting the permission is cast by the legislature upon the Magistrate trying the case, and that duty cannot be assigned either to the District Magistrate or to the Police. In view of the opinion expressed by the trial Magistrate in favour of the compounding of the offence I proceed under S. 345, sub-S. 5-A, Criminal P. C., and allow the parties to compound the offence.

The result of the composition of the offence is that the accused are acquitted.

R.M./R.K.

Order accordingly.

1930 Cr. Cases 305 (1)

(Rangoon)

CHARI, J.

Nga Nyi Gyi—Accused—Appellant.

v.

Emperor

Criminal Appeal Decided on 29th July 1929.

Criminal P. C., S. 393 read with Burma Act (8 of 1927)—Sentence in different cases collectively exceeding period fixed—Person cannot be punished with whipping.

The word "sentenced" which occurs in S. 393, Criminal P. C., and in the Burma Act 8 of 1927, must be read in a general sense, and, if a person is sentenced for any period exceeding the period fixed by the Act whether in conviction in one case or more than one, he cannot be punished with whipping: 1 *Mad.* 56 *Ref.* [P 305 C 2]

Tun Byu—for the Crown.

Judgment.—The accused in this case was properly identified by Ma Sein Pu and his guilt has been established.

The case was admitted because a sentence of whipping was passed in addition to the seven years' rigorous imprisonment passed on the accused. In a previous case, Criminal Regular No. 140 of 1929 in the Court of the same Magistrate the accused was sentenced to four years' rigorous imprisonment, and the sentence of seven years passed on him was directed to run after the expiry of the sentence in the previous case.

The question arises whether a sentence of whipping is legal. Under S. 393, Criminal P. C. no male sentenced to death or to transportation or to penal servitude or to imprisonment for more than five years could be punished with whipping. This has been altered by the Burma Act 8 of 1927 and the term of five has been extended to seven years. The question for decision is whether a person, who is sentenced in two different cases to punishments which collectively exceed the term of seven years, could be punished with whipping. In a Madras case *Re Proceedings of the High Court* (1876) (1) it has been held that a person, who has been punished with the classes of punishment specified in S. 393, Criminal P. C. but in a different case and for a different offence, could not be punished with whipping in a subsequent case in which he has been convicted. It seems to me, therefore, that the word "sentenced" which

(1) [1876] 1 *Mad.* 56.

occurs in S. 393, Criminal P. C., and in the Burma Act 8 of 1927, must be read in a general sense, and, if a person is sentenced for any period exceeding the period fixed by the Act whether in conviction in one case or more than one, he cannot be punished with whipping. The order of whipping in this case is illegal and therefore set aside.

The explanation offered by the District Magistrate is accepted. The trial Magistrate's explanation is also accepted, as the question is not free from doubt and the section of the Burma Act is undoubtedly capable of the construction which the learned Magistrate put on it.

v.B./R.K.

Order accordingly.

* 1930 Cr. Cases 305 (2)

(Nagpur)

JACKSON, A. J. C.

on difference between

STAPLES AND SUBHEDAR, A. J. Cs.

Daulat and others—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 28 of 1929, Decided on 7th August 1929, from an order of Sess. Judge, Hoshangabad, D/- 16th February 1929.

(a) Evidence Act, Ss. 133 and 114, *Illus.* (b)—(Per Subhedar, A. J. C.)—Scope—Rule in S. 114, *Illus.* (b) has almost acquired force of law by judicial decisions—(Jackson, A. J. C.) *doubting.*

Per Subhedar, A. J. C.—The rule in S. 114, *Illus.* (b), that an accomplice is unworthy of credit unless he is corroborated in material particulars has become a rule of practice of so universal application that it has now almost acquired the force of law. [P 307 Q 1]

Per Jackson, A. J. C.—S. 133 cannot be entirely nullified by judicial decisions and there may be cases in which the rule in S. 114, *Illus.* (b), should not be applied. The question arising in every case where the uncorroborated evidence of the accomplice has to be considered is whether it can be believed or not. Further when the evidence is strengthened by corroboration of other facts of the story by evidence of several accomplices or by confessions of co-accused, the question whether the maxim should still apply must receive careful consideration. A. I. R. 1921 Nag. 29, *Rel. on.* [P 315 Q]

* (b) Evidence Act, S. 114, *Illus.*

(Per Subhedar and Jackson, A. J. C's.)—where there are several accused, approver's story should be corroborated as regards particular accused and must be confirmed on some point which implicates that particular accused—(Staples, A. J. C., *contra.*)

Per Staples, A. J. C.—It is true that an approver's story should be corroborated not only as regards the facts of the case but also as to

gards the identity of the accused, but where there are several accused and the story of the approver has been confirmed on many points, and as regards the identity of several of the accused, it should not be considered necessary that his story should be corroborated as regards the identity of the remaining accused unless there are reasons for believing that the approver has named those other accused on account of personal spite or for some other reason. The real test of the evidence of the approver is whether it has been believed or not and when it has been corroborated on many points and has not been shown to be false in any particular it should be accepted; and when once it has been accepted as a whole corroboration as regards the identity of each of several accused should not be demanded: *A. I. R. 1921 Nag. 3*; *9 All. 528, Expl.*; *Reg. v. Baskerville, (1916) 2 K.B. 658, Dist. [P 312 C 1, 2]*

(*Per Jackson and Subhedar, A. J. Cs.*)—Even where there are several accused persons, an approver's story to be corroborated as regards a particular accused must be corroborated on some point which implicates that accused. It is not necessary that it should be corroborated on all points relating to him, but there must be some guarantee that his evidence is true as regards that particular accused: *A. I. R. 1921 Nag. 39, Rel. on*; *14 Bom. 331*; *A. I. R. 1922 Nag. 172*; *A. I. R. 1925 Nag. 78, Appl. [P 315 C 1]*

(*c*) Evidence Act, S. 30—(*Per Subhedar, A. J. C.*)—Confession of co-accused cannot be used to corroborate evidence of approver—(*Staples, A. J. C., contra.*)

(*Per Subhedar, A. J. C.*)—Confessional statements of accused cannot be used in corroboration of the evidence of the approver inasmuch as tainted evidence is not made better by being corroborated by other tainted evidence. [P 309 C 1]

(*Per Staples, A. J. C.*)—Confessions of co-accused must be taken into consideration and cannot be brushed aside merely as tainted evidence: *A. I. R. 1921 Nag. 39, Rel. on.* [P 313 C 1]

(*d*) Evidence Act, S. 133—Corroboration may be circumstantial.

(*Per Staples, A. J. C.*)—Corroboration of approver's story may be circumstantial: *A. I. R. 1922 Nag. 172, Rel. on.* [P 313 C 2]

R. N. Padhye—for Appellant.

G. P. Dick—for Respondent.

Opinion

Subhedar, A. J. C.—The following nine persons were tried by the Sessions Judge, Hoshangabad, for two separate offences under Ss. 302 and 395, I. P. C.: (1) Daulat, son of Jairam Bhoir, (2) Hiraji, son of Sakia Bhoir, (3) Lehram, son of Sakia Bhoir, (4) Lehram, son of Gangu Bhoir, (5) Bajya, son of Sukhya Bhoir, (6) Keoli, son of Ganesh Bhoir, (7) Ganpat, son of Jairam Bhoir, (8) Patiram, son of Karti Mehra, (9) Bhemia, son of Bhogaji Mehra. Of these accused, 1, 2, 3 and 6 were convicted and sentenced to death for the offence

of murder and to transportation for life for dacoity and the rest were acquitted. The convicted persons have preferred appeals which are registered in this Court as Criminal Appeals Nos. 28, 29, 30 and 31 of 1929. There are also references by the Sessions Judge for confirmation of the sentences of death passed upon the appellants and these are registered as Criminal References Nos. 6, 7, 8 and 9 of 1929. The Local Government has also preferred appeals against the acquittal of accused 4, 5, 7 and 8 and these are registered as Criminal Appeals Nos. 51, 52, 53 and 54 of 1929. As the two sets of appeals and the references are connected, this judgment will govern the disposal of all the cases.

The case for the prosecution was that in pursuance of a conspiracy all the nine accused and one Tukaram (P. W. 2), who turned an approver, entered the house of one Shiamrao Sonar, a malguzar and money lender of mouza Siladehi, in the Multai Tahsil, Betul District, on the night of 11th October 1928, and while the unfortunate man was fast asleep accused 1 and 2 did him to death by striking him with an axe while the other accused and the approver watched this atrocious crime being committed in their presence, and that after the murder all the accused rifled the safe of the deceased and robbed him of its contents and also took away other articles from the house valued at about Rs. 2,000. The case rests almost entirely upon the evidence of the approver Tukaram (P. W. 2) whose testimony has been believed in by the learned Sessions Judge as it was sufficiently corroborated by the recovery of some of the stolen articles at the instance of some of the accused. At the hearing of the appeals in this Court Mr. R. N. Padhye represented accused 1 Daulat, Mr. Razak appeared for accused 2 and 3, Hiraji and Lehram, while Mr. Pathak appeared for accused 6 Keoli. In the Government appeals Mr. Fida Husain appeared for all the four accused 4, 5, 7 and 8, who had been acquitted in the lower Court.

The main argument advanced on behalf of all the accused was that the evidence of the approver Tukaram (P. W. 2) should be discarded because he was on inimical terms with some of the accused and because his testimony was not corroborated in material particulars

by any independent, reliable and legal evidence. It was also argued that the statements of some of the accused, e.g., Bajya, Ganpat and Patiram (Nos. 5, 7 and 8) amounting to confessions could not legally be used against the other accused as evidence either by themselves or in corroboration of the testimony of the approver. It was further contended that on the finding of the Sessions Judge and on the evidence on record the convictions under S. 395, I. P. C., were not correct.

With regard to the first contention it is undoubtedly correct to say that under S. 133, Evidence Act, an accomplice is a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice: *Govinda v. Emperor* (1); but by a series of judicial decisions the rule as to the necessity of substantial corroboration of this sort of tainted evidence embodied in S. 114, Illus. (b) *ibid*, has become a rule of practice of so universal application that it has now almost acquired the force of law. As observed by Jardine, J., in *Queen-Empress v. Chagan Dayaram* (2) at p. 344 :

"The rule in S. 114 and that in S. 133 are part of one subject, and both are found in most of the great judgments mentioned in our judgments in that case ; and neither section is to be ignored in the exercise of judicial discretion. Illus. (b) is, however, the rule, and when it is departed from, I think the Court should show or that it should appear, that the circumstances justify the exceptional treatment of the case. As I said in *Queen-Empress v. Maganlal* (3) at p. 138, 'it has been held by two eminent Judges, now members of the Judicial Committee of the Privy Council, that it would certainly be unsafe to depart in India from the established practice of England in the application of the rule requiring corroboration. These are the words of Couch, C. J., in *Reg v. Imam* (4), and they pervade Sir Barnes Peacock's decision in *Elahee Bukhsh, In re* (5).' It is not enough for a Court to state the rule pro forma and merely as a reason to evade it the Courts must act up to it."

It is next to be considered what sort of corroboration is necessary to make the approver's evidence worthy of credit. The fullest and the most authoritative exposition of the law on the subject in question is to be found in *Rex v. Baskerville* (6) in which the judgment of the

Court of appeal consisting of five eminent Judges was delivered by Lord Reading, L. C. J., wherein the law was laid down in these words :

"There is no doubt that the uncorroborated evidence of an accomplice is admissible in law: see *R. v. Atwood* (7). But it has long been a rule of practice at common law for the Judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and, in the discretion of the Judge, to advise them not to convict upon such evidence ; but the Judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence : *R. v. Stubbs* (8); *Meunier, In re* (9). 'As the rule of practice at common law was founded originally upon the exercise of the discretion of the Judge at the trial, and moreover, as it is anomalous in its nature, inasmuch as it requires confirmation of the testimony of a competent witness, it is not surprising that this rule should have led to differences of opinion as to the nature and extent of the corroboration required, although there are propositions of law applicable to corroboration which are beyond controversy. For example, "confirmation does not mean that there should be independent evidence of that which the accomplice relates, or his testimony would be unnecessary": *Reg. v. Mullins* (10), per Maule, J. Indeed, if it were required that the accomplice should be confirmed in every detail of the crime his evidence would not be essential to the case; it would be merely confirmatory of other and independent testimony. Again, the corroboration must be by some evidence other than that of an accomplice, and, therefore, one accomplice's evidence is not corroboration of the testimony of another accomplice: *R. v. Nookes* (11):

"After examining these and other authorities to the present date, we have come to the conclusion that the better opinion of the law upon this point is that stated in *R. v. Stubbs* (8) by Parke, B., namely, that the evidence of an accomplice must be confirmed not only as to the circumstances of the crime, but also as to the identity of the prisoner. The learned Baron does not mean that there must be confirmation of all the circumstances of the crime; as we have already stated, that is unnecessary. It is sufficient if there is confirmation, as to a material circumstance of the crime and of the identity of the accused in relation to the crime. Parke, B., gave this opinion as a result of twenty-five years' practice; it was accepted by the other Judges, and has been much relied upon in later

(1) A. I. R. 1921 Nag. 89=17 N. L. R. 113.

(2) [1890] 14 Bom. 331.

(3) [1890] 14 Bom. 115. a

(4) 3 B. H. C. R. 57.

(5) 5 W. R. 80 Cr.=B. L. R. Sup. Vol. 459.

(6) [1916] 2 K. B. 658=86 L. J. K. B. 28=80 S. J. 696=25 Cox. C. C. 524=20 J. P. 446=115 L. T. 459.

(7) [1788] 1 Leach 464.

(8) 25 L. J. M. C. 16=7 Cox. C. C. 48=4 W. R. 35.

(9) [1894] 2 Q. B. 415=18 Cox. C. C. 15=53 L. J. M. C. 193=12 W. R. 637=71 L. T. 403.

(10) [1848] 3 Cox. C. C. 526.

(11) [1832] 5 C. & P. 426.

cases. In *R. v. Wilkes* (12) Alderson, B., said: "The confirmation which I always advise juries to require, is a confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged. You may legally convict on the evidence of an accomplice only, if you can safely rely on his testimony; but I advise juries never to act on the evidence of an accomplice, unless he is confirmed as to the particular person who is charged with the offence."

"We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect the accused with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true, not merely that the crime has been committed, but that it was committed by the accused."

"The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connexion with the crime."

The tests laid down in the above case were applied with approval by Kotval, A. J. C. in *Kisan Raghuj v. Emperor* (13). In *Sheroo v. Emperor* (14) Kotval, A. J. C. and Kinkhede, A. J. C., also held that before a conviction is based on the statement of an approver the first and foremost essential condition is that the statement must be a trustworthy statement and there must be ample corroboration of the evidence of the accomplice in material particulars which must be independent of the accomplice or of a co-confessing prisoner.

Applying the principles laid down in the above paragraphs to the present case it appears to me to be unsafe to rely solely on the testimony of the approver Tukaram (P. W. 2) and not to raise the presumption against his evidence under S. 114 (b), Evidence Act. The murder was committed on 11th October 1928, and Tukaram was not arrested till 18th October 1928, and he

remained in police custody till 3rd November 1928, when he was remanded with some of the other accused to jail custody. On 12th November 1928, the police again took this man under their care along with some of the accused evidently for the purpose of having his confession recorded, but it was not till 5th December 1928, when the challan was presented that Tukaram made his statement (Ex. P-29), was tendered pardon, made an approver and was at once examined as P. W. 2.

It will, therefore, be seen that in spite of the fact that he was taken out of the jail custody by the police for the express purpose of having his confession formally recorded, Tukaram apparently did not consent to make a confession before a Magistrate, like accused Ganpat (No. 7) and accused Patiram (No. 8) whose confessions (Exs. P-27 and P-28) were recorded by Mr. Mohanlal, Sub-Divisional Magistrate on 25th and 29th November 1928, respectively. It may also be noted that one Tudari, Bhomia and Keoli accused were also put up before the same Magistrate for making confession but they did not make any but complained of ill-treatment at the hands of the police: see Exs. P-9 D and 6 D-1. There is also evidence on the record that the approver Tukaram is on inimical terms with accused Daulat and the brothers Hiraji and Lehram. Unless, therefore, the evidence of Tukaram is corroborated in material particulars by independent evidence and connects individual accused with the crime, I will not consider it trustworthy. In the course of arguments it was not denied that Shiamrao was murdered on the night of 11th October 1928. I will, therefore, proceed to examine the case of each individual accused in order to determine if the evidence on record is sufficient in his case for a conviction for the substantive offence of this murder under S. 302, I. P. C.

Daulat, accused 1.—There is ample reliable evidence of P. W. 12, P. W. 18 and P. W. 19 that this accused was on the most inimical terms with the deceased Shiamrao. The accused himself admits that there were decrees obtained by Shiamrao against him and that in resisting execution of one of these he was convicted under S. 183, I. P. C. The approver Tukaram states that this

(12) [1886] 7 C. & P. 272.

(13) A. I. R. 1922 Nag. 172.

(14) A. I. R. 1926 Nag. 78.

accused took the most leading part in starting the conspiracy to commit the murder and actually gave four blows to the deceased with an axe which caused his death. An axe head Art. H-3 was also recovered from a well on information supplied by this accused. Similarly Art. T-2 a piece of the broken kardora proved to have been worn by the murdered man on the night of the murder and wrenched from his body was also recovered from a field at the instance of this accused. This portion of the kardora is a part of the other portion Art. V-2 which was seized from Shiamrao's house. In his explanation this accused merely stated that the Kardora (Art. T-2) belonged to him but he has failed to account for its possession and for the necessity of burying it underground. I therefore, hold that the evidence of the approver has been sufficiently corroborated by other independent evidence noted above in the case of this accused to connect him with the murder. Looking to the prominent part that he took in the crime the sentence of death passed against this accused by the Sessions Judge was the most appropriate one and is hereby confirmed.

Hiraji and Lehram accused 2 and 3. — These two accused are real brothers. The approver Tukaram states that these accused were also in the conspiracy to murder Shiamrao, and that both of them were present inside the room where Shiamrao was murdered. There is no independent evidence on the record to substantiate this part of the approver's evidence which attempts to connect these men with the crime. No property belonging to the deceased was recovered from them or at their instance. On the principle of law already enunciated above the confessional statements of Ganpat and Patiram (accused 7 and 8) cannot be used against these accused either independently or in corroboration of the evidence of the approver for as remarked at p. 923 of Amir Ali's Law of Evidence, 8th Edition:

"Tainted evidence is not made better by being corroborated by other tainted evidence."

I would therefore, set aside the convictions of these accused and acquit them.

Lehram accused 4. — This is one of the accused who has been acquitted by the Sessions Judge and against whom

the Government has filed an appeal. According to the approver Tukaram this accused was one of the four who did not enter the room but remained in the angan when the murder was committed. As in the case of accused 2 and 3 there is also no independent evidence beyond that of the approver and the confessional statements of accused 7 and 8 against this accused. For the reasons already given in the case of accused 2 and 3, I also hold, though for reasons different from those given by the learned Sessions Judge, that this accused is not guilty of the offence charged against him. I would, therefore, uphold his acquittal and dismiss the Government appeal against him.

Bajya accused 5. — This accused in his statement before the Committing Magistrate as well as before the Sessions Judge has confessed to his having been a party to the conspiracy engineered by accused 1 to kill Shiamrao and also to his having accompanied the other conspirators to the scene of murder and to the part taken by himself as deposed to by the approver Tukaram. But he also stated that he joined the conspiracy because of the threat of death administered to him by accused 1. In the first place even assuming the story of this accused as regards compulsion to be true which, however, is not the case because there is no evidence to support it, his case does not come within the purview of S. 94, I. P. C., which declares that nothing is an offence which is done by a person under circumstances of compulsion specified therein. The very opening words of the section exclude "murder" from its operation. Disagreeing with the learned Sessions Judge I set aside the acquittal of this accused and convict him of murder. As he was a mere hireling on his own admission and took no important part in the actual murder, I sentence him to transportation for life.

Keoli accused 6. — The evidence of the approver Tukaram finds ample corroboration in the statement made by this accused before the Committing Magistrate (Ex. p. 37) although he retracted the same before the Court of Sessions. Tukaram the approver and Guru (P. W. 18) prove that about a month and a half before the murder the deceased Shiamrao did not agree to take

the large amount of debt due by the father of this accused by easy instalments. It is also proved that Arts. O-2, P-2 and Q-2 belonging to the deceased were found tied up in Art. N-2 a piece of angobha belonging to this accused. Art. W-2 a portion of Art. N-2 was also dug out from a portion of the field by this accused. All this evidence is sufficient to hold this accused guilty of the offence of murder and I accordingly uphold his conviction. This accused also took a very leading part in the crime and he gave a blow with an axe on the buttock of the deceased apparently out of sheer spite because the fatal blows were already given by accused 1. It was at his suggestion that after having come out of the house after committing the murder that the whole gang went back into the house and committed theft. Under these circumstances this accused was rightly sentenced to death and I confirm the said sentence.

Ganpat accused 7.—Besides his confession (Ex. p. 27) there are his own statements both in the committing Magistrate's Court and the Sessions Court that he agreed to join in the conspiracy to kill Shiamrao at the instance of Keoli accused for a consideration of Rs. 100., that he did go to the place in pursuance of the conspiracy and was one of those who took their stand in the angan. The approver Tukaram also does not assign to this accused any other part in the affair than what is already admitted by him. Disagreeing with the Sessions Judge I set aside his acquittal and convict this accused of murder and sentence him to transportation for life.

Patiram accused 8.—The case of this accused is exactly like that of Ganpat accused 7 with the only difference that in his statement before the Sessions Judge he pleads compulsion. For the reasons given in the case of Bajya, accused 5, the plea of compulsion even if proved cannot be availed of by this accused. I accordingly convict him of murder and sentence him to transportation for life as he was merely a hireling and took no active part in the murder.

A very ingenious argument was advanced by Mr. Fida Husain to the effect that in the case of three of his clients no common intention to murder

Shiamrao was established, because the evidence of the approver and their own admissions went to show that they had only agreed to accompany the principal conspirators to the scene merely to stand as spectators without any part being assigned to them in the carrying out of the proposed murder. This argument requires no very serious consideration. An effective reply to it is to be found by holding these accused guilty under S. 114, I. P. C., read with S. 302 *ibid*, for it was not disputed that their admitted participation in the affair brought them within the four corners of the definition of abettors within the meaning of S. 107 *ibid*. They could also be held guilty under S. 34 read with S. 302, I. P. C. *Barendra Kumar Ghose v. Emperor* (15).

This disposes of all the cases so far as the offence of murder under S. 302, I. P. C., is concerned. As to the offence of dacoity under S. 395, I. P. C., I hold that on the evidence on record which I will discuss later on and on the findings of the learned Sessions Judge this offence has not been established.

In para. 8 of his judgment the Sessions Judge states as follows :

"This is not a case in which murder was committed in progress of or in pursuance of the commission of dacoity as for instance for effecting a safe retreat. What the approver has stated is that the intention was that Shiamrao should be murdered that the accused persons left the house after that purpose was accomplished and that they came back to the room to commit dacoity partly because Keoli wanted to remove the bond on which he was liable to pay a debt and partly because it was believed that the crime would be supposed to be the work not of any of the villagers but of those who did not belong to the village. It may be noted here that Keoli in his statement before the Committing Magistrate, has stated that Shiamrao was not attacked while he was on his way to the ghana because it was apprehended that he might manage to escape."

This conclusion of the learned Sessions Judge is perfectly warranted by the evidence on record and the proved circumstances of the case. The very fact that the prosecution was started for two separate offences of murder (S. 302, I. P. C., and dacoity (S. 395, I. P. C.), and not under S. 396, I. P. C., itself indicates that murder was absolutely unconnected with the theft committed

(15) A. I. R. 1925 P. C. 1=51, Cal. 197=52 I. A. 40 (P. C.).

by the murderers after commission of the murder. The learned Government Advocate relied on the following passage appearing at p. 37 of the record in the cross-examination of the approver Tukaram to show that the original conspiracy was to commit dacoity as well and that the conviction under S. 395, I. P. C., was therefore, warranted :

"On Friday Daulat said that he would kill Shiamrao. He said that he would kill also Shiamrao's wife, child and even servants. Some of us then said that to that extent we must not go and that only Shiamrao should be killed and his property should be looted. None of these that were present said that he would not kill Shiamrao."

It will be seen that the statement in the above quotation is very vague and indefinite because it does not say that all the conspirators agreed to the suggestion of murder and loot. The above statement is also not corroborated by any other evidence on the record. Moreover just a little later after the aforesaid statement was made the approver also stated as follows :

"It was when the police said after the murder that he has joined in order to take possession of the bond that I came to know that he had joined for that purpose."

The fact that after the murder was committed all the conspirators came out of the house with the idea of dispersing but re-entered the house at the suggestion of Keoli accused to commit theft and thus create evidence that the crime was committed by people living outside the village itself shows that dacoity was not thought of at all by the conspirators in the first instance and that their sole object was only to murder Shiamrao. If it were otherwise it has not been explained why they did not set about ransacking the safe and other contents of the house soon after Shiamrao had been killed. There is no suggestion that they had to leave the room and the house because the inmates of the house had been aroused from sleep and had pursued them.

Under S. 390, I. P. C., theft is "robbery" if in order to the committing of the theft, or in carrying away property obtained by the theft, the offender for that end voluntarily causes or attempts to cause to any person death or hurt etc. Under S. 391, I. P. C., when five or more persons commit robbery it becomes dacoity. The essence of the offence is the inflicting of hurt in order to the com-

mitting of the ft. Hurt in the event of theft does not amount to robbery. On the evidence in the present case Shiamrao was already killed before the persons responsible for his murder re-entered the house and rifled it of some of its contents on the suggestion of Keoli accused with a definite end in view. Disagreeing then with the Sessions Judge I hold that the offence of dacoity under S. 395, I. P. C., has not been proved in this case, but that those who took part in the theft are liable to be convicted only under S. 379, I. P. C. On the evidence on record I find all the accused whom I have held guilty under S. 302, I. P. C., also guilty under S. 379, I. P. C., and I sentence each of them to rigorous imprisonment for one year, the sentences in each case to run concurrently.

The net result of the decision is as under :

For the net result see statement at p. 312.

The accused Nos. 4, 5, 7 and 8, who had appeared personally at the hearing of the appeals in this Court, have been bound over to appear before the District Magistrate, Betul to hear the result. When they so appear Nos. 5, 7 and 8 will surrender themselves and undergo the sentence passed against them.

Staples, A. J. C.—I have read the opinion of Subhedar, A. J. C., with whom I heard these appeals, and, while agreeing with him that the conviction of Daulat and Keoli under S. 302, I. P. C., should be maintained and the sentences of death confirmed, that the appeals preferred by the Local Government as regards Bajya, Ganpat and Patiram should be allowed and that the acquittals of these persons by the Sessions Judge should be set aside and they should be convicted under S. 302, I. P. C., and sentenced to transportation for life. I would disagree with his view that the convictions of Hiraji and Lehram son of Sakia should be set aside and am of opinion that the conviction of these two appellants also under S. 302 should be maintained. I am further of opinion that the appeal of the Local Government as regards Lehram son of Gangu should also be allowed and his acquittal should be set aside and he too should be convicted under S. 302, I. P. C. As regards the question of the conviction under S. 395, I. P. C., I would

agree with the opinion expressed by Subhedar, A. J. C., that the conviction should be under S. 379, I. P. C., only.

As regards the three persons Hiraji, Lehram son of Sakia and Lehram son of Gangu, Subhedar, A. J. C., following *Rex v. Baskerville* (6) as interpreted by Kotval, A. J. C., in *Kisan Raghuj v. Emperor* (13) has held that there has been no corroboration of the approver's story as regards the identity of these persons and that, therefore, they should be acquitted. It is true that in *Rex v. Baskerville* (6) it has been held that an approver's story should be corroborated not only as regards the facts of the case but also as regards the identity of the accused, but it may be noted that in

accused, it should not be considered necessary that his story should be corroborated as regards the identity of the remaining accused unless there are reasons for believing that the approver has named those other accused on account of personal spite or for some other reason.

The rules as regards the corroboration of an approver's testimony should not be interpreted too mechanically, and where there has been a general corroboration of the approver's story the rest of the story should, as a rule, be, I think, accepted unless it can be shown to be false or there are good reasons for disbelieving it. The real test of the evidence of an approver, as indeed of

No.	Name of accused.	Offence.	Result.	Sentence.	Remarks.
1	Daulat	S. 302 I.P.C.	convicted	Death and one year R. I.	Cr. A. No. 28/29 dismissed.
2	Hiraji	S. 379 "	"	"	Cr. A. No. 23/29 allowed.
3	Lehram son of Sakia.	S. 302 "	acquitted	"	Cr. A. No. 30/29 "
4	"	S. 379 "	"	"	"
5	Lehram son of Gangu.	S. 302 "	"	"	Cr. A. No. 52/29 dismissed.
6	"	S. 379 "	"	"	"
7	Bajya	S. 302 "	convicted	transportation for life.	Cr. A. No. 51/29 allowed.
8	"	S. 379 "	"	one year R. I.	"
9	Keoli	S. 302 "	"	death	Cr. A. No. 31/29 dismissed.
10	"	S. 379 "	"	one year R. I.	"
11	Ganpat	S. 202 "	"	transportation for life.	Cr. A. No. 53/29 allowed.
12	"	S. 379 "	"	one year R. I.	"
13	Patiram	S. 302 "	"	transportation for life.	Cr. A. No. 54/29 "
14	"	S. 379 "	"	one year R. I.	"

that case there was only one accused and I think it is straining the rule as laid down in that case too far to say, as Kotval, A. J. C., appears to hold in *Kisan Raghuj v. Emperor* (13) that where there are several accused there must be corroboration of the approver's story as regards each one of them. To hold so would be, I think tantamount to holding that the approver's story must be corroborated in every detail, which view has been expressly dissented from in *Reg v. Mullins* (10) which has been cited by Kotval, A. J. C., in *Kisan Raghuj v. Emperor* (13). I am of opinion that where there are several accused and the story of the approver has been confirmed on many points and as regards the identity of several of the

any other evidence, is whether it has been believed or not, and when it has been corroborated on many points and has not been shown to be false in any particular it should, I think, be accepted; and when once it has been accepted as a whole, corroboration as regards the identity of each of several accused should not be demanded. This, I think, is the view which has been taken in *Govinda v. Emperor* (1) and in *Queen Empress v. Gobardhan* (16), which has been followed therein. Each case, moreover, must be decided on its own facts, and in the present case I am of opinion that the evidence of the approver Tukaram has been very fully corroborated.

Tukaram has given a very clear and full story of the whole occurrence and his presence at the time of the murder has been corroborated by the evidence Mt. Verubai, the widow of the murdered man, Shiamrao. His evidence is further corroborated, as noted by Subhedar, A. J. C., the confessions of two of the accused and by the recovery of property which has been well-identified. As noted above, his statement has not, I think, been shown to be false in any particular, and the allegations of enmity which have been put forward have not been substantiated or, at any rate, the grounds alleged for enmity seem rather slight. These facts will, I think, completely do away with any suspicion that might attach to Tukaram's evidence on account of the facts noted in paras. 11 and 12 of Subhedar, A. J. C.'s opinion. It would also be borne in mind that Tukaram clearly admits his own presence and complicity in the offence and gives the detail that he was taken there to open the safe adding that he did open the safe which is borne out by the statement of one of the other accused.

Another point, I think, which has to be borne in mind is that the confessing accused Ganpat and Patiram have given a very full and clear account which agrees in practically every detail with the story as told by Tukaram. It is true that such confessions cannot be, strictly speaking, corroboration of the approver's evidence as noted by Subhedar, A. J. C., in para. 15 of his opinion; but on the other hand, those confessions cannot be disregarded altogether and as the accused in making those confessions implicate themselves they may, and, in fact, should, be taken into consideration according to S. 30, Evidence Act. In *Govinda v. Emperor* (1) confessions of co-accused have been considered as evidence that can strengthen the evidence of an accomplice and I am of opinion that, at any rate, such evidence must be taken into consideration and cannot be brushed aside merely as tainted evidence. In the present case, as noted above, there is a particularly consistent story told both by Tukaram and these two accused Ganpat and Patiram. I would, in particular, note that as regards the two appellants Hiraji and Lehram son of Sakia, they all agree

that they were two of the four men who entered the room in which Shiamrao was sleeping, while the remaining accused stood outside. They all agree that it was Daulat who struck Shiamrao with his axe and that Keoli gave one blow later. They all agree that it was Lehram son of Sakia who opened the tatta and again they all agree that it was Keoli who brought the key from Shiamrao's person and gave it to Tukaram who opened the safe. It has not been shown, nor has it even been suggested, that there has been any agreement among these three persons Tukaram, Ganpat and Patiram, to tell a concerted story, and the fact, then that they to tell such a particularly clear and consistent story must, I think, carry great weight. As regards Lehram son of Gangu, Tukaram and both accused Ganpat and Patiram agree that he was in the party and he was one of those who stayed outside, and I see no reason why the evidence should not be believed as regards this accused also.

Then, too, I think, such corroboration may be circumstantial, and Kotval, A. J. C. in *Kisan Raghuj v. Emperor* (13) has held this at p. 56 (of 6 N. L. J.). Now in the present case from the evidence of Tukaram it appears that Shiamrao had obtained a decree against Hiraji five or six months ago, that in a criminal case against Shiamrao, Hiraji had given evidence against him and that Lehram's (son of Sakia) wife had beaten Shiamrao's son and they were on bad terms. It also appears that in a case filed by a Gond against Shiamrao, Lehram son of Gangu had given evidence against him and that half of Lehram's sister's field had passed to Shiamrao in satisfaction of a debt. There is thus, at any rate, some evidence on record to show that Hiraji and Lehram son of Gangu were on bad terms with Shiamrao, whilst the other Lehram is Hiraji's brother. As regards any motive for Tukaram implicating these persons falsely, there is, I think, as stated above, no sufficient evidence. Hiraji, before the Committing Magistrate, stated on examination that Tukaram was telling lies through enmity, that he had taken a wife from Bidhora and had been fined Rs. 25 by the panchas that there was enmity on that ground and

also because he had given evidence against Tukaram's brother on a bond and had also given evidence according to which the house of one Sirju Teli had been released from attachment effected by Tukaram. Lehram son of Sakia stated that Tukaram unnecessarily mentioned his name because he had abused him on being asked to make an admission and quarrels took place at times over a field. Lehram son of Gangu has stated that Tukaram implicated him through enmity because he refused to give false evidence in a case against Tukaram's brother and because he did not depose in favour of Tukaram in another case in which Tukaram had been beaten. He has admitted that that case was some five or six years ago. He has added that he did not prepare a cart for Guru some two years ago and that there was also a quarrel about that. Before the Sessions Judge Hiraji has simply stated on this point that Shiamrao had obtained a decree against him and so they, presumably the prosecution witnesses, spoke against him.

He has added that there was no enmity between him and Shiamrao. Lehram son of Sakia simply stated that Tukaram deposed against him on account of previous enmity, while Lehram son of Gangu stated that Tukaram gave evidence against him because he was tutored by police and on account of previous enmity. No evidence has led in support of their statements but Tukaram has been cross-examined on this point. In cross-examination he stated that Hiraji and his brother Lehram are distant cousins, that they owned separate houses and cultivated land separately. He has admitted that in a criminal case Hiraji gave evidence against Shiamrao and his (Tukaram's) brother Bhaurao about a year ago and that in connexion with the execution of his decree against a Gond Teli Hiraji gave evidence against him and the objection of one Sirju was allowed. He has denied that there was any dispute between him and Hiraji and Lehram about any field or right of way. I can find no statement in Tukaram's cross-examination to bear out the allegation of enmity as regards Lehram son of Gangu, and I am of opinion that the admitted facts as regards Hiraji and

his brother Lehram are quite insufficient to show any such enmity as would be likely to cause Tukaram to give false evidence against him on a murder charge. Further, no reason whatever has been shown why the two accused Ganpat and Patiram should wish to make false statements against Hiraji and the two Lehrams, nor has any enmity even been alleged.

I am of opinion, then that, as the case stands, in view of the corroboration of the approver's story on so many points and as regards the identity of several of the accused and in view of the agreement between his story and the confessions made by two accused Ganpat and Patiram. Tukaram's evidence must be accepted as against Hiraji, his brother Lehram and Lehram son of Gangu also. I do not, however, think that the sentence of death as regards Hiraji and Lehram son of Sakia should be confirmed. It is true that it has been shown that these two did enter the room at the time of the murder with Daulat and Keoli, whilst the others remained outside, but it has not been shown that they struck any blow, and I am of opinion that the lesser sentence only of transportation for life should be imposed. As regards Lehram son of Gangu, the approver as well as the confessing accused Ganpat and Patiram all agree that he remained outside and he also should be sentenced to transportation for life. I would agree with the sentence of rigorous imprisonment for one year which has been suggested by Subhedar, A. J. C., for the offence under S. 379, I. P. C., and would add that that sentence should be passed upon Hiraji and the two Lehrams also as well as the other appellants.

On account of difference the case came before another Judge who delivered the following judgment.

Jackson, A. J. C. — Nine persons were tried by the Sessions Judge, Hoshangabad, for the offences punishable under Ss. 302 and 395, I. P. C. Four only were convicted and sentenced to death for the offence of murder and to transportation for life for the offence of dacoity. The Local Government has appealed against the acquittal of four of the accused, and the four convicted have also appealed. As regards

two of the accused convicted and one of the persons in respect of whom the Local Government has preferred an appeal the Bench which originally heard the case has differed. Subhedar, A. J. C. is in favour of setting aside the convictions of Hiraji and his brother Lehram, sons of Sakia, and of disallowing the appeal by the Local Government as regards Lehram, son of Gangu. Their cases have consequently been referred to me for decision.

The point taken on behalf of the three persons with whom I am concerned is that the evidence against them is that of an uncorroborated approver Tukaram, and the first question I have to consider is whether there is no corroboration of his evidence. Subhedar, A. J. C., has held that the confessions of two co-accused are no corroboration of Tukaram and that the corroboration that there undoubtedly is of Tukaram's evidence as regards other accused is no corroboration of his evidence as regards the three persons whose cases I am now considering. His opinion is based mainly on the judgment of Lord Reading, L. C. J., in *Dex v. Baskerville* (6). Staples, A. J. C., would distinguish that case on the ground that there was only one accused person in it but I do not think that the distinction is a sound one. It seems to me that an approver's story, to be corroborated as regards a particular accused, must be corroborated on some point which implicates that accused. It is not necessary that it should be corroborated on all points relating to him, but there must be some guarantee that his evidence is true as regards that particular accused. That is the view that has been taken by a Bench of this Court in *Govinda v. Emperor* (1) in which the following pronouncement has been made :

"We are in agreement with the view that so long as there is no corroboration by independent evidence regarding a particular accused, the evidence may be termed uncorroborated evidence of accomplices."

I am of opinion that the evidence of Tukaram may be regarded as uncorroborated evidence of an accomplice and may be rejected if the Court thinks fit to apply the rule stated in ill. (b) to S. 114, Evidence Act, that an accomplice is unworthy of credit unless he is corroborated in material particulars. It

has been stated by Subhedar, A. J. C., in para. 8 of his opinion that this rule has become a rule of practice of so universal application that it has now almost acquired the force of law. Even so, there may still be cases in which the rule should not be applied. S. 133, Evidence Act, has not been repealed and cannot be entirely nullified by judicial decisions. The question arising in every case where the uncorroborated evidence of an accomplice has to be considered is whether it can be believed or not. In the present case the decision by a Bench of this Court to which I have already referred is directly applicable. Immediately after the words that I have quoted above comes the following sentence :

"but when the evidence is strengthened by corroboration of other parts of the story, by evidence of several accomplices or by confessions of co-accused, the question whether the maxim should still apply must receive careful consideration."

As pointed out by Staples, A. J. C., Tukaram's evidence has been corroborated as against other accused than Hiraji and the two Lehrs, and has nowhere been shown to be false. It agrees in all important particulars with the confessions made by two of the accused, Ganpat and Patiram. It also agrees with the statements made by two other accused, Bajya and Keoli, in their examination, though there is no confession by these accused formally recorded by a Magistrate prior to the trial. No reference to Bajya or Keoli has been made by either of the learned Judges, possibly by reason of the decision in *Mahadeo Prasad v. Emperor* (17), which makes S. 30, Evidence Act, inapplicable to a case in which the confession of the accomplice appears in his examination in the trial. That ruling would not apply in the present case, as Bajya's and Keoli's confessions were made in the first instance in the Court of the Committing Magistrate and not at the trial before the Sessions Judge.

As regards Hiraji and the two Lehrs, Tukaram's evidence, read with the confessions of the four co-accused, Bajya, Keoli, Ganpat and Patiram, should, I think, be accepted as true. Neither his evidence nor the confessions, it seems to me, can be rejected because they are self-exculpatory and do not im-

plicate the givers to the same extent as the other persons implicated by them. The participation in the crime admitted by them is sufficient to make them fully responsible for the crime. It is urged that Tukaram's evidence should be rejected, because after he had been remanded to jail custody, he was retaken into police custody on 13th November 1928, for the purpose of having his confession recorded, but the confession was not recorded until 5th December 1928. I do not consider that this is a good ground for rejecting his evidence. I cannot find that any question was put to Tukaram or the Circle Inspector Dilarwar Husain (P. W. No. 13) or the Sub-Inspector Shiamrao (P. W. No. 17) as to the reasons for the delay in recording Thukaram's confession. I find also from the evidence of the Circle Inspector that Tukaram was not taken back into police custody for the purpose of getting a confession recorded. The object, according to that witness, was to get Tukaram to show where property stolen from the deceased was concealed and generally to get information to assist the police in their investigation.

Another point on which it is sought to discredit the prosecution case is that one Bapu, the brother of the deceased, has not been prosecuted although the deceased's wife Venubai (P. W. No. 5) when she was awakened by the offenders in the commission of their crime had thought that she recognized Tukaram and Bapu. But as regards Bapu her statement is only this:

"I had a faint suspicion that one of those persons was my husband's brother Bapu;"

and obviously on such a statement there is no reason to support that there is anything wrong in the fact that Bapu has not been prosecuted. Nor in the circumstances can I attach any importance to the fact that the first information report does not mention the names of Hiraji and the two Lehrams. That report was made by the Kotwal who states in it that he personally does not know and how many the thieves were. It is urged that the motive on the part of the accused persons whose cases I am considering was insufficient. But in sufficiency of motive is not itself a ground for rejecting evidence, otherwise considered trustworthy. There was some motive and the evidence, as I have held,

is sufficient to prove the case against Hiraji and his brother, Lehram, and Lehram son of Gangu.

For the above reasons I agree with the view of Staples, A. J. C., that the convictions of Hiraji and his brother Lehram should be maintained and that the appeal of the Government in respect of Lehram son of Gangu should be allowed and that he should be convicted of an offence punishable under S. 302, I. P. C., as also of an offence punishable under S. 379. The Bench has held that the second offence committed was of theft and not dacoity.

P.N./R.K.

Order accordingly.

1930 Cr. Cases 316

(Nagpur)

SUBHEDAR, A. J. C.

Bageshwar—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 399 of 1929, Decided on 16th January 1930, against order of Dist. Magistrate, Raipur, D/- 11th October 1929 in Crim. Misc. Case No. 2 of 1929.

(a) **Criminal Trial—Evidence — Want of interest in prosecution does not by itself stamp evidence of witness with truth — Evidence must be such as to carry conviction of truth to prudent man.**

It is an elementary principle in the administration of criminal justice that want of interest in the prosecution does not by itself stamp the evidence of a witness with truth. The weight to be attached to the testimony of a witness depends in a large measure upon various considerations, e. g., if on the face of it the evidence is so much in consonance with probabilities and consistent with other evidence, and generally so fits in with the material details of the case for the prosecution as to carry conviction of truth to a prudent mind. If these elements are wanting in the testimony of a witness, however independent he may be, his evidence is worthless and should not be relied on in the decision of criminal cases where persuasion of guilt must amount to a moral certainty. [P 317 C 2; P 318 C 1]

(b) **Criminal P. C., S. 203 — Serious discrepancies existing in important eye-witnesses — Trying Magistrate is right in dismissing complaint — In such case District Magistrate has no power to interfere, with order of discharge, under S. 436.**

Where there are serious discrepancies existing in the evidence of the important eye-witnesses for the prosecution it is perfectly within the trying Magistrate's competence to disbelieve these witnesses and hold that there was no *prima facie* case as against the accused and the District Magistrate has, therefore, no power under S. 436 to interfere with the order of dis-

charge which is based on a careful appreciation of the evidence on record : 8 A. L. J. 45, *Rel.* [P 318 C 2]

(c) Criminal P. C., S. 436—Not misappreciation of evidence, but irregularity or illegality in proceedings should be considered by the District Magistrate in setting aside order of discharge.

Even misappreciation of the evidence by the trying Magistrate will not in law justify the District Magistrate in setting aside the order of discharge which can only be done if there is either irregularity or illegality in the proceedings : 81 *Mad.* 133 ; 18 A. L. J. 1125 and A. I. R. 1926 Nag. 117, *Rel. on.* [P 318 C 2]

S. C. Dutt Chaudhury—for Accused.

Order.—The facts leading to this application for revision are briefly as follows :

The applicant, Bageshwar Bania, is a driver of the taxi car No. 5262. It was alleged that on the afternoon of 25th February last, while taking his car on the Raipur Arang road, the applicant knocked down Kejana, a seven years old grandson of Mt. Ramkuar (P. W. 3), on the road in front of the octroi outpost and caused his death. The map of the scene of the accident is filed as Ex. P-5. After investigation the applicant was challaned by the police for an offence under S. 304(A), I. P. C., before Mr. G. P. Pande, Magistrate First Class, Raipur, for having caused the death of the boy by rash and negligent driving.

Fifteen witnesses were examined for the prosecution at considerable length and the trial lasted for nearly six months. In a very elaborate judgment extending over seven closely written foolscap sheets the learned trying Magistrate carefully analysed and critically discussed the whole of the evidence and came to the conclusion that it failed to establish the identity of the applicant with the driver of the car which caused the death of the boy. An order of discharge was accordingly recorded in favour of the applicant.

On examining the record of the case suo motu the District Magistrate, Raipur, set aside the order of discharge and ordered further inquiry into the case under S. 436, Criminal P. C., by another Magistrate, Mr. Muniruddin. It is against this order that the present application for revision is filed.

As I understand the District Magistrate's order he held the trial to be defective in two respects :

(1) That the trying Magistrate did not visit the scene of the offence which led

to his misappreciation of the evidence of Pitamber (P. W. 5) and Sheikh Lal (P. W. 6), and (2) that the trying Magistrate did not examine the investigating officer at length.

After examining the record carefully and hearing the learned pleader for the applicant, I am quite clear that the order of the District Magistrate is erroneous both on law and facts and should be set aside. It reads more like a special pleading for the prosecution than a balanced judicial pronouncement.

There is no sense in the District Magistrate's suggestion that the visit to the scene of the accident by the trying Magistrate would have either enhanced the worth of the evidence of Pitamber (P. W. 5) and Sheikh Lal (P. W. 6), or explained away the flagrant discrepancies between their testimony inter se and that of Mt. Ramkuar (P. W. 3) on several material points in the case which are detailed by the trying Magistrate in his judgment. The learned District Magistrate should not have imported his own personal knowledge into his judicial order and built a theory of his own that because the outhouses of these witnesses (Pitamber and Sheikh Lal) :

"are not only close to the road but turn in towards the road at such an angle that both Sheikh Lal and Pitamber should have been able to see Bageshwar clearly,"

because both these witnesses positively stated in their evidence that they could and did see the applicant only on reaching the road where the accident took place and not from the outhouses where they lived.

The learned District Magistrate is evidently wrong in starting with a preconceived notion that because Pitamber and Sheikh Lal are independent witnesses and have no "interest in securing Bageshwar's conviction" they have no reason to depose falsely against him. It is an elementary principle in the administration of criminal justice that want of interest in the prosecution does not by itself stamp the evidence of a witness with truth. The weight which is to be attached to the testimony of a witness depends in a large measure upon various considerations, e. g., if on the face of his evidence is so much in consonance with probabilities and consistent with other evidence, and generally so fits in

with the material details of the case for the prosecution as to carry conviction of truth to a prudent mind. If these elements are wanting in the testimony of a witness, however independent he may be, his evidence is worthless and should not be relied on in the decision of criminal cases where persuasion of guilt must amount to a moral certainty.

Neither is the District Magistrate justified in offering an explanation of his own creation in para. 6 of his order in the matter of the evidence of Mt. Ramkuar (P. W. 3). The learned District Magistrate states that :

"in her statement to the police she had said that the car struck the tree immediately after the boy was knocked down."

The inference suggested is that her memory failed her when Mt. Ramkuar deposed before the Court that she did not notice the car striking the tree.

Since no extract of Mt. Ramkuar's alleged statement from the police diary is filed on the record, nor was the alleged statement put to her in the course of her examination as a witness, the learned District Magistrate clearly erred in law in relying upon it for the purpose of explaining away a very material discrepancy between her evidence and that of the other two eyewitnesses for the prosecution, viz., Pitamber (P. W. 5) and Sheikh Lal (P. W. 6). Moreover, in the absence of the police diary before me I have no means to verify if Mt. Ramkuar had even made such a statement to the police.

But if the District Magistrate has relied upon the first information report, Ex. P-1., I can only say that he has misread that document because it is clearly stated therein that:

"on inquiry it was known from Pitamber Dhobi that the driver was driving his car very fast and that he could not stop it when the boy came in front and that he dashed it against a tree and ran away."

The passage just quoted clearly shows that the information as to the car dashing against a tree was conveyed to the police not by the woman, P.W. 3, but by Pitamber (P.W. 5).

The first part of the suggestion by the District Magistrate, therefore, in explaining away the admittedly serious discrepancies in the evidence of the aforesaid three eyewitnesses for the prosecution falls to the ground. Neither is there the slightest justification for

the District Magistrate for offering the other suggestion in explanation of the said discrepancies that "some one has made it worth her while to lie."

Moreover, in the teeth of the unequivocal admission of Mt. Ramkuar that she could clearly see up to a distance of five yards and in the absence of any suggestion by her that she had failed to observe or remember other details because of her being unnerved on account of the sudden and unexpected death of her grandson; the learned District Magistrate, who had no occasion to examine the woman personally, has apparently drawn upon his imagination in putting forward on her behalf certain excuses in para. 6 of his order in an attempt to reconcile her evidence with that of Pitamber (P. W. 5) and Sheikh Lal (P.W. 6). To say the least of it such a procedure on the part of the learned District Magistrate was unfair to the applicant besides being unwarranted in the exercise by him of the powers of revision under S. 436, Criminal P.C.

In the face of the serious discrepancies existing in the evidence of the three important eyewitnesses for the prosecution, viz., Mt. Ramkuar (P.W.3), Pitamber (P. W. 5) and Sheikh Lal (P.W.6), as noticed and rightly criticised by the trying Magistrate in paras. 5 to 12 of his well reasoned judgment, it was perfectly within his competence to disbelieve these witnesses and hold, as he did, that there was no prima facie case against the applicant, and the District Magistrate had, therefore, no power under S. 436, Criminal P. C., to interfere with the order of discharge which was based on a careful appreciation of the evidence on record: *Chandan v. Kallu* (1). Even misappreciation of the evidence by the trying Magistrate which is not made out in the present case would not in law have justified the District Magistrate in setting aside the order of discharge which could only be done if there was either irregularity or illegality in the proceedings: *Lakshminarasappa v. Venkatappa* (2) and *Binderi Dube v. Emperor* (3), cited with approval by this Court in *Sheocharan v. Emperor* (4), (at p. 91 of 21 N.L.R.).

(1) [1911] 8 A. L. J. 45=9 I. C. 274=12 Cr. L. J. 45.

(2) [1908] 31 M.L.J. 133=18 M.L.J. 57.

(3) [1920] 18 A.L.J. 1185=59 I. C. 198.

(4) A. I. R. 1926 Nag. 117=21 N.L.R. 88.

The deposition of the investigating officer, Murlidhar Ghoshe (P. W. 2), is recorded at considerable length by the trying Magistrate at pp. 14 to 16 of the record. In para. 5 of his order, beyond indulging in bare platitudes on the value of the evidence of an investigating officer "for getting a frame work of the case" the learned District Magistrate has not stated in what respects the frame work got up in the present case from the examination of Murlidhar (P. W. 2) was defective and how it has failed to "link up" the evidence of the set of witnesses from Kanver with the evidence of Raipur witnesses. It is, therefore, impossible for me to uphold the view of the learned District Magistrate that the trial has been defective or incomplete on account of not examining the investigating officer "at length." I, therefore, hold that there was neither any illegality nor irregularity committed by the trying Magistrate in recording the deposition of the investigating officer which vitiated the order of discharge passed by him.

For the reasons given above I have no hesitation in holding that the decision of the trying Magistrate in discharging the applicant was not only not perverse but absolutely correct, arrived at, as it was, after a full and complete inquiry and a careful consideration of the materials on record and probabilities of the case. I, therefore, set aside the order of the District Magistrate and restore that of the trying Magistrate.

V.S./R.K.

Order set aside

**** 1930 Cr. Cases 319**

(Allahabad)

Full Bench

BOYS, KING AND SEN, JJ.

Emperor

v.

Kanver Sen and others—Opposite Parties.

Criminal Misc. Case No. 384 of 1929,
Decided on 6th November 1929.

**** (a) Criminal P. C., S. 526 (6-a)—Words "any person" explained.**

The words "any person" in S. 526 (6a) are comprehensive enough to include (1) the Crown or the Local Government, (2) any private individual who has an interest in the subject matters of the complaint, as also (3) all or any one of the accused persons. [P 321 C 2]

**** (b) Criminal P. C., S. 526 (6-a)—Application for transfer rejected as being frivolous or vexatious—Government opposing application is entitled to recover costs from applicants.**

Where an application for the transfer of a case has been made to the High Court and has been thrown out on the ground that it is frivolous or vexatious, the Local Government opposing the application is entitled to recover its costs from the applicants. [P 322 C 2]

(c) Criminal P. C., S. 526 (6-a)—Rule that Crown neither pays nor receives costs is not without exceptions.

There is not and there cannot be a cast iron rule that the Crown neither pays nor receives costs. Exceptions may be grafted upon this rule by local statute. The peculiar circumstances of a case may also necessitate a departure from the said rule: *Johnson v. Reg.*, (1901) A. C. 817, *Rel. on.*; 36 *Mad.* 601, (P.C.), *Ref.* [P 322 C 2]

(d) Criminal P. C., S. 250—S. 250 is applicable even to case of Crown—Obiter.

Obiter.—There is nothing in the language of S. 250 to make that section non-applicable to the case of the Crown. [P 322 C 2]

U. S. Bajpai—for the Crown.

A. P. Pandey—for the Opposite parties.

Sen, J.—Kanver Sen, Ram Lal, Sat Narain, Gopal Krishua Consul, Kashi Ram, Madan, Kishanchand and Beliram, who, with two others, are on their trial before a Magistrate of the First Class of Benares under S. 420, I. P. C. applied to this Court under S. 526 (1), Criminal P. C. for the transfer of the case to some other criminal Court of equal jurisdiction on the ground that a fair and impartial trial could not be had in the Court where the case was pending.

The learned Government Advocate was instructed by the Local Government to oppose the application. The applicants were represented by counsel. The parties were heard and the application was eventually dismissed on the ground that it was frivolous and vexatious.

The learned Government Advocate moved this Court to exercise the power contained in the provision of S. 526 (6-a), Criminal P. C. On behalf of the Crown, an affidavit was filed by Mohammad Fariduddin, which showed that the costs incurred by the Local Government in opposing the application amounted to Rs. 585-1-6.

It was not controverted that the application for transfer was opposed by the Crown nor was it disputed that the costs claimed had been reasonably incurred by the Crown in consequence of the application for transfer.

Two arguments appear to have been advanced on behalf of the applicants. It was argued that the words "any person who has opposed the application" in S. 526 (6a), Criminal P. C., are not of sufficient amplitude to include either the Crown or the Local Government having regard to the context of the entire section. It was further argued that S. 526, Criminal P. C., must be taken to have been founded upon the doctrine of the English Common Law according to which the Crown neither receives nor pays costs in criminal matters.

The question which has been referred to this Bench for determination is: Does the word "person" in S. 526, Cl. 6 (a), Criminal P. C., include the "Local Government?" If the answer to this question be in the negative there is an end of the matter and the case need not be canvassed any further. If the answer to the question be in the affirmative, the consequence of our finding will be that we must direct the applicants to jointly and severally pay a sum of Rs. 535-1-6 to the Local Government being the costs of opposing the application for transfer, which has already been adjudicated upon as frivolous and vexatious.

Applications for transfer generally fall either under one or other of three categories. Cases do occur at times which fit in with the provisions of S. 526 (1), Criminal P. C. Justice demands that in such cases, this Court should be moved to step in and make an order of transfer. There may also be some cases not exactly on the border line but in which either the complainant or the accused person may be under a bona fide apprehension that the trial was likely to be affected by either pre-possessions or prejudices on the part of the tribunal having the seisin of the case but that in truth and in fact, his alarms were not justified and there were no sufficient or valid reasons to necessitate a transfer. The grounds for the application may have been insufficient and yet the application may well have been an arguable one. An application belonging to this class cannot be described as either frivolous or vexatious. In these two classes of cases, this Court has always been studiously careful in not interposing any barrier in the way of the applicants, which directly or indirectly may have the effect to either discourage or have a tendency to

discourage such applications. The third class of cases stands upon a different footing altogether. These applications, not uncommonly, are founded upon actual and sometimes patent falsehoods or contain either half truths or even grave distortion of facts. Not uncommonly, the object of the application is to procure an adjournment of the trial to enable the party concerned to prattle with witnesses, to try tricks with them and even to tamper with their evidence or in the expectation that the particular Magistrate may be transferred. When applications of this class are made to this Court and are opposed by the Government, ex facie, it appears to be reasonable in the highest degree that the Government successfully opposing the application should be entitled to recover their costs.

In Act 5 of 1893, as originally passed, there was no provision corresponding to S. 526 (6a) of the present Criminal P. C. The aforesaid clause was placed upon the statute book under the Amending Act 18 of 1923. This amendment led to consequential changes in S. 526 (5) of the original section.

Section 526 (6a), Criminal P. C., provides as follows:

"Where any application for the exercise of the power conferred by this section is dismissed, the High Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of costs to any person who has opposed the application any expenses reasonably incurred by such person in consequence of the application."

It has been argued that the Crown or the Local Government is not a "person" within the meaning of that term in the Criminal Procedure Code, that the legislature consciously intended to exclude the Crown or the Local Government from the operation of Cl. (6a) and that where it contemplated that the Crown or the Local Government should be referred to, the words used in the text are "a party interested." Reliance has been strongly placed upon Cl. (3) which provides that

"the High Court may act either on the report of the lower Court or on the application of a party interested or on its own initiative."

It is not denied that the expression "a party interested" is wide enough to include the Crown or the Local Government. But it is contended that the words "any person who has opposed the application" are not of such wide signi-

finance as the words "a party interested" so as to include the Local Government and that if the legislature intended to allow costs to the Government for opposing the application it ought to have introduced in Cl. (6a), S. 526, Criminal P. C. the words "to any party interested" and "such party" in place of the words "any person" or such "person" occurring in the said clause.

We are clearly of opinion that the word "person" in S. 526, (6a), Criminal P. C. is of a wider import than the words "a party interested" in sub-S. (3).

In criminal law, as a branch of public law in jurisprudence, the Crown is a necessary party in view of the immediateness of the public interest involved. Unlike private law, individual interests are not allowed to predominate; but the public interest balances or in some cases even outweighs the private. The commonwealth can be directly represented by the proper officers of the State and vindicated by them in the name of the State or of its titular head. It is in the highest degree fallacious to consider that the State or the Local Government is an obstruction.

The term "person" has not been defined in the Criminal P. C. but S. 4, sub-S. (2), of the Code Provides that

"all words and expressions used herein, and defined in the Indian Penal Code and not heretofore defined shall be deemed to have the meanings respectively attributed to them by that Code."

Section 11, I. P. C. provides that

"the word 'person' includes any company or association or body of persons whether incorporated or not."

Under S. 17 of the said Code, the word "Government" denotes

"the person or persons authorised by law to administer executive Government in any part of British India."

The Government which evidently means the Local Government is therefore either a person or persons with a definite function. Where there is a constituted authority consisting of a person or a number of persons, having a definite function it would be impossible to hold that the said authority has for some inscrutable reason ceased to be a person within the meaning of S. 526 (6a), Criminal P. C. In all serious offences, it is the Government which is the actual prosecutor. Even in minor offences, theoretically, the

Government is the complainant. Where an application for transfer is made, the Government is vitally concerned in the result and S. 526 (6) is imperative that notice of such application shall be given to the Public Prosecutor. The Public Prosecutor has a right to oppose the application and in many cases, the application is opposed by the Local Government through its Crown Officer. In a great majority of cases, more specially in cases of serious magnitude, the only party which steps in to oppose the application is the Crown. In enacting S. 526, (6a), Criminal P. C. the legislature could not have intended to shut out from its purview the one party, which was materially interested in opposing the application. We are of opinion that the word "any person" in the subsection aforesaid is comprehensive enough to include (1) the Crown or the Local Government (2) any private individual who has an interest in the subject matters of the complaint as also (3) all or any one of the accused persons.

The words "any person who has opposed the application" are general enough to include the Local Government can also be inferred as the result of the amendment of the original sub-S. (5). This subsection, as it originally stood, ran as follows :

"When an accused person makes an application under this section, the High Court may direct him to execute a bond, with or without sureties, conditioned that he will, if convicted, pay the costs of the prosecutor."

By the Amending Act, 1893, the words "convicted, pay the costs of the prosecutor" were substituted by the words :

"so ordered, pay any amount which the High Court has power under this section to award by way of costs to the person opposing the application."

There can be no manner of doubt that the scope of this subsection has been considerably enlarged by the amendment, and the substitution of the words "person opposing the application" in place of the words "the prosecutor" clearly indicates that it was intended to extend the benefit of the subsection to persons opposing the application who need not necessarily be the prosecutor.

Our attention was drawn to a large number of sections of the Penal Code with the intention of establishing the postulate that the word "person" had been used in those sections in contradistinction to the word "party." We

do not think it necessary to examine this part of the argument in detail. The word "person" in the various sections that we were referred to is bound to have the meaning as given in S. 11, unless the said meaning is repugnant to the subject or context.

It may be observed, in passing, that if the argument of the learned advocate for the applicants be accepted in its entirety and pushed to its logical conclusion, it would be beyond the province of the criminal Court to enforce the production of a vital document from the possession of the Local Government under S. 94, Criminal P. C., if Local Government was not a "person" in whose possession or power such a document was believed to be.

As a last resort, the applicants took their stand upon what is generally known as the common law rule that the Crown neither pays nor receives costs; and our attention was drawn to certain observations of Lord Atkinson, *In re, Vaithinatha Pillai v. Emperor* (1). In this case, the applicant by special leave had appealed to the Privy Council against the order of the Additional Sessions Judge of Tanjore convicting him of the abetment of the murder of his daughter-in-law and sentencing him to death. On the appeal being allowed, Sir Robert Finlay for the appellant made a motion for costs in favour of the successful appellant. This motion was disallowed and reliance was placed upon the headnote of *Johnson v. Reg* (2) (at p. 825) which runs thus:

"In future the Board will adhere to the practice of the House of Lords; and their rule as to costs in cases between the Crown and a subject will be that the Crown neither pays nor receives costs unless the case is covered by some local statute or there are exceptional circumstances justifying a departure from the ordinary rule."

It is clear from this pronouncement that the common law rule is not of such wide import as claimed by the applicants and that there is not and there cannot be a cast iron rule that the Crown neither pays nor receives costs. Exceptions may be grafted upon this rule by local statute. The peculiar circumstances of the case may also necessitate a departure from the said rule. In Eng-

land, this common law rule has been entrenched upon by the Costs in Criminal Cases Act (1908, 8th Edn. 7 C. 15), S. 6 of which provides that:

"The Court by or before which any person is convicted of an indictable offence may, if they think fit, in addition to any other lawful punishment, order the person convicted to pay the whole or any part of the costs incurred in or about the prosecution and conviction including any proceedings before the examining Justices as taxed by the proper officer."

Under the Judicature Act, 1925, S. 25 (3) the Court has the power to award costs on the hearing of an appeal from Quarter Sessions, both in the appellate Court and the primary Court, though such power did not exist prior to the Judicature Act of 1894.

In this country, where we have got statutory provisions relating to costs, payable in a criminal case, we cannot go by the English Common law rule even if the rule had been quite as general as has been claimed for it. There is nothing in the language of S. 250, Criminal P. C., to make that section non-applicable to the case of the Crown. We mention the aforesaid section, not because it has any application to the point under our consideration but because it was referred to us in the course of the argument. The language of S. 526 (6 a), Criminal P. C., appears to us to be clear, explicit and unequivocal. From a consideration of the plain language of the context and the policy underlying the frame work of the entire section, we unhesitatingly come to the conclusion that where an application for transfer of a case has been made to this Court and has been thrown out on the ground that it is frivolous or vexatious, the Local Government opposing the application is entitled to recover its costs from the applicants. Our answer to the reference is in the affirmative, and we hold that the word "person" in S. 526, Cl. (6a), Criminal P. C., includes "the Local Government." We direct that Kanver Sen and seven others referred to above by name jointly and severally do pay a sum of Rs. 585-1-6 to the Local Government.

V.S./R.K.

Answer accordingly

(1) [1918] 36 Mad. 501=21 I. C. 263=45 I. A. 193 (P.C.).

(2) [1904] A. C. 617=53 W. R. 207=73 L. J. P. C. 113=20 T. L. R. 697.

* * 1930 Cr. Cases 323

(Madras)

Full Bench

KUMARASWAMI SASTRI, CURGENVEN
AND WALSH, JJ.*In re, Karuthaswami Servai*—Petitioner—Accused.

Criminal Revn. Case No. 941 of 1928, Crim. Revn. Petn. No. 681 of 1928, Decided on 22nd October 1929, from judgment of Sess. Judge, Ramnad, in Crim. Appeal No. 19 of 1928.

* * (a) Criminal P. C. Ss. 117 (2), 256 and 257—Security proceedings—Right of accused to recall for cross examinations is under S. 257 and not S. 256.

An accused person who has been called upon to give security for good behaviour, has no absolute right to recall prosecution witnesses for cross-examination under S. 256, but he has a right under S. 257: (*Case law discussed.*)

[P 326 C 2]

(b) Criminal P. C., S. 112—"Order in writing setting forth substance of the information received" is equivalent to charge—Criminal P. C., S. 117 (2).

The words "no charge need be framed" in S. 117 (2) can only mean that no occasion can arise for framing a charge because under S. 221 (1) every charge shall state the offence with which the accused is charged. In security proceedings the place of charge is taken by the "order in writing setting forth the substance of the information received" prescribed by S. 112. This order has to be read over to the person in respect of whom it is made, and although the Code does not provide that he should plead to it, it resembles a charge in that it must contain a statement in abstract of the prosecution case.

[P 327 C 2]

Nugent Grant for R. Kesava Aiyangar—for Petitioner.

N. S. Mani for the Public Prosecutor—for the Crown.

Order of Reference.

Waller, J.—Mr. Grant on behalf of the petitioner raises two points of law. The first is that the notice served on his client did not conform to the requirements of S. 112, Criminal P.C. Assuming that it did not, the defect seems to me to have been cured by the fact that he was supplied with a copy of the charge-sheet. The next raises a more difficult question. The petitioner during the enquiry, asked the Magistrate to re-summon some of the witnesses against him for further cross-examination but his request was refused. Mr. Grant argues that, by virtue of sub-S. (2), S. 117, Criminal P. C., the whole of the procedure applicable to a warrant case is applicable to a case of this nature. I have been

referred to no authority of this Court that bears directly on the point. Indeed in the course of a long experience as a Magistrate, I have never come across a case in which it was even suggested to me that the accused in a security enquiry had the right now claimed. There are two decisions by other High Courts which directly negative it. One is *Chintamon Singh v. Emperor* (1). The other is *Bija v. Emperor* (2). I should be prepared to follow these decisions but for certain observations that occur in *E. Venkatachinnayya v. Emperor* (3).

The question that had to be decided was whether the accused in a security case was entitled under S. 250 (a), Criminal P. C., to demand that the witnesses against them should be re-summoned and re-heard, when there was a change of magistracy. The decision was that though the subsection very clearly refers to a trial and not an enquiry, they were so entitled. With great respect, it seems to me somewhat difficult to reconcile this view with the view expressed in other decisions of this Court as to the distinction between a trial and an enquiry. That, however, is a question that does not arise here. What is material is that two of the Judges, Ayling and Coutts-Trotter, JJ., expressed the opinion that the whole of the procedure governing warrant cases, was attracted by S. 117 (2), Criminal P.C., to enquiries in security cases of the kind I am now considering. The matter is of considerable importance and, in view of the obiter dicta in the case in *E. Venkatachinnayya v. Emperor* (3), I think that the following question should be referred to a Full Bench:

"Is an accused person, who has been called upon to give security for good behaviour entitled to the benefit of S. 256, Criminal P. C.?"

I may add that, as pointed out in *Chintamon Singh v. Emperor* (3), the object of S. 256 is to give the accused an opportunity of further cross-examination directed expressly to the case embodied in the charge, which seems to be superfluous where, as in security cases, the precise charges against him are known to him before the enquiry begins.

(1) [1907] 35 Cal. 243=7 C. L. J. 177=12 C. W. N. 299.

(2) A. I. R. 1927 Lah. 470=8 Lah. 285.

(3) [1920] 48 Mad. 511=88 M. L. J. 370=11 M. L. W. 435=56 I.C. 50=(1920) M.W.N. 280 (F.B.).

Anantakrishna Aiyar, J.—I agree that the question stated by my learned brother should be referred for the decision of a Full Bench.

Opinion :

Kumaraswami Sastri, J.—The question referred to us for decision is :

"Is an accused person, who has been called upon to give security for good behaviour, entitled to the benefit of S. 256, Criminal P. C."

The sections dealing with security for good behaviour are contained in Chap. 8, Criminal P. C.

Section 110 empowers the Magistrates enumerated therein to require a person habitually addicted to the commission of offences mentioned in Cls. (a) to (c) to show cause why he should not be ordered to execute a bond with sureties for his good behaviour for such period not exceeding three years as the Magistrate thinks fit.

Section 112 provides that, where a Magistrate deems it necessary to require any person to show cause, he shall make an order in writing setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties required.

Section 113 says that if the person in respect of whom an order has been made is present in Court, it shall be read over to him or explained to him if he so desires.

Section 114 says that if the person is not present in Court, a summons should be issued calling on him to appear.

Section 115 requires the summons or warrant to be accompanied by a copy of the order made under S. 112 and to be delivered to the person.

Then comes S. 117, the section which prescribes the mode of enquiry. It says that when the person appears in Court, the Magistrate shall proceed to enquire into the truth of the information upon which action has been taken and take further evidence as may appear necessary.

Clause (2) runs as follows :

"Such inquiry shall be made, as nearly as may be practicable where the order requires security for keeping the peace, in the manner hereinafter prescribed for conducting trials and recording evidence in summons cases; and where the order requires security for good behaviour in the manner hereinafter prescribed for conducting trials and recording evidence in warrant cases, except that no charge need be framed."

The form prescribed in Sch. 5 for the summons to be issued under S. 114 runs as follows :

"Whereas it has been made to appear to me by credible information that (then the substance of the information is set out)

"you are hereby required to attend in person (or by a duly authorized agent) (on a date specified in the form) to show cause why you should not be required to enter into a bond, etc."

So that Chap. 8 provides for the procedure to be adopted till the enquiry opens and S. 117 says that where the order requires security for good behaviour the enquiry shall be made as nearly as practicable in the manner prescribed for conducting trials in warrant cases. Turning to the mode prescribed for the trial of warrant cases which is provided for in Chap. 21, S. 252 provides for the discharge of the accused if no case is made out by the prosecution witnesses.

Section 254 enacts that if the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence, a charge should be framed.

Section 255 requires that the charge should be read and explained to the accused and that he should be asked whether he pleads guilty or has any defence to make and empowers the Magistrate to convict the accused if he pleads guilty.

Under S. 256 if the accused refuses to plead, or does not plead, or claims to be tried, then he has to state within the period mentioned in the section whether he wishes to cross-examine any, and, if so, which of the witnesses for the prosecution whose evidence has been taken. If he says he does so wish, the witnesses named by him shall be recalled, and, after cross-examination and re-examination, if any, they shall be discharged and the evidence of the remaining witnesses for the prosecution shall next be taken, and, after cross-examination and re-examination, if any, they also shall be discharged and the accused shall then be called upon to enter upon his defence and produce his evidence.

Section 257 runs as follows :

"(1) If the accused, after he has entered upon his defence, applies to the Magistrate to issue any process for compelling the attendance of any witness for the purpose of examination or cross-examination; or the production of any document or other thing, the Magistrate shall issue such process unless he considers that such application should be refused on the ground

that it is made for the purpose of vexation or delay or for defeating the ends of justice. Such ground shall be recorded by him in writing :

Provided that, when the accused has cross-examined, or had the opportunity of cross-examining any witness after the charge is framed, the attendance of such witness shall not be compelled under this section, unless the Magistrate is satisfied that it is necessary for the purposes of justice.

(2) The Magistrate may, before summoning any witness on such application, require that his reasonable expenses incurred in attending for the purposes of the trial be deposited in Court."

Under S. 258, the Magistrate has to record the order of acquittal if he finds the accused not guilty, and if he is guilty to pass sentence according to law.

Section 259 refers to the procedure to be adopted if the complainant is absent and the case is compoundable.

Now it is obvious that under Chap. 21 the Magistrate can frame a charge at any stage of the prosecution case. He is not bound to wait until all the prosecution witnesses have been examined. The sections following S. 254 presume that a charge has been framed and are only applicable on that basis. They also refer to offence and to acquittal.

It is obvious from the provisions of Chap. 8 that no charge is framed but the procedure till we come to trial is that the Magistrate proceeds *ex parte* until it comes to the stage of sending notice or summons to the person against whom security is required. Then under S. 112, the Magistrate gives the substance of the information received and the particulars as to the bond, and then the trial begins.

Reading the provisions of Chaps. 8 and 21 it is clear that so far as the person required to give security is concerned, the trial really commences from the point where notice has been given to him to show cause which contains the substance of the information and which must be treated as equivalent to a charge though not the charge itself. In this view effect can be given to all the provisions and under S. 256 the cross-examination of the witnesses should take place as if witnesses examined for the prosecution are witnesses examined after a charge has been framed. S. 257 would apply where for any reason he wants to recall and cross-examine the prosecution witnesses, the Magistrate having a discretion to refuse an application if he is

of opinion that the application is made for the purpose of vexation or delay.

It has been argued by Mr. Grant that all that S. 117, Cl. (2), says is that no charge need be framed and that consequently if a Magistrate chooses to frame a charge, then there will be really two charges, one contained in the notice and the other in the charge framed. I find it difficult to see how any Magistrate can, having regard to the provisions of Chap. 8 frame any charge such as is contemplated by Ss. 221 to 223 in Chap. 19. The words "no charge need be framed" really mean that the charge shall be dispensed with because in the very nature of things it is not possible to frame a charge with the particulars enjoined by Ss. 221 to 223.

It is also argued that a party cannot know exactly for what he is tried until all the witnesses have been examined and it may be necessary for him to cross-examine the witnesses and that it would be a great hardship if the opportunity given to him by S. 256 is not given. Treating it as a mere question of hardship, I think S. 257 provides for all reasonable requirements. The Magistrate is bound, if he refuses the application, to state in writing that in his opinion the application is made for the purpose of vexation or delay or for defeating the ends of justice. Except for that reason the Magistrate is bound to issue process and there is no reason why if the right is going to be abused the Magistrate is still bound to issue summons. I agree with the observations of Shadi Lal, J., in *Ahmad Bakhsh v. Emperor* (4), that if there is no hardship to the other party under S. 287 it is desirable that proceedings under Chap. 21 should not be unduly delayed.

The view I take is amply supported by authority.

In *Chintamon Singh v. Emperor* (1) Rampini and Sharfuddin, JJ., observed :

"No doubt, under S. 117, Criminal P. C., the enquiry into bad livelihood cases should be made as nearly as may be practicable in the manner prescribed for conducting trials and recording evidence in warrant cases. But we do not think that the provisions of S. 256, Criminal P. C., indicate that the person called upon to show cause under S. 110, Criminal P. C. has a right to further cross-examine the prosecution witnesses under S. 256, Criminal P. C. inasmuch as the provisions of this section relate to cases where a formal charge is required by

(4) [1916] 1 P. B. 1916 Cr.—22 I. C. 676—58 P. W. B. 1915 Cr.

S. 254 has been drawn up and the accused has been called upon to meet that charge. In cases under S. 110, Criminal P. O. the order of the Magistrate under S. 112, Criminal P. C. is equivalent to a charge. The object in giving the substance of the information in an order under S. 112, Criminal P. C. is that the person called upon to show cause may clearly understand the matter that he has to meet in his defence, and a Magistrate has no power to go beyond the requirements of his order under S. 112, Criminal P. C."

In *Bija v. Emperor* (2), it was held that a person against whom proceedings have been taken under S. 110, Criminal P. C., has no right to further cross-examine the prosecution witness under S. 256 of the Code. Sir Shadi Lal, C. J., refers with approval to *Chintamon Singh v. Emperor* (1).

In *Ahmad Bakhsh v. Emperor* (4), Shadi Lal, J., observed :

"In security cases the order passed by the Magistrate under S. 112 is equivalent to a charge in a warrant case and the person against whom the order is made is fully aware of of what is alleged against him. The evidence is thereafter recorded in his presence and he has every reasonable opportunity of cross-examining the witnesses. There is consequently no conceivable reason why he should be allowed the right of a second cross-examination and why he should thereby protract the proceedings unnecessarily. The reason which underlies the rule as to double cross-examination in warrant cases is entirely absent here and the principle of *cessante ratione legis, cessat ipsa lex* is fully applicable."

The learned Judge follows the view taken in *Chintaman Singh v. Emperor* (1) and dissents from the view taken in *Emperor v. Lansha* (5).

Mr. Grant has referred us to *Venkatachinnayya v. Emperor* (3). The question there for determination was whether S. 350 (1), proviso (a), Criminal P. C. which refers to change of magistracy during the pendency of a trial and the right to have a de novo trial applies to security proceedings and the Full Bench held it did. In dealing with the question, however, there are observations of Ayling and Coutts-Trotter, JJ. to the effect that the accused had a right under S. 256 to recall the prosecution witnesses. These observations are in my opinion obiter dicta as the learned Judges were not there dealing with the right now claimed.

Reference has also been made to *Emperor v. Lansha* (5) which is a case decided by the Chief Court of Burma and

where it was held that S. 256, Criminal P. C. is applicable to proceedings under S. 110 by virtue of the provisions of S. 117, Cl. (2) of the Code. There is no reference to any authorities, and this case is dissented from in the case reported in *Bija v. Emperor* (2).

In *Emperor v. Tirlok* (6) Boys, J., after referring to the provisions of S. 117 and the provision that no charge need be framed, observed ;

"The reason for the exception is obvious. What is equivalent to a charge has already been framed in the order served upon the accused in accordance with S. 112."

The learned Judge then goes on to deal with Ss. 254 and 255 and observes that at any stage of the proceedings the Magistrate, if he is prima facie satisfied that there is a case against the accused, may interrupt proceedings for the purpose of asking the accused whether he pleads guilty or whether he has any defence to make and that if he does so and the accused wishes to defend, then the accused can recall for cross-examination witnesses examined up to that stage and if the Magistrate does not do so but waits till all the prosecution witnesses are called, the accused can, when he is asked if he wishes to defend, ask for the recall of prosecution witnesses. It seems to me that if the notice under S. 112 is equivalent to the charge and if when that notice is read to accused he has the option of either executing the bond or denying his liability to do so, there is no necessity for the Magistrate interrupting proceedings. He cannot again issue a notice under S. 112 and there is no analogy to a Magistrate in warrant cases framing a charge when only some of the prosecution witnesses are examined and then going on with the rest of the prosecution evidence.

I prefer to follow the view taken in *Chintaman Singh v. Emperor* (1), *Ahmad Bakhsh v. Emperor* (4) and *Bija v. Emperor* (2) and would answer the reference by stating that in security proceedings where the other side wants to recall any prosecution witness he has no absolute right to do so under S. 256, Criminal P. C., but has a right under S. 257 of the Code.

In this case it appears that the Magistrate rejected that application to re-summon on the ground that S. 256 does

(b) [1910] 4 Bur. L. T. 24=J. L. O. 408=11 Cr.

not give the accused that right. He has not applied his mind to the question whether it is necessary in the interests of the accused that the witnesses should be re-summoned nor does he state that he considered the application was one made for the purpose of delay. Whether this would be a ground for interference is a matter entirely for the Bench to decide.

Curgenvén, J.—In deciding whether the right to recall prosecution witnesses for cross-examination, given by S. 256, Criminal P. C., can be claimed under S. 117 in security proceedings, it is of assistance to consider why the right is given in the trial of a warrant case. Two answers are possible :

(1) The charge shows the accused, perhaps for the first time, precisely what he has to meet. The first cross-examination may, therefore, have been conducted in some measure under a mistaken impression.

(2) Answers elicited from later prosecution witnesses necessitate the further questioning of earlier ones.

If the right had been given on ground (2), exercise of it would not have been restricted to the stage immediately after charge, since a charge may be framed before the examination of the prosecution witnesses is completed. It would have been fixed at the close of the prosecution evidence. The fact that the stage in the case at which the right must be exercised is the stage at which the charge is framed supports the view that charge and right are related as cause and effect, and therefore no charge no right. There is no such right in proceedings where no charge is framed, e. g., summons cases, sessions trials, civil suits.

If the right is allowed in proceedings under S. 117, it must be on a less qualified basis than in a warrant case. We must hold that it is exerciseable in all instances after all the witnesses for the prosecution have been examined. In so holding, instead of merely applying warrant procedure "as nearly as may be practicable," we should be going beyond it and conceding a right which it does not confer. We should be creating an inflexible rule in security cases where no such inflexible rule exists in warrant cases.

I agree with my learned brother

Kumaraswami Sastri, J., that the words "No charge need be framed" can only mean that no occasion can arise for framing a charge; because under S. 221 (1) every charge shall state the offence with which the accused is charged. In security proceedings the place of charge is taken by the "order in writing setting forth the substance of the information received" prescribed by S. 112. This order has to be read over to the person in respect of whom it is made, and although the Code does not provide that he should plead to it it resembles a charge in that it must contain a statement in abstract of the prosecution case.

In *Venkatachinnayya v. Emperor* (3), the question for decision, so far as we are now concerned, was whether in security proceedings for good behaviour the effect of sub-S. (2), S. 117, Criminal P. C., was to render applicable the provisions of Ch. 21 of the Code, dealing with warrant cases, and those of Ch. 25, in so far as they deal with the mode of taking or recording evidence in such cases, or whether the subsection attracted the provisions of all sections of the Code which are applicable to warrant cases. The Full Bench had not to decide which of the provisions of Ch. 21, should be deemed to be inapplicable, so that any observations made upon that question were clearly obiter. I do not myself think that Ayling, J., in selecting S. 256 as what seems to have been a random illustration, meant that in his view its provisions had necessarily to be enforced. All that he says is that S. 350 is as much a matter of procedure as the right to have prosecution witnesses recalled and cross-examined conferred by S. 256. Accordingly there was no ground for disputing the applicability of S. 350 merely because it occurred elsewhere in the Code. The line of reasoning is not vitiated by the circumstance that the provisions of S. 256, although a matter of procedure and therefore prima facie applicable, may, on special grounds, be found incompatible with the method of conducting a security inquiry. The observation of Coutts-Trotter, J., (as he then was), that the whole of the procedure in a warrant case must be adopted, was clearly no more than a generalisation.

I agree with the answer to the reference proposed by my learned brother.

Walsh, J.—I agree that the order calling on a person to show cause why he should not execute a bond to be of good behaviour is "equivalent to a charge" and there is ample authority for this position. It is impossible to frame a regular charge for several reasons. In the first place it is doubtful whether a person called on to show cause in such a case is an "accused."

In *Jhoja Singh v. Queen-Empress* (7), it was held that he was; but in *Hopcroft v. Emperor* (8) more cautious language is used that "he stands in the position of an accused person" and finally in *Binode Behari Nath v. Emperor* (9), it was held that he was not an accused person so that *Jhoja Singh v. Queen-Empress* (7), must be held to have been overruled. *Queen-Empress v. Mona Puna* (10), does not deal with a case of security for good behaviour. No doubt *Queen-Empress v. Mutasaddi Lal* (11), remains and Coutts-Trotter, J., in *E. Venkatachinnayya v. Emperor* (3), seems to incline to the same view.

Secondly, it is doubtful if there is any "offence". In *E. Venkatachinnayya v. Emperor* (3), Ayling, J., remarked on p. 523 that no "offence" is involved in an enquiry under Chap. 8 of the Code and Coutts-Trotter, J., (as he then was) says: "If he cannot be said to be "charged" with an offence it is at least sought to be proved against him that he is a person with criminal or undesirable propensities."

I agree with my learned brothers in interpreting the words "No charge need be framed" as meaning that no occasion can arise for framing a charge. If the order under S. 112, Criminal P. C., which is equivalent to a charge is not a charge there is no stage at which or process by which it can become anything more. Neither evidence in support of it nor the Court's opinion that it is prima facie proved by the evidence tendered can enable anything else to be framed than an order under the terms of S. 112 and the Code does not contemplate two identical charges in the same case. I agree with my learned brother Curgenven, J., in his classification of the two reasons why a right to recall and cross-examine prosecution witnesses is

given in a warrant case and I would say that Ss. 256 and 257 seem to me to deal respectively with those two rights. The right to cross-examine when the person first knows exactly what the charge against him is, is absolute and is dealt with under S. 256. It extends not to all the prosecution witnesses but only to those examined before the charge is framed and the Court may frame a charge at any stage. It does not mean as we should have to hold that it means if we accepted Mr. Grant's argument, a right to recall and cross-examine all the prosecution witnesses.

The right to recall and cross-examine earlier witnesses owing to what may be said by later ones is qualified and is dealt with by S. 257. As the "equivalent to a charge" is framed under Chap. 8 before any of the prosecution witnesses are examined the absolute right of recall cannot arise for the first purpose, but the qualified right for the second purpose does exist. It may be noted that Chap. 8 seems to be somewhat defective as it does not expressly provide for an examination of witnesses called for the defence and the only form of summons given in the Appendix, Sch. 5, is with regard to giving security for keeping the peace.

The balance of authority is certainly against a right of re-call and cross-examination of the prosecution witnesses under S. 256 (1). The remarks relied on in *E. Venkatachinnayya v. Emperor* (3) are obiter. Although the reference to us does not mention S. 257 I agree that we should answer the question in the manner proposed by my learned brothers.

P.R.S./V.S.

Reference answered. .

* 1930 Cr. Cases 328

(Calcutta)

Full Bench

RANKIN, C. J. AND SUHRAWARDY AND PEARSON, JJ.

In the matter of *Sojoni Kanta Das*.
and

In the matter of "India in Bondage :
Her Right to Freedom."

Application under S. 99-B of Criminal Procedure Code, Decided on 8rd January 1930.

(7) [1896] 23 Cal. 492.

(8) [1909] 36 Cal. 163=1 I. C. 727=12 C. W. N. 151.

(9) A.I.R. 1924 Cal. 992=50 Cal. 985.

(10) [1892] 16 Bom. 661.

(11) [1898] 21 All. 107=(1898) A. W. N. 165.

* Penal Code S. 124-A—It is no defence to say that only form and not fact of the Government is attacked—Any advocacy for change in Government that brings present Government into hatred etc. comes within S. 124-A.

The words used by the legislature in S. 124-A are the "Government established by law in British India." The section does not contemplate the probability of attempts being made to excite hatred and contempt against abstractions, but uses a clear phrase for a definite thing and, therefore, it is no defence to say that the attempt to excite hatred and contempt was directed solely against the particular form of Government now obtaining in India and not against the fact of the Government. Any advocacy regarding change in the form of Government as bringing into hatred or contempt or exciting disaffection towards the present Government comes within the mischief of S. 124-A. [P 331 C 2]

B. C. Chatterjee—for Applicant.

The Advocate General—for the Crown.

Rankin, C. J.—This is an application by Sojini Kanta Das under S. 99-B, Criminal P. C. in respect of a book entitled "India in Bondage: Her right to Freedom" of which he is the printer and publisher. On 13th August 1929, the Government of Bengal declared every copy of this book to be forfeited to His Majesty under S. 99-A of the Code. The present application is to set aside that order on the ground that the book did not contain any seditious matter or any matter the publication of which is punishable under S. 124-A, I. P. C. Our duty is to come to a finding under S. 99-D, Criminal P. C., namely, if we are not satisfied that the book contains seditious or other matter of such a nature as is referred to in sub-S. 1, S. 99-A, our duty is to set aside the order of forfeiture.

The book would appear to have been first published in December 1928 and again in May 1929. The name of the author is given as Jabez T. Sunderland. From certain passages in the book it would appear that it is addressed to an American audience and the author writes as an American. The book, however, was printed in India and it is only with its publication in India that this Court can be concerned. The general thesis or argument of the book is that Great Britain has no right to rule in India; that British rule in India is unjust, tyrannical and highly evil in its effects—is a crime against humanity and a menace to the world's freedom and peace. The main purpose of the

book is to remove the impression, said to be widespread in America, that British rule in India has been and is a great and almost unqualified good. The author claims to be well qualified to deal with this matter by reason in particular of the fact that he has paid no less than two visits to India—one in the years 1895-96 and again in 1913-14. He claims to have read the Indian periodical press extensively during his visits and to have been a regular subscriber since 1896 to no fewer than 7 Indian newspapers. Accordingly the reader is informed with great thoroughness and persistency that any signs of prosperity to be noticed in India are not signs of the prosperity of the Indian people but only of the English; that the all-over-shadowing fact connected with the history of India in recent years has been the succession of famines and the consequent plague epidemics. That in fact there is always famine, in the sense of starvation on a wide scale somewhere in the land. That the people of India are growing speedily poorer. The causes of India's impoverishment are set forth as being heavy taxation, the destruction of her manufactures as a result of British rule, the enormous and wholly unnecessary cost of her Government and in particular the heavy military expense of Government. These things are set forth as being the evils of foreign rule and the only remedy for them is said to be self-rule. It further appears, according to the author, that England's position in India works much injustice to the United States of America:

"When our Government desires to communicate upon any matter officially with India, it must be done round about by way of the British Ambassador, the official not of India, but of the nation that is holding India in bondage."

A chapter is devoted to the "Arrogance of the British India"; another is devoted to the denunciation of the legal system in India, the information of the author being that its "law system" was framed for India by Macaulay. This it appears (the reference would seem to be to the Indian Penal Code) is of a nature degrading to the Indian people. Its main features are said to be that the Judge and the prosecutor is the same man, that so many of the Judges are foreigners, generally Englishmen, who have little acquaintance with the

Indian people; that Englishmen are often appointed Judges who have no knowledge of law; that the legal system is very costly. But the gravest charge of all against the British legal system in India is given as partiality and favouritism towards Europeans. So too, the kind of peace which British rule has brought to India is explained to have been worse than war. "The British have made a graveyard and they call it peace." Again, the British Government is responsible for India's "opium curse":

"The British have fostered the opium evil and organized it for purposes of revenue. It has done this hypocritically, pretending that it is fulfilling the wishes of the Indian people."

The like is said, at length, of India's "drink curse." Of caste in India, it is said:

"The truth is the caste which is the most galling of any to the Indian people, and which they most desire to see reformed or removed, is that of their arrogant foreign lords and masters, who with some honourable exceptions, treat them as serfs."

Of Hindu-Mahomedan riots it is explained that the responsibility for them is primarily on the British who

"have employed the policy of fostering divisions among the people, knowing well that divisions always weaken a nation and render it easier to hold in subjection."

Again, as to the military protection which the British give to India a chapter is devoted to showing that

"The only protection the British give India in return for the crushing military burden that she is compelled to bear is the infinite injustice and wrong of subjection, bondage, exploitation, loss of freedom, deprivation of the place which she has a right to occupy among the great nations of mankind."

Another chapter describes the British rule in India as worse than that of the Moghul Emperors because it is a government of "foreigners and transients," India being a

"plundered nation in the hands of constant plunderer with the plunder carried away clean out of the land"

It does not seem to me to be necessary in this judgment to illustrate further the character and contents of the book, nor do I propose to select for quotation the more extreme or rhetorical passages, or the passages which display at its worst the authors animus against the Government at present established by law in British India.

The question being whether we are satisfied or not satisfied that the book

contains seditious matter the publication of which is punishable under S. 124-A, I. P. C., the only reasonable answer in my opinion is that there is in this book ample to satisfy any Court of justice that the terms of that section have again and again been contravened. The book appears to me to be a sustained attempt to bring into hatred or contempt and to excite disaffection towards the Government established by law in British India. The disapprobation expressed of the measures of Government or of the administrative or other actions of Government is motivated throughout by a desire to excite hatred, contempt and disaffection.

The Advocate-General has referred us to the statement by Strachey, J., in *Queen Empress v. Bal Gangadhar* (1) at p. 137 of the meaning of S. 124-A, I. P. C., as it then stood:

"A man may criticize or comment upon any measure or act of Government, whether legislative or executive, and freely express his opinion upon it. . . . He may express the strongest condemnation of such measures and he may do so severely and even unreasonably, perversely and unfairly. So long as he confines himself to that, he will be protected by the explanation. But if he goes beyond that and, whether in course of comments upon measures or not, holds up the Government itself to the hatred or contempt of his reader as for instance by attributing to it every sort of evil or misfortune suffered by the people or dwelling adversely on its foreign origin and character or imputing to it base motives or accusing it of hostility or indifference to the welfare of the people—then he is guilty under the section and the explanation will not save him."

Of this book it can hardly be doubted that its leading features are accurately described in the latter portion of the passage just cited. It proceeds indeed upon well worn lines every evil and misfortune, be it the "drink curse" the "opium curse," famine or anything else, is attributed to the English Government whose foreign origin and character is insisted on upon every page. The baseness of its motives is the ever ready explanation of its policy.

In these circumstances Mr. B. C. Chatterjee, counsel for the applicant, contended before us that the criticism of Government was both elaborate and severe but that nevertheless the book does not offend against section 124-A by reason of the fact that it appears

from certain passages therein that it is no part of the author's purpose to advocate that India should become entirely independent of the British Empire. Thus in one passage the author says :

"Here lies India's only hope. She must be come an absolutely independent nation with no connexion with Great Britain, or else, remaining in the Empire, she must be given the place of a real partner not that of a subordinate under a partner's name,) a place of as true freedom and of an perfect equality with the other partners in the Empire as that of Australia, or New Zealand or South Africa or Canada "

In other passages, moreover, the book contains criticism of the present form of Government as being contrary to England's own interests and its continuance as the kind of policy which cost her the American colonies and which, if persisted in must cost her India also. In the preface or "foreword," there is a passage in which the author disclaims enmity to Great Britain and states that what he advocates for India he believes to be for England's good as well as that of India. It appears that this position is maintained, so far as the author is concerned, by asserting that there are two Englands one which he likes to think of as the true one and the other which he describes as "this evil and as I believe dangerous England" and "this imperialistic, might-makes-right England" which :

"unless held in check will make India a smouldering volcano of unrest."

On the whole it seems to me to be quite true to say that it is no part of the purpose of the book to argue that all connexion with Great Britain should be abrogated. So long as the author is engaged in denunciation, he has little interest, so far as I can discover, in any particular proposals for reform and the book does not seem to be an argument in favour of any special type of constitution. This circumstance, however, has little bearing upon the question whether the book infringes S. 124-A. It is not necessary for our present purposes to consider whether the advocacy of any particular policy or any particular kind of constitution would necessarily, and of itself, be within the terms of the section. Though there may be policies or doctrines the advocacy of which is otherwise illegal no such question

need be considered in this case. The words of the section are:

"brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards His Majesty or the Government established by law in British India."

No interpretation can be given to these words which would render it possible to hold that the book does not offend against the section.

Mr. Chatterjee suggested that there was room for a distinction between the fact and the form of British Government of India and contended that the attempt, if any, to excite hatred and contempt was in this book directed solely against the particular form of Government now obtaining and was thus innocent under the section. The words used by the legislature are "the Government established by law in British India." The section does not contemplate the probability of attempts being made to excite hatred and contempt against abstractions, but uses a clear phrase for a definite thing, and it would be altogether misinterpreted if effect were given to Mr. Chatterjee's argument. The book itself, moreover, fails altogether to fall into line with the distinction suggested. People who are so unfortunate as to be unable to advocate change in the form of Government without attempting to bring into hatred or contempt or to excite disaffection towards the Government established by law have not been specially favoured by the legislature either by the terms of the section itself or by the explanations. They may take their grievance, if any, to the legislature, but the section while it stands must be interpreted according to the plain and natural meaning of its words. In my opinion this application must be dismissed.

Suhrawardy, J.—I agree.

Pearson, J.—I agree.

V.S./R.K. *Application dismissed.*

1930 Cr. Cases 331

(Lahore)

HILTON, J.

Ram Chandra—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 402 of 1929, Decided on 19th July 1929, from order of Addl. Dist. Magistrate, Lahore, D/- 2nd April 1926.

(a) Evidence Act, S. 159—Writing includes "printed matter."

The word "writing" used in S. 159 includes also printed matter. [P 333 C 1]

(b) Evidence Act, S. 159—Witness can refresh his memory by referring to document read at or near the transaction—It is immaterial that it was not printed by him.

When a witness wants to refresh his memory under S. 159, he is to do so by referring in Court to the document which he had read at or near the time of the transaction, and it is the fact that he had known it to be correct when he read it that is the justification for his doing so. It is quite immaterial that a document to which the witness refers in Court was not printed by the witness himself or in his presence. It is essential only that he should have read it at or soon after the transaction, to which it relates. [P 333 C 1]

(c) Evidence Act, S. 62, Expl. 1—One specimen of newspaper is counterpart original of another of same date.

One specimen of a newspaper is not a copy of another specimen of the same newspaper of the same date. There is no relation between them of copy and original. They are all counterpart originals, each being primary evidence of the contents of the rest. [P 333 C 2]

(d) Evidence Act, S. 81—Newspaper actually produced—Presumption of genuineness arises.

There is a presumption under S. 81 of the genuineness of the specimen actually produced. [P 333 C 2]

(e) Penal Code, S. 124-A—Memory of witness's testimony as to actual word used should not be relied.

In a case under S. 124-A, whatever the memory of witnesses, their memories as to actual words used should not be relied upon after a considerable time. [P 333 C 2]

(f) Penal Code, S. 124-A—Truth does not excuse seditious commentary.

If certain alleged facts are used as a peg on which to hang seditious comments, the truth of the facts does not excuse the seditious commentary: 19 Bom. L. R. 211, *Dist.* [P 334 C 2]

Barkat Ali—for Appellant.

Das Raj Sawhay—for the Crown.

Judgment.—Ram Chandra has been convicted by the Additional District Magistrate of Lahore under S. 124-A, I. P. C., and sentenced to rigorous imprisonment for one year and a fine of Rs. 200 on account of a speech alleged to have been made by him on 19th November 1928, at a public meeting held outside the Mori Gate at Lahore. At the same trial he was also convicted under the same section and sentenced to rigorous imprisonment for two years and a fine of Rs. 300 on account of a speech alleged to have been made by him on 16th December 1928, at a meeting held in the Bradlaugh Hall at

Lahore. It was ordered that the sentence of imprisonment should run consecutively. He now appeals against these convictions and sentences.

I take first the speech of 16th December 1928. The prosecution were able to lead evidence of persons who were present at the meeting and who deposed that they heard what the appellant uttered. Among these was Agha Rashid Ahmad, a Sub-Inspector of the C. I. D., who recorded a shorthand report of the speech while it was being made. The version of the speech contained in the report is the version upon which the prosecution has relied and the charge framed is based upon it.

The appellant did not deny that he had spoken at this meeting but he made a defence that his speech was entirely different from the version entered in the charge sheet to which the prosecution witnesses had deposed. He called several witnesses and cited others to depose that they attended the meeting and that they heard what the appellant uttered. There is no doubt that the appellant expected these witnesses to depose that the appellant's words were not those entered in the charge sheet. When Ram Kishan, D. W. 10, was being examined he stated that he had heard the appellant's speech and that next morning he had read a report or account of that speech in the *Bande Mataram* newspaper of that date. The defence counsel then wanted to ask the witness whether that account which he had read on the following morning was such as he knew to be correct when he read it. This question was disallowed by the learned Magistrate on an objection made by the Public Prosecutor. The defence counsel also wanted that the witness should be permitted to refresh his memory concerning the words of the speech from a copy of the *Bande Mataram* newspaper bearing the date 18th December 1928, (and presumably published on 17th December). This request was also disallowed on the Public Prosecutor's objection. The reasons which the learned Magistrate recorded for overruling the appellant's counsel on these matters were first that the witness had not himself printed the newspaper nor had seen it in the process of being printed, and secondly, that the defence had not been able to prove

that the issue of the newspaper which was tendered in Court contained an account of the speech identical with any report that had been recorded by any reporter while the meeting was going on.

When the learned Magistrate had given his ruling on these points the appellant made a statement closing his defence on the ground that the Magistrate's ruling would debar from coming on the record the remaining evidence upon which he had intended to rely.

Strong exception has been taken before me to the learned Magistrate's ruling on these points and it is contended that the appellant's defence was thereby nullified contrary to law. In my opinion, the learned Magistrate did not take a correct view of the law and his ruling cannot be upheld.

The first point to observe is that the word "writing" used in S. 159, Evidence Act, includes also printed matter (see General Clauses Act 10 of 1897, S. 3, sub-S. 59).

The next point is that when a witness wants to refresh his memory under S. 159, Evidence Act, he is to do so by referring in Court to the document which he had read at or near the time of the transaction, and it is the fact that he had known it to be correct when he read it that is the justification for his doing so. Thus there is no question, as the learned Magistrate seems to have thought of producing in Court any report recorded by a reporter at the meeting, for the simple reason that no such report had ever been read by the witness at or near the time of the transaction.

The next point is that it is quite immaterial that the document to which the witness refers in Court was not printed by the witness himself or in his presence. It is essential only that he should have read it at or soon after the transaction to which it relates.

The final point which has occupied me, though I am not sure whether it was raised before the learned Magistrate, is the fact that the specimen of the newspaper actually produced in Court when the witness was being examined was probably not the identical specimen which the witness says that he had read on the day after the speech. It might seem at first sight that if the

specimen which the witness had read is the original, the specimen produced in Court would be only its copy and that, therefore, the Magistrate had under para. 3, S. 159 a discretion to disallow a reference to such a copy. Turning, however, to Explan. 2 to S. 62, Evidence Act, it is found that where a number of documents are all made by one uniform process as in the case of printing, etc., each is primary evidence of the contents of the rest but where they are all copies of a common original they are not primary evidence of the contents of the original. From this it follows that one specimen of a newspaper is not a copy of another specimen of the same newspaper of the same date. There is no relation between them of copy and original. They are all counter-part originals, each being primary evidence of the contents of the rest. The specimen produced in Court is, therefore, primary evidence of the contents of the specimen which the witness had read and I can see no valid reason why in that case the witness cannot refresh his memory by referring as well to one specimen as to another. It may be added that there is a presumption under S. 81, Evidence Act of the genuineness of the specimen actually produced.

For the above reasons I am led to conclude that the ruling of the learned Magistrate was not in accordance with law and that it had the effect of depriving the appellant of his right to put his defence properly before the Court.

In such a case as this the correct course to pursue would ordinarily be to direct under S. 42b, Criminal P. C., that the defence witnesses of the category in question should now be examined by way of additional evidence. I have carefully considered the advisability of adopting this course and have come to the conclusion that it should not be followed. Whatever the memory of these witnesses might have been in March 1929, when they attended the learned Magistrate's Court concerning a speech made in the proceeding December, their memories of actual words used could now be of very little assistance to the Court even when refreshed by a reference to documents read by them soon after the speech. It must, I think, be admitted that the appellant would still remain with a valid grievance that his witness-

ses had been examined too long after the date of the speech to carry such conviction to the mind of the Court as they might have carried some months earlier. On this view of the matter I have decided to acquit the appellant on the charge, relating to the speech of 16th December 1928.

Coming now to the speech of 19th November 1928, the appellant admitted that he had made the speech, which has been proved by S. Arjan Singh, Sub-Inspector of the C. I. D., P. W. 2, who was present at the meeting and took a shorthand report of the speech at the time it was being made.

The appellant's learned counsel has argued before me that the version proved by S. Arjan Singh does not represent the entire speech which the appellant made, but comprises only quotations or extracts from it and that the appellant cannot be condemned unless the full speech is before the Court from which the Court could judge the tenor of it as a whole. He has referred me to several authorities, most of which relate to newspaper articles and one of them *Bal Gangadhar Tilak v. Emperor* (1) to a lengthy and obviously well-considered speech. In the first place I do not find it proved that the prosecution version is not the full speech. S. Arjan Singh clearly deposed that he took down the speech word for word and omitted nothing and that he can write shorthand at 130 words a minute. No defence witness was asked to give any rival version of the speech. In fact no defence witness was called who was present when this speech was made. I hold, therefore, that prosecution version is a full and correct version. The remaining question is whether the speech is within S. 124-A. Reading it as a whole and wherever two interpretations of a phrase are possible giving the appellant the benefit of the more innocent, I find the speech to be seditious.

The appellant led some defence evidence to prove how certain injuries were received by the late Lala Lajpat Rai and what effect they had on his health. The object of this evidence was to show that certain remarks on this subject in the speech were based on

facts. Those facts are, however, not important for the purpose of judging the character of the speech. If certain alleged facts are used as a peg on which to hang seditious comments the truth of the facts does not excuse the seditious commentary. I, therefore, express no opinion about this defence evidence and proceed to examine the speech.

In it I find indirect incitements to violent action in the expression that in other countries streams of blood would have been shed and also couplet which begins with the words : " If the arm is not strong." These phrases are somewhat tempered by others where non-violent movements are referred to. On the whole there is not much incitement to violence. On the other hand excitement of hatred and disaffection of the established Government is plentiful. The phrase about shaking the Government goes well beyond disapprobation which Explan. 2 to S. 124-A allows. Then there is the contemptuous charge that the Government believes in force. Disaffection is strongly pronounced in the phrase : " If you want to put an end to this Government " and again in the sentence about the movement of complete independence. These are phrases which colour the whole speech and express its intention. They amount, in my opinion, to sedition.

As regards the sentence I would have reduced it to some extent as the speech is not very violent, but for the fact that the appellant has a previous conviction of recent date under the same section. I dismiss the appeal in respect of the conviction for the speech of 19th November 1928, and confirm the sentence of one year's rigorous imprisonment and fine of Rs. 200. I accept the appeal in respect of the speech of 16th December 1928, and setting aside the conviction and sentence of two years' rigorous imprisonment and Rs. 300 fine, I direct that the appellant be acquitted on that charge and that the fine of Rs. 300 if paid, be refunded.

V.B./R.K. *Appeal partly allowed.*

(1) [1917] 19 Bom. L. R. 211=39 I. C. 807=48 Cr. L. 7. 567.

1930 Cr. Cases 335 (1)

(Madras)

JACKSON, J.

D. Madar Sahib—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Case No. 617 of 1929, and Criminal Revn. Petn. No. 561 of 1929, Decided on 29th November 1929.

(a) Madras District Municipalities Act, Sch. 4, R. 30—Distraint warrant signed by facsimile stamp is irregular and invalid.

Where an officer leaves a facsimile stamp of his signature behind him, which the peons continue to use, a warrant issued stamped by such facsimile is quite irregular and invalid.

(b) Madras District Municipalities Act, Sch. 4, R. 30—Warrant must be issued under sign manual—Civil P. C., S. 2 (20) has no application to District Municipalities Act—But illiterate may affix mark under Madras General Clauses Act, S. 3 (29).

Under the District Municipalities Act a warrant must bear the signature of the Chairman. Signature must be taken in its accepted sense of sign manual. The fact that in S. 2 (20), Civil P. C., sign is used as including stamp has no bearing on the Madras District Municipalities Act. But if the Chairman happens to be illiterate, under S. 3 (20), Madras General Clauses Act, he may affix his mark. [P 335 C 2]

(c) Madras District Municipalities Act, Sch. 4, R. 31—Distrainer has no right to take front door—Accused resisting such distraint is protected by rule of self defence and cannot be convicted under Penal Code, S. 332.

A distrainer having a warrant has no right to take the front door of a house, and if he threatens to do so, such a proceeding renders the house unsafe calling for immediate defence of private property. Further if the accused resists such attempts he cannot be said to have exceeded his right of self-defence and any conviction under Penal Code, S. 332, is liable to be set aside: 13 *Mad.* 518, *Foll.* [P 335 C 2]

V. L. Ethiraj and *S. Ramachandran*—for Petitioners.

K. S. Vasudevan for Public Prosecutor—*for the Crown.*

Order.—The two petitioners have been sentenced to three months' simple imprisonment and Rs. 50 fine under S. 332, I. P. C., for resisting a distraint under a warrant purporting to have been issued by the Municipal Chairman of Cuddappah. It seems clear that there was no warrant. The prosecution theory is that the ex-Chairman left a facsimile stamp of his signature behind him, which the peons continued to use. Of course this would be quite irregular and would give no validity to a warrant.

It is clear from Appendix A of Sch. 4, District Municipalities Act that the warrant must bear the signature of the chairman. Signature must be taken in

its accepted sense of sign manual. The fact that in S. 2 (20), Civil P. C., sign is used as including stamp has no bearing on the Madras District Municipalities Act. The only departure from the general rule is that if the Chairman happens to be illiterate, under S. 3 (29) Madras General Clauses Act he may affix his mark. Even if the distrainers had a warrant they had no right to do so as they threatened, and take the front door of the house *Queen Empress v. Sahaik Ibrahim* (1), a proceeding which rendered the house unsafe, and called for immediate defence of private property. In the circumstances I am not prepared to hold that the accused exceeded that right. The conviction is set aside and the fine ordered to be refunded. Accuseds' bail is released.

P.R.S./V.S.

Conviction set aside.• (1) [1890] 13 *Mad.* 518.

1930 Cr. Cases 335 (2)

(Patna)

WORT, J.

Mahadeo Lal—Petitioners.

v.

Hossaini Pandey—Opposite Party.

Criminal Revn. No. 480 of 1929, Decided on 26th August 1929

(a) Criminal P. C. S. 138—Error in nomination of jury whether can be cured by S. 537.

The nomination of a Jury is a nomination of the Court which has to try the case and irregularity with regard to that matter is an irregularity which goes to the root of the proceedings. It is doubtful whether in any event the provisions of S. 537, Criminal P. C., could cure the irregularity in this respect. : 3 *Cal.* 499, *Ref.* [P 336 C 1]

(b) Criminal P. C., S. 139-A—Can there be waiver of mandatory provisions (Queare).

Whether there can be a waiver of mandatory provision such as is contained in S. 139-A of the Code. [P 336 C 2]

Sarju Prasad—for Petitioners.

S. P. Varma and *Bhagwat Prasad*—for Opposite Party.

Judgment.—This rule is directed against the order of the Magistrate made on 13th June 1929, as a result of an award by a Jury under Chap. 10, Criminal P. C. He ordered the petitioners to remove an encroachment being a wall on plot No. 234 on or before 27th June 1929. Execution of this order was stayed on 27th June 1926, till the disposal of an appeal which was pending before the Sessions Judge.

I very much regret to have set aside

the order of the Magistrate having regard to the fact that although there was irregularity in the proceedings, it is perfectly clear to me that so far as it was possible, the petitioner waived this irregularity. The first contention is that the Jury which was summoned was appointed in contravention of the provisions of S. 138, Criminal P. C. That section provides that :

"On receiving an application under S. 135 to appoint a jury, the Magistrate shall forthwith appoint a jury consisting of an uneven number of persons not less than five, of whom the foreman and one-half of the remaining members shall be nominated by the Magistrate. . . ."

In this case the Magistrate nominated the foreman, but stated that the parties would nominate the remainder and that in fact was done ; two were nominated by the petitioners and two were nominated by the opposite party. It is contended that this is an irregularity by reason of the provisions of S. 537, Criminal P. C. It is to be noticed that in S. 537 the errors and omissions which are cured by that section are stated to be in :

"the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial"

and then in sub-para. (c) mention is made of an omission to revise a list of jurors or assessors in accordance with S. 324 ; and apart from the mention of a misdirection to the jury in subpara. (a) there is nothing in the whole of this section about the appointment or nomination of a jury. Now quite clearly the nomination of a jury is a nomination of the Court, which has to try the case and it would seem that irregularity with regard to that matter is an irregularity which goes to the root of the proceedings. Therefore, in my judgment it is doubtful whether in any event the provisions of S. 537, Criminal P. C., could cure the irregularity in this respect. In connexion with this point the decision in *Upendra Nath v. Khitish Chandra* (1) is relied upon. In that case similar irregularity in the appointment of a jury was held to be incapable of making a legally binding award. However, having regard to the other point in the case it is unnecessary for me to say whether as a matter of law the irregularity in the appointment of the jurors in the case was such as could not be

cured by S. 537, Criminal P. C. The other point in the case is that the Magistrate did not comply with the provisions of S. 139-A, Criminal P. C. In this connexion I might mention that it is clear that the petitioners the moment they were summoned to come before the Magistrate asked for a jury, and, therefore, it seems to me that there was a clear waiver of their rights under S. 139-A. But I have the gravest doubt whether there can be a waiver of a mandatory provision such as is contained in S. 139-A of the Code. The section provides that

"where an order is made under S. 133 of the Code, . . . the Magistrate shall, on the appearance, before him of the person against whom the order was made, question him as to whether he denies the existence of any public right in respect of the way, river, channel or place, and, if he does so, the Magistrate shall, before proceeding under S. 137 or S. 138, inquire into the matter."

Now there was no inquiry by the Magistrate. If there had been it might have resulted in the necessity of proceeding under the second subsection of S. 139-A. As I have said, there was no inquiry and therefore, it is idle to speculate as to what the result of such inquiry would have been. It is contended that in the petitioners' written statement the question of whether the land was private property or public land was not disputed, that is to say, that it was admitted that it was a public land and the fact desired that there had been an encroachment. In my judgment I do not think that this contention is supported by a perusal of the written statement ; but in any event that matter is immaterial, because the section quite clearly means that the party against whom the order under S. 133 is directed is under no necessity of contending that it is his private land, but on the other hand it is obligatory on the part of the Magistrate to inquire whether that in fact is the contention of the party or not. In these circumstances the award of the jury is set aside. The matter will proceed from the stage in which the proceedings had reached on the date when the petitioner first came before the Magistrate after being served with the order under S. 133, and the Magistrate will determine the matter according to law.

V.B./R.K.

Case remanded.

THE CRIMINAL CASES

JOURNAL SECTION INDIAN LEGISLATION

1930]

[APRIL

ACT 2 of 1930

(Received G. G's assent on 1st March 1930)

The Dangerous Drugs Act

This Act has been enacted for centralising and vesting the control of the operations relating to Dangerous Drugs in G. G. in Council. It applies to the whole of British India including British Baluchistan and Sonthal Pergannas.

Section 2 gives the various definitions of different kinds of Dangerous Drugs and of acts of importing, exporting, transporting etc.

Section 3 gives G. G. in Council power to frame rules for determining percentage.

Sections 4 to 9 deal with prohibition and control over dealings with the "Dangerous Drugs."

Sections 10 to 21 deal with offences and punishments therefor including attempts and abetments.

Sections 22 to 35 deal with procedure regarding issue of warrants, seizure and arrest without warrant, the mode in which they are to be effected and incidental rights and liabilities of the excise officers and the offenders, including the rules for confiscations etc.

Sections 36 to 41 are miscellaneous. S. 36 relates to rules made under the Act. S. 37 deals with recovery of sums due to Government. S. 38 relates to applicability of Sea Customs Act. S. 39 relates to savings of Local Acts.

Schedule 1 deals with bonds to ab-

stain from the commission of offences under the Act.

Schedule 2 gives the extent to which local Acts have been amended:

ACT 6 of 1930

(Received G. G's assent on 15th March 1930)

Amends the Prisons Act, 1894.

In S. 27, Cl. (2), Prisons Act 1894, "21" is substituted for "18."

ACT 9 of 1930

(Received G. G's assent on 20th March 1930)

Amends the Cantonments (House Accommodation) Act, 1923

Clause (bb), S. 2, sub-S. 1, has been omitted. Cl. (d), sub-S. 1, has been amended so as to include Officer Commanding the district. S. 6 has been now substituted by new section. In S. 7 a proviso has been added. S. 8 has been omitted. By the amended S. 13, sub-S. 2, "Civil Court" has been substituted for "committee of arbitration." In sub-S. (1), S. 15, word "30" has been substituted for the word "15." The same is the case with S. 16, sub-Ss. (1) and (2). S. 17 has been substituted for the old S. 17. The whole of Chap. 4 has been substituted by a new Chap. 4. S. 29 has been amended. The old S. 30 has been substituted by a new S. 30. S. 34-A has been added.

Articles

Canon Law and a Registrar Marriage,

By

A. PHIL, FONSECA, B. A. LL.B., PLEADER, KARACHI

(Continued from p. 12.)

I will now consider the Code of Canon Law. Can it be possible or even probable that the drafts-man was so ignorant of such a public fact as a civil marriage that he did not provide for such a case. I will not refer to canons already quoted in the judgments. By Canon 6 *ignorantia juris neminem excusat*, and Canon 18 is very important if there is:

"any doubt or ambiguity one must refer to the previous law in force, the purpose and object of the law and the circumstances, and the mind of the legislator."

There can be no doubt that the marriage is forbidden, as that is the opinion of all canonists. By Canon 16 this opinion should have been followed. Kemp, J., in dealing with the impediments after Canon 1035 has omitted to refer to Canon 1036 (2) and (3) concerning a diriment impediment and a grave prohibition. Further, Canon 1042 perfectly includes clandestinity. The ordinary impediments and objections in Indian and English law to the validity of a marriage e. g., affinity, prohibited degrees etc., are referred to here as those of a minor order but all the rest are of a major order. This is clear and sweeping and it must include clandestinity. Thus, one must conclude that this is the law and that there is a prohibition. At least the Tamesi decree is clear and it should have been enforced. It is unnecessary to refer to other canons in support of my arguments at this stage. Again, marriages *ex facie ecclesiae* are recognised by the Catholic Church in only two instances and no other. Does this not exclude clandestinity? The ordinary maxim supports this view *expressio unius alterius exclusio*. Consequently, a civil marriage is prohibited by the Code of Canon as explained in Kemp, J.'s judgment.

Kemp, J., speaks of "an entire nullity." What is null must be void. That is the sense in which it is used. To have no existence in law it must be forbidden or prohibited. A civil marriage alone is recognized by law where expressly it is compulsory by statute.

In India a religious marriage is attended with full legal status as much as a civil marriage of non-Catholics. If Canon Law lays down that a civil marriage produces a state of concubinage, which Kemp, J., admits is a state of sin, it must be forbidden. If the effect is forbidden it must follow that the cause is equally forbidden. The effect, murder, is punished and therefore forbidden, so, the cause is equally forbidden. The same may be said of other null and void contracts. It is clear from the foregoing that Canon Law legislates regarding the validity of marriages, and this is partly admitted in the judgments: *vide essentials*. From the findings it follows that certain implications, which the Judges say do not arise certainly do so, as I have tried to show above. And regarding custom and usage, I will quote two sound rules of interpretation *optimus legis interpret* *consuetudor optimus interpret rerum usus*. These also apply.

In conclusion, I will only refer to the amendment of S. 88. An explanation may be added in these words. Personal Law includes the forms and essentials of Hindu, Mahomedan and Canon Laws. An unusual method would be to add a section to Canon 1012 or 1035 prohibiting clandestinity. It will be really a surprise to the Vatican authorities that India makes an amendment necessary but it will be more expeditious.*

*NOTE on *Berthiasume v. Dastous*, 1930 P.C. 1929, cited by Kemp, J. The facts of this case are quite different. Two Canadians, their domicile being Canadian, married in France, where a certificate of a civil marriage is a condition precedent to a religious marriage by the French Code. The marriage according to the French Law was void because of its absence. The remarks of Viscount Dunedin are relevant only when a conflict of laws arises, or when a reference to international law becomes necessary. The conclusion of the Privy Council really supports the Catholic position,

because they hold in favour of the religious marriage on the Doctrine of the Canon Law regarding a putative marriage, which "has been adopted by many systems" including the Quebec Code. Viscount Dunedin states clearly, she was "from her antecedents and religion quite incapable of considering marriage as anything but a religious ceremony." No S. 88 arose here for interpretation. Here the marriage was contracted in

India, not outside India, where a civil ceremony was not necessary. If the Canon Law was not the personal law, or if the Portuguese domicile fell for consideration, the rules of international law would apply to the case. It is important to note that the original and appellate Courts held in favour of a valid marriage, which was confirmed by the Privy Council on the ground stated above.

The Sarda Act and after

By .

B. Srinivasa Rao, M.A., B.L., Vakil, Guntur.

Now that Act 19 of 1929, more popularly known as the Sarda Act, is a *fait accompli* and the Governor-General of India has given his assent thereto, the orthodox critics and opponents of the measure seem to be desperately trying to get at some device by which to get over its penal provisions. The device that easily strikes them, is a journey to the nearest Native State, with a view to solemnise the prohibited marriage, within that State. Readers of the *All India Reporter* may well ask, is this a successful device? or does the law of the land attach the same penalty to it? But before that question is answered, a brief survey of the Act is necessary.

The preamble clearly enunciates the purpose of the measure, as an act to restrain the solemnisation of child-marriages; and this purpose is sought to be achieved by eleven short sections: of which S. 1 deals with title, extent and commencement; S. 2 gives definitions; Ss. 3-7 deal with penalties; and Ss. 8 and 9 with jurisdiction and cognizance; while the powers of the Court relating to preliminary inquiries and security for costs, are described in the last two sections of the Act.

As if to reconcile the masses as well as the classes, to the new awakening, the enforcement of the measure has been put off till 1st April 1930. A child has been defined as a male under 18, or a female under 14; and child-marriage, has been defined as a marriage to which either of the contracting parties is a child. The punishment for an offending

adult under 21 is limited to a maximum fine of Rs. 1,000; while adults over 21 are liable to an additional sentence of a month's imprisonment. The abettors are likewise dealt with, for performing, conducting or directing, any child-marriage.

The foregoing *resume* of the Act suffices to start our discussion. To take a concrete case, *A* and *B* are British Indian subjects of His Majesty. *A* has a daughter aged 11 while *B* has a son aged 22. *A* wants to give his daughter in marriage to *B*'s son. *A* and *B* consent to perform this in British India on 1st April 1930. In this case the bride will escape with fine, but the bridegroom as well as *A* and *B*, are liable to be punished with a month's simple imprisonment as well.

Can this be averted by *A* and *B* going to Hyderabad Deccan, for instance; and perform the marriage there; and what differences does it make, if *A* and *B* do not personally go to the Native State but send their children with instructions to solemnise their marriage there? That is the question to be answered. But to get at a complete answer to that question, we have to travel a little outside the Sarda Act, and turn our attention to the Penal Code and the Code of Criminal Procedure. It is to these enactments we have to look for enlightenment in doubtful matters, except in cases where reference to them has been specifically barred.

The word "Offence" has been defined by sub-S. (0), S. 4, Criminal P. C., as an

act or omission, made punishable by any law for the time being in force : and S. 188 of the same Code imposes a liability on Indian subjects for punishment in British Courts, even in cases where the offence is committed beyond British India. The only proviso to the application of that section is that the Political Agent or the Local Government, as the case may be, has to certify to the fitness of inquiry into the charge.

For clearer understanding, the section is reproduced below :

"Section 188 : where a Native Indian subject of His Majesty commits an offence, at any place, without and beyond the limits of British India, or

when any British subject commits an offence in the territories of any Native Prince or Chief in India or,

he may be dealt with, in respect of such offence, as if it had been committed at any place within British India, at which he may be found :

Provided that no such charge shall be inquired into in British India, unless the Political Agent, if there is one, for the territory in which the offence is alleged to have been committed, certifies that in his opinion, the charge ought to be inquired into in British India; and where there is no Political Agent, the sanction of the Local Government shall be required :

Along with this, S. 108-A, I.P.C., has to be considered. This new section has been added by the Indian Penal Code Amendment Act (4 of 1898) and reads :

"A person abets an offence within the meaning of this Code, who in British India, abets the commission of any act, without and beyond British India, which would constitute an offence, if committed in British India."

Even a cursory reading of the above extracts would incline us to the view that our orthodox critics cannot escape the penal provisions of Act 19 of 1929; even if they actually do not go to Hyderabad, but send their children to that place for the specific purpose of having their marriage performed there. It has further to be remembered that sub-S. 2; S. 6, Sarda Act, draws a rebuttable presumption, that where a minor has contracted a child-marriage, the person having charge of such minor, has failed to prevent the marriage from being solemnised. In other words the parents the *prima facie* held to be abettors.

That is where we stand; and it makes no difference whether the prohibited marriage is solemnised within or without British India; and whether or not the parents actually accompany them to the Native States, for the purpose of solemnising the marriage of their children.

As a drowning man catches at a straw, the orthodox critic will hereafter have to shift the scene of his activity to the chambers of Political Agents, and Government Houses, thanks to Rai Sahib Harabilas Sarda. The orthodox critic will have to take the further precaution, that the Native State to which he proposes to go, or send his children, does not itself contain a local parallel Act, like the Infant Marriage Prevention Act, of Baroda, or the Child Marriage Prevention Act of Rajkot.

It is not the purpose of this article to canvass the necessity or desirability of such a measure as the Sarda Act, but only to elucidate the legal position of the orthodox critics who think they can get over the penal provisions of the Act, by running to the nearest Native State for achieving the very purpose, forbidden within British India.

In fairness it has, however, to be conceded that the matter under discussion is by no means free from doubt. From the nature of things, there cannot be case law to illumine us; nor a plentiful crop of text books and commentaries, to guide us. A priori considerations may not always assist us in coming to a correct conclusion; and it has also to be remembered that where angels fear to tread, it may not be wise for others to rush in. Nevertheless, I have tried, in the crowded columns of the *All India Reporter*, to develop a categorical statement of the law on the subject; with a view to sound a note of warning to my orthodox friends, against a possibly precipitate path of peril: even if they should hold that the Sarda Act has resulted as Justice Mackay of the Madras High Court has observed not merely in a social revolution, but "a seismic disturbance of an age-long practice."

1930 Cr. Cases 337

(Lahore)

BHIDE, J.

Muhammad Rafi—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 602 of 1929, Decided on 6th August 1929, from an order of Magistrate, First Class, Sialkot, D/- 4th June 1929.

Penal Code, Ss. 320 and 326—Wound on neck with sharp edged weapon is dangerous to life, but it is not sufficient in itself to cause death.

The accused, a young man of twenty, inflicted a wound with a sharp-edged weapon on the neck of his friend in a sudden impulse as a result of a quarrel. The wound became septic and wounded man died.

Held: that a wound on the neck was "dangerous to life" within the meaning of Cl. 8, S. 320 and was therefore grievous. But the wound itself was not in itself sufficient to cause death and the circumstances did not justify a finding that the accused knew that his act was likely to cause death. Considering the age of the accused and the circumstances, the sentence of seven years passed on the accused was very severe and sentence for two years was sufficient. *A. I. R. 1922 Lah. 26, Ref. [P 338 C 1, 2]*

Muhammad Amin—for Appellant.

Shambu Lal Puri—for the Crown.

Judgment.—The appellant Muhammad Rafi alias Raffo, aged about 18 or 20 has been convicted in this case under S. 304 (II), I. P. C., for causing the death of another youth named Habibullah, aged about 20, by inflicting an injury on his neck with a pen-knife and has been sentenced to rigorous imprisonment for seven years.

The prosecution story briefly was that on 10th March 1929, at about mid-day, there was a quarrel between the two boys over a loan of ten annas and later on, at about 1 p. m. when the deceased was sitting at the shop of one Allah Rakha, a mochi, the appellant came up and inflicted an injury on his neck with a pen-knife from behind. The deceased was taken to the hospital and died there fifteen days later as the result of septic poisoning from the wound.

The prosecution case rests on a dying declaration made by the deceased to a Magistrate at about 6 p. m. on the day on which he was wounded and the testimony of one Siraj (P. W. No. 9). There were three other witnesses relied on by the prosecution, viz., Allah Rakha Mochi, Allah Rakha Gujjar and Umar Din, but

they have not supported the prosecution story as stated above.

As regards the dying declaration Ex. P. A. recorded by the Magistrate, the learned counsel for the appellant had urged that the document itself cannot be treated as evidence under S. 160, Evidence Act as the Magistrate did not state that he had no recollection of the facts and that he could only say that whatever he had recorded was correct [see *Partab Singh v. Emperor* (1).] The Magistrate has, however, given some of the facts orally. He has deposed that the neck of the deceased was bandaged and on being questioned the deceased told him that Raffo, son of Shafi, of his own Mohalla had stabbed him with a knife at 1 p. m. at the shop of Allah Rakha mochi. The Magistrate had not given orally the details of the previous quarrel which appear in Ex. P. A. There is, however, no independent evidence on the record about this previous quarrel and the learned trial Magistrate has disbelieved it as a probable improvement introduced to heighten the gravity of the offence. The Magistrate who recorded the dying declaration states that there were four or five persons sitting by the side of the deceased when the declaration was recorded and that he suspected that they prompted him when this part of the story, i. e. about the previous quarrel was narrated to him. This fact no doubt throws suspicion on the dying declaration. At the same time, I do not think there is any good reason to doubt the truth of the deceased's allegation, that it was the appellant who inflicted the injury on the neck; for there is nothing on the record to show that the deceased or his relations had any motive to implicate the appellant falsely. Although innocent persons are sometimes implicated with the guilty in cases of this description it must be remembered that only one person, viz., the appellant was charged in this case, and I cannot believe in the circumstances that he would have been charged instead of the real culprit, if the offence had been committed by some one else.

The dying declaration is corroborated by the evidence of Siraj. The learned counsel for the appellant has pointed out certain discrepancies in the state-

(1) *A. I. R. 1926 Lah. 310=7 Lah. 91.*

ment of this witness before the Police and in Court but this witness also appears to be distinguished and I see no good reason to distrust his evidence as the main facts regarding the attack made by the appellant on the deceased in his presence.

The two Allah Rakhas and Umar Din have not supported the prosecution story, but as the learned Magistrate has pointed out their statement are mutually inconsistent and it seems that they have deliberately refrained from disclosing the truth in order to save the appellant.

The appellant pleaded not guilty but could give no reasonable explanation of the charge brought against him. He produced some evidence in defence to show that he was in Lahore on the date of the offence. This was not even alleged by him in his statement and the evidence produced is valueless.

In my judgment, it is proved beyond any doubt that it was the appellant who inflicted the injury on the neck of the deceased which resulted in his death. Owing to the paucity of the evidence as regards the circumstances which led to the commission of the offence, the determination of the nature of the offence is not free from difficulty. There is no reliable evidence as to the motive for the offence but the probability is that it was committed on a sudden impulse as the result of a quarrel.

The medical evidence shows that the injury was on the right side of the neck about 2½" by ½" in dimension and was inflicted with a sharp-edged weapon. The Assistant Surgeon, who treated the deceased has, however, deposed that there was every possibility of the deceased surviving but for the wound becoming septic, apparently as a result of it being pressed with hands and bandaged with dirty cloth in the initial stages before the deceased was taken to the hospital. From the medical evidence, it thus appears that the wound was not in itself sufficient to cause death. I do not think the circumstances of the case justify a finding that the appellant knew that his act was likely to cause death. At the same time, a wound on the neck, must, I think be at least considered to be 'dangerous to life' within the meaning of Cl. 8, S. 320, I. P. C., and therefore 'grievous.'

I alter the conviction of the appellant to one under S. 326, I. P. C. As regards the sentence, the appellant's age is given in the record as 17 or 18. The learned Magistrate has estimated it in his judgment as 20. Even taking the latter figure to be correct, the sentence of seven years passed on him, seems very severe in view of all the circumstances. The facts of the case are somewhat similar to those in *Ghulam Muhayuddin v. Emperor* (2) in which the accused was awarded a sentence of three years, though the injury was more serious and resulted in death in a few hours. I think, a sentence of rigorous imprisonment for two years will meet the ends of justice in the present case and I reduce the sentence to this term accordingly.

R.M./R.K. *Order accordingly.*

(2) A. I. R. 1922 Lah. 26.

1930 Cr. Cases 338

(Lahore)

FFORDE, J.

Anand Kishore—Accused—Appellant.
v.

Emperor—Opposite Party.

Criminal Appeal No. 361 of 1929, Decided on 7th May 1929, from order of Addl. Dist. Magistrate, Lahore, D/- 2nd April 1929.

(a) Penal Code, S. 124-A — Speech in which the speaker approves of violence as means of achieving self-Government amounts to offence under S. 124-A.

A speech in which the speaker exhorts his audience to persuade Congress to alter their constitutional policy of non-violence into a policy of anarchy is intended to excite disaffection towards the established Government and amounts to an offence under S. 124-A. To advise a person to persuade others to adopt violence as a means of attaining a political goal is no less objectionable than advising that person to commit violence himself for that purpose. In either case the advice is to pursue a course of action which is calculated to disturb the tranquility of the State. It is a recommendation to oppose the established Government by force. Such a speech as a whole is obviously calculated to cause disaffection towards the Government established by law and the speaker must be deemed to have that intent.

[P 339 C 2]

(b) Penal Code, S. 124-A—Accused of peaceful character committing offence on impulse—Sentence of 12 months was reduced to what had been undergone.

Where the offence is a first offence and committed by a person of peaceful character on the impulse of the moment, the sentence of 12 months' rigorous imprisonment and a

fine or Rs. 500 is somewhat severe and should be reduced to wit, to what had been undergone. [P 341 C 1]

Gokal Chand Narang and Amin Chand—for Appellant.

C. H. Carden Noad—for the Crown.

Judgment.—The appellant has been convicted under S. 124-A, I. P. C. of having delivered a speech on 16th December 1928, the intent of which was to excite or attempt to excite disaffection towards the Government established by law in British India. The speech which he is alleged to have made, according to the evidence of the principal witness for the Crown Sub-Inspector, Agha Rashid Ahmad, is as follows:

"As a member of Congress I shall not say that you should resort to violence, because I have taken the vow of non-violence. But I shall try in the Congress to secure a change in the creed of non-violence. I beg to say from a personal stand-point that while Mahatma Gandhi has rendered a service to the country he has caused a severe loss to us also. The army of the bureaucracy could not have achieved that success which one command of Mahatma Gandhi has achieved. Bengalis resorted to violence in order to secure the cancellation of the partition of Bengal. You should force the Congress to discard the programme of non-violence because Swaraj cannot be attained by it. My personal opinion is that you should resort to violence if we should obtain Swaraj by anarchism and violence. You should study history. The obvious work that you should do is that you should enter the Congress and get non-violence discarded. I personally believe that it was non-violence which emboldened the bureaucracy to deal lathi blows to Lala Lajpat Rai and Jawhar Lal Nehru. Gandhi Ji has said that we should not constitute secret societies. But the first work that you should do is to secure the alteration of the Congress creed, so that there should remain no distinction between violence and non-violence."

This version of the speech delivered by the appellant on the occasion in question is stated by the C. I. D. witness to have been reduced to shorthand notes and he has sworn to the accuracy of that version by refreshing his memory from the actual shorthand notes which were taken at the time. I see no reason why this witness' evidence should not be accepted. He has no motive whatsoever to single out the appellant and in the absence of any evidence to his discredit it must be assumed that a person of this officer's standing is speaking the truth. The other two witnesses who purport to give substantially the same version of the speech do not impress me as persons to whose evidence much weight can

be attached. Dr. Narang in a very powerful defence on behalf of the appellant has urged that even taking the speech as it is deposed to by the police witness, that speech does not establish an offence under S. 124-A, I. P. C. The contention I am unable to accept. There cannot be the slightest doubt that the speaker by exhorting his audience to persuade Congress to alter their constitutional policy of non-violence into a policy of anarchy was exciting and intended to excite disaffection towards the established Government. It is true that he states in his speech that:

"as a member of Congress I shall not say that you should not resort to violence"

but later on he stated that his personal opinion was that

"you should resort to violence if we would be obtain Swaraj by anarchism and violence."

Moreover, he has pointed out to his audience that but for the policy of non-violence the

"bureaucracy would not have permitted lathi blows to be dealt with to Lala Lajpat Rai and Jawahar Lal Nehru."

I have not the slightest doubt that the speech as proved by the official witness constitutes an offence under S. 124-A, I. P. C.

The speaker approves of violence as a means of achieving self-Government. To advise a person to persuade others to adopt violence as a means of attaining a political goal, is no less objectionable than advising that person to commit violence himself for that purpose. In either case the advice is to pursue a course of action which is calculated to disturb the tranquility of the State. It is a recommendation to oppose the established Government by means of force. Such a speech read as a whole is obviously calculated to cause disaffection to the Government established by law and the speaker must be deemed to have had that intent when he uttered the words in question.

Dr. Narang has very strongly contended that this version of the speech should not be accepted. He contends that his client was rather deprecating the policy of violence towards the established Government than advocating it. He says that even the official report of the speech should be read as a warning to the audience not to resort to violence but rather to enter the Congress party and achieve their object. But this view,

as I have said, is obviously untenable if one is to accept the speech as sworn to by the Sub-Inspector. Even if the speech had rested at exhorting the audience to attempt to convert the Congress policy of non-violence to one of anarchy, it would still, as I have already explained, come within the purview of S. 124-A. I do not rely only on the evidence of the Sub-Inspector in coming to the conclusion that the appellant did intend to use words likely to cause disaffection towards the established Government, but I am fortified in this view by some of the remarks which one of the defence witnesses let fall in the course of his examination. I would refer to the evidence of Lala Ganpat Rai, D. W. No. 11. In the course of his examination-in-chief he expressed himself as follows:

"The purport of his speech was that the people were dissatisfied with the Congress creed of non-violence. He exhorted his audience to remain non-violent and said that, being a member of the Congress he could not and would not break the pledge he had taken. He added that he would not advise violence till such time as the creed had been changed."

In other words, according to this witness the speaker excused himself from advocating the policy of violence owing to his pledge to Congress. He expressed, however, his intention of ceasing to maintain a non-violent political attitude if the audience succeeded in changing the policy of the Congress party. Dr. Narang has argued that as it is known to everybody that persons who belong to the Congress party could never be induced to change their policy of non-violence for one of violence, therefore, the speaker must be understood to have intended to dissuade the audience from themselves attempting to enforce their political views by violent methods. The witness, however, stated in cross-examination that the "kakori martyrs," including persons who were sentenced to death were Congressmen and he added that it was said in the meeting that they were Congressmen. If that be so the audience would be inclined, I take it, to assume that Congressmen could by active propaganda be persuaded to adopt a violent policy. However, I need not pursue the very ingenious and able argument of Dr. Narang any further as I am satisfied that the speech delivered by the appellant is accurately given in the evidence of the Sub-Inspector.

There remains the question of the penalty which has been imposed upon the appellant. It appears that the appellant had no intention of attending the meeting held by "Naujawan Bharat Sabha" but happened to be in Bradlaugh Hall at the time attending a Congress meeting. The meeting in commemoration of the kakori crime took place after the Congress meeting and the appellant apparently, was persuaded by one of the speakers at the second meeting to come into the Hall. He was also asked, though he was not one of the official speakers, to express his views, and it was not until all the speeches were delivered that he got up and said a few words, and, admittedly, he did not speak for more than a few minutes. Dr. Narang states that the appellant is a well connected person of respectable antecedents and is of a peaceful and harmless character. He is a man of 45 and a bookseller and it is not suggested that he has ever before been a party to any meeting of a seditious or violent nature. The learned Government-Advocate agrees that the appellant in attending the meeting and in making his speech acted on the impulse of the moment, and had not originally intended to have had anything to do with that meeting. I am inclined to think that the appellant did act rather on the impulse of the moment, and, having been induced to attend a meeting of the kind he felt that he could hardly leave it without saying something that was not antagonistic to the views of the audience which he was to address. I do not for a moment desire to minimise the gravity of the appellant's conduct in using the expressions he did at that gathering.

There is no doubt that an incitement to political violence, expressed in moderate language by a respectable person, would have more effect upon ordinary people than the ranting of an irresponsible individual. At the same time I am impressed by the previous character of the appellant and I think that for a first offence—having regard to all the circumstances the punishment which has been imposed is somewhat severe. The appellant was sentenced to 12 months' rigorous imprisonment and a fine of Rs. 500. He has already undergone five weeks' imprisonment. I think that, bearing in mind the

character and antecedents of the appellant and the circumstances under which he was persuaded to address the audience, it would meet the ends of justice if the imprisonment is reduced to the punishment already undergone. At the same time I would confirm the penalty of fine with the alternative, in default of payment, of further three month's rigorous imprisonment.

R.M./R.K. *Order accordingly.*

1930 Cr. Cases 341

(Lahore)

ZAFAR ALI, J.

Satya Pal—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 725 of 1929, Decided on 11th November 1929, against order of the Addl. Dist. Magistrate, Delhi, D/- 11th July 1929.

(a) Criminal P. C., S. 497—Offence under S. 124-A, Penal Code—Accused on bail—Charge read—Accused praying for adjournment for argument before pleading—If adjournment granted bail need not be cancelled.

In a trial for an offence under S. 124-A, if the accused is on bail and the charge being read before pleading the accused asks for an adjournment for argument and the Magistrate agrees to it, the Magistrate is not bound to cancel the bail. [P 341 C 2]

(b) Penal Code, S. 124-A—To advocate expulsion of Englishmen from India is tantamount to asking for subversion of Government established by law.

At present to advocate expulsion of Englishmen from India is tantamount to asking for the subversion of Government now established by law. [P 342 C 1, 2]

(c) Penal Code, S. 124-A — "War" and "warring against Government" do not necessarily make speech seditious.

The word "jung" in urdu is often used metaphorically and means the same thing as the implication of the word war in such expressions as "warring elements," "warring opinions" and so on, and unless there is something expressly to the contrary in a speech the expression "war against the Government" does not transgress the border line between exciting discontent and exciting disaffection. [P 342 C 2]

Gokal Chand Narang and Mohammad Alam—for Appellant.

Abdul Rashid and Suraj Narain—for the Crown.

Judgment.—The appellant in this case is Dr. Satya Pal, a prominent congressman of this province. He addressed a public meeting in the Queen's Garden at Delhi on 10th March 1929, and the

sequal was that the Senior Superintendent of Police of Delhi lodged a complaint against him with the sanction of the Local Government, charging him with having delivered a speech which was seditious within the purview of S. 124-A, I. P. C. The appellant was tried by the Additional District Magistrate of Delhi, who found him guilty and sentenced him to rigorous imprisonment for two years and a fine of Rs. 500 or in default to further rigorous imprisonment for six months.

The speech was in Urdu and was taken down in shorthand by a C. I. D. Reporter who produced a transcription of it as well as its translation into English. This Reporter was the principal prosecution witness in the case. Dr. Satya Pal did not cross-examine him or any other prosecution witness, nor did he produce any witness in defence. When examined by the Magistrate he admitted that the translation was "a fair summary of his speech." In the written statement that he filed he admitted that:

"the governing sentiment expressed in that speech was one of entire dissatisfaction with the present system of Government and the desire to replace that system by swaraj by which he meant the Government of India by Indians freed from alien domination."

In these circumstances the Magistrate had no other alternative nor has this Court than to accept the report of the speech as correct and to determine whether it was seditious within the purview of S. 124-A, I. P. C.

When the Magistrate read out the charge under the section to the appellant he did not plead, but asked for an adjournment for arguments. The Magistrate agreed to this but at the same time cancelled his bail bond and ordered his arrest. Hearing this Dr. Satya Pal withdrew his prayer for an adjournment. Counsel for the appellant Dr. Narang complains that the Magistrate did not afford reasonable facilities to the appellant to defend himself and refers chiefly to the above incident in support of the said complaint. All that I consider necessary to remark in this connexion is that the Magistrate was not bound, as he thought he was, to cancel the bond and it would have been of no consequence to let the appellant remain on bail till final orders.

Coming to the merits, Dr. Narang argued that the speech could not appear to be seditious if read as a whole in "a fair, free and liberal spirit," and that, as observed by Fitzgerald, J., in *Sullivan* (1) "the case should be viewed in a free, bold, manly and generous spirit towards the appellant." I am of opinion that the utterance as a whole sounds seditious, as the speaker's theme throughout was that the Government was tyrannical and that Englishmen or English rulers were devoid of all feeling of sympathy towards India and Indians. According to the appellant's admission, it was the speech of a political worker who was highly dissatisfied with the present system of Government, and it is clear from the speech that his aim and object was to impress upon the audience the paramount necessity of making a sustained effort for independence and to gain it or to perish in the struggle for it. It is not, therefore, necessary to produce the whole of the speech, but the following excerpts therefrom will amply bear out the above remarks:

"These Englishmen have been ruling over us for long in a highly oppressive and tyrannical manner. During 150 years they have, by destroying all "the good things of India, rendered India crippled, penniless, helpless, forlorn, dishonoured, degraded and disgraced." * * * "The greater the tyranny the more the Indians will realize their duty."

Then follows a conversation between a Martial Law prisoner and his wife, who said:

"That his son was not to go to a school where even the shadow of an Englishman was near and that Englishmen should be turned out of India." * * * "English rule was not required in India even for a single moment."

The speaker ended by saying:

"Brothers and sisters; take a pledge, God to witness, that either you will have your chests perforated by bullets in this battle field, reduce yourself to dust, or you will turn out of India these proud, pharaoh-tempered merciless and oppressive Englishmen."

The above statements and sentiment against the Englishmen in India were practically against the British Government in India because Englishmen constitute the predominating element in the administration and Government of this country. Thus the natural consequence of the appellant's speech was to bring into hatred or contempt or to excite disaffection against the Government established by law in British India, and it must be presumed that he had the intent to do so.

At the same time it may be observed that these are the main portions of the speech which appear to me to be reprehensible within the purview of S. 124-A, I.P.C., and the expression "war against the Government" that occurred at an early stage of the speech and other utterances do not transgress the border line between exciting discontent and exciting disaffection. The word jung "war" as in English so in urdu is used in a metaphorical sense and it was obviously used in that sense by the appellant. In English such phrases as "warring elements," "warring opinions" are in common use.

My attention was invited to the fact that the creed of the congress was non-violence and on that ground it was argued that the appellant could not have asked his hearers to have recourse to violence; but, leaving that out of consideration, I consider that the appellant had no intention to incite people to violence. But there can be no gainsaying the fact that what he said was sufficient to bring into hatred or contempt or to excite disaffection against the Government.

Dr. Muhammad Alam, who too appeared on behalf of the appellant, raised a novel contention which may be noticed here in passing. He strenuously argued that the scope of the law of sedition becomes narrower with the liberal change in the policy of the Government and acceptance of the principle that India should be governed by Indians, and that, as by the Declaration of 1917, and the preamble to the Government of India Act 1919, and the recent announcement of the Viceroy of India, the right of India to attain dominion status has been recognized, it is no offence to advocate exclusion of Britishers from the Government. This argument cannot hold water, because in the present moment at least to advocate expulsion of Englishmen from India is tantamount to asking for the subversion of the Government now established by law.

In view of what has been stated above I come to the conclusion that the appellant has been rightly convicted of sedition under S. 124-A, I. P. C.

As regards the sentence, it appears to be excessive. Speeches expressing similar sentiments are commonly made but are couched in a language to which no exception can be taken. People are now accustomed to hearing such speeches and the general political awakening has advanced so far that feelings are not easily aroused. In a case which was worse than this inasmuch as the accused in that case incited people to violence Fforde, J., reduced the sentence of imprisonment to five weeks which had already expired: see *Anand Kishore v. Emperor* (2). In the present case the appellant has already suffered imprisonment for four months. I reduce the sentence to the imprisonment already undergone and remit the fine. The appeal is accepted to this extent.

V.B./R.K. *Sentence reduced.*

(2) A. I. R. 1930 Lah. 306=(1930) Cr. C. 338.

1930 Cr. Cases 343

(Lahore)

HILTON, J.

Bhartu and another—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 406 of 1929 Decided on 15th July 1929, from order of Sess. Judge, Karnal, D/- 22nd March 1929.

(a) Criminal Trial—Evidence of eye-witnesses not on good terms with accused should not be relied upon unless corroborated—Evidence Act S. 114

Where the alleged eye witnesses are not on good terms with the accused or belong to opposite faction, it is not safe to rely on their uncorroborated testimony. [P 344 C 1]

(b) Penal Code S. 326—Fact that quarrel during which deceased gets fatal wound is sudden and arises in heat of passion is mitigating circumstance in favour of accused—Criminal Trial.

The fact that the quarrel which ends in the deceased getting a fatal hurt, was a sudden one, arising in a heat of passion, is a mitigating circumstance in favour of the accused and his sentence should be reduced. [P 344 C 1]

Shamair Chand and Sham Lal—for Appellants.

S. C. Chatterji for Government Advocate—for the Crown.

Judgment.—Jagar has been convicted under S. 326, I. P. O. and sentenced to rigorous imprisonment for 10 years. Bhartu has been convicted under Ss. 326-109, I. P. C., and sentenced to

rigorous imprisonment for three years. They both appeal.

The facts found by the learned Sessions Judge are that one Pehlada, met his death on the evening of 12th November 1928, from injuries of an incised character which had been inflicted on legs and which had resulted in compound fractures of the leg bones which in turn had led to shock and haemorrhage and thus to heart failure. These injuries are held to have been inflicted by the appellant Jagar while the appellant Bhartu is held to have seized the victim's waist and thrown him on the ground. The story which the learned Sessions Judge appears to have believed is that the deceased Pehlada had had a quarrel with Jagar appellant in a field which he was irrigating concerning his turn of the water and had then run a considerable distance to another field described as Nikku's field in order to avoid being struck by the appellant Jagar. As he thus ran pursued by Jagar some other persons are believed to have confronted him and blocked his way and one of these, namely, the appellant Bhartu then threw him to the ground while Jagar came up and inflicted with a gandasa the blows on the legs from which Pehlada subsequently succumbed.

The defence of both appellants was that their implication was due to enmity and village factions and that neither of them had taken any part in the attack upon Pehlada.

There were two alleged eye witnesses named Ad Ram and Maman of whom the first named admitted facts which show that he is not on good terms with the appellants. The learned Sessions Judge did not entirely disbelieve their evidence but considered it to be exaggerated. The main point on which he did not believe them was their assertion that several other persons whom the learned Sessions Judge acquitted had joined with the two appellants in striking blows upon the deceased. As regards the witness, Maman, it does not appear that he had any direct enmity with the appellants but his cross-examination gave some reason to believe that he and they belonged to opposite factions.

An important witness was Santa who deposed that he had been with the de-

ceased Pehlada in the field which the latter was intending to irrigate, that Pehlada had told him that his turn of water had finished and that the witness could start to take his turn and that the witness then went to the canal outlet which is more than a kos from that field. Before he went to the canal outlet he had observed the appellant Jagar in his field and had heard some talk between Jagar and the deceased Pehlada in which Jagar had been saying that he would have his turn of water first while Pehlada had been saying that his turn would be first. The witness left the place while the two men were thus talking to each other.

In my opinion the evidence of the two eye witnesses is such that it is not safe to rely upon their uncorroborated testimony and this, to some extent, is the view which the learned Sessions Judge himself adopted. He did not, however, apply it to its full extent inasmuch as he has convicted Bhartu against whom there is no corroboration. As against Jagar appellant I find corroboration of the testimony of these two witnesses in the evidence of the witness Santa whose testimony has been detailed above. This witness clearly proves that Jagar had begun to quarrel with the deceased about their respective turns of water and that this quarrel took place not far from the scene where Pehlada was subsequently struck to the ground. I hold therefore that the guilt of Jagar is sufficiently proved by the evidence of the prosecution. I also agree with the learned Sessions Judge that the intention of Jagar was to maim Pehlada and not kill him, and that the offence is, therefore, one under S. 326, I. P. C.

Applying the criterion already mentioned I find no sufficient evidence to corroborate the story of the eye witnesses regarding Bhartu and I consider that Bhartu is entitled to an acquittal. As regards the sentence passed upon Jagar, even the eye-witnesses did not profess to see the beginning of the fight and it is therefore impossible to say whether any provocation was given and to what extent. The quarrel was probably a sudden one arising in the heat of passion. The theory which the prosecution had put forward to the effect that the attack upon Pehlada was a pre-

meditated attack owing to enmity arising out of the fact that Pehlada had remarried Jagar's mother 16 years earlier in absurd. This theory was obviously introduced into the case in order to make out the case of premeditated attack which the evidence did not otherwise justify. on this account I consider that a reduction of Jagar's sentence is called for.

I accept the appeal of Bhartu and direct his acquittal. I maintain the conviction of Jagar but reduce the sentence to rigorous imprisonment for five years.

R.M./R.K.

Appeal allowed.

1930 Cr. Cases 344

(Lahore)

SHADI LAL, C. J.

Emperor

v.

Karam Singh—Accused—Respondent.
Criminal Revn. No. 1297 of 1929,
Decided on 22nd November 1929, referred by Sess. Judge, Lahore, on 15th July 1919,

(a) Criminal P. C., S. 207—Commitment in cases not exclusively triable by Sessions Court—Magistrate must record adequate reasons.

In committing cases not exclusively triable by the Court of Sessions, Magistrates should exercise a proper discretion and give adequate reasons for making commitment to the Court of Session. Reasons should be such as to show whether the commitment is made in the sound exercise of the discretionary power vested in the Magistrate by law, and if he does not give adequate reasons, the commitment may be quashed: 15 Bom. L. R. 998; 3 A. L. J. 74 and 8 S.L.R. 23, Ref. [P 345 C 2]

(b) Criminal P. C., S. 207—Connected case pending in Sessions Court—Magistrate should not commit the case to Sessions merely to avoid conflict of decision.

A case triable by a Magistrate and not exclusively triable by a Court of Sessions should not be committed to the Court of Sessions merely to avoid a possible conflict of decision and proper course in such cases is to await the result of the Sessions trial. [P 345 C 2]

R. C. Soni—for the Crown.

Report.—The accused Karam Singh (26) a Labana of Kanjra in the Lahore Tahsil has been committed for trial before this Court on a charge of theft under S. 379, I. P. C.

According to the evidence in the case it appears, that one Dharam Singh and his brother Vir Singh of the same village concealed themselves in the field of one Tehl Singh on the night of 18th and 19th March 1929, with the object of trying to catch such person or

persons as were stealing their green fodder. Towards morning Dharam Singh and Vir Singh saw the accused Karam Singh and Karam Singh son of Baisakhi enter their fields and commence to cut green wheat and Sainji. The two watchers did not move from their place of concealment till the two culprits namely Karam Singh accused and Karam Singh son of Baisakhi were moving off with what they had cut and stolen. Vir Singh is then alleged to have stepped forward and dealt Karam Singh accused a blow on the head with his dang. On this Karam Singh accused threw down his bundle and ran away. Karam Singh son of Baisakhi, however, turned and faced Dharam Singh and Vir Singh, and seized the latter by his hair. Dharam Singh thereupon ran to Vir Singh's assistance upon which he was assailed with a datri, which he seized and wrested from his assailant. Karam Singh son of Baisakhi is then said to have grappled with Vir Singh, and Dharam Singh went to the assistance of his brother and dealt Karam Singh son of Baisakhi some lathi blows which felled him.

An alarm was then raised and several persons collected and Karam Singh son of Baisakhi was beaten by them with sticks, because he was a thief. He died from these injuries and in connexion with his death Dharam Singh and Vir Singh have been committed to this Court on a charge of murder under S. 302, I. P. C.

The learned Magistrate in committing Karam Singh son of Khushal Singh, the accused, to this Court for trial under S. 379, I. P. C. has remarked as follows:

"The question for determination is whether the story told by Dharam Singh, who has been separately challanged for murdering Karam Singh son of Baisakhi, is correct or not. Since the point at issue in the murder case which has been committed today to the Court of the Sessions Judge, at Lahore is the same, I think it desirable that the present theft case should as well be committed to the same Court as both the cases relate to the same occurrence and the questions involved in both of them are the same."

Now S. 206, Criminal P. C. confers powers on Presidency Magistrate, District Magistrate, Sub-Divisional Magistrate, or Magistrate of the First Class or any Magistrate (not being a Magistrate of the Third Class) empowered on this behalf by the Local Government,

to commit any person for trial to the Court of Session, or High Court, for any offence triable by such Court.

The offence of theft under S. 379, I. P. C., according to Col. 8, Sch. 2, Criminal P. C., is triable by any Magistrate and not exclusively by a Court of Sessions.

The reasons given by the learned Magistrate for committing the accused Karam Singh are in my opinion inadequate. It would appear that the sole reason for his having done so is to avoid a possible conflict of decisions but this could easily and well have been avoided by awaiting the result of the sessions trial in the case of Dharam Singh and Vir Singh. In paras. 26 and 27 on p. 533 of Sohoni's Code of Criminal Procedure, 10th Edition 1927, it is remarked that in committing cases not exclusively triable by the Court of Sessions, Magistrates should exercise a proper discretion and give adequate reasons for making commitment to the Court of Sessions. Reasons should be such as to show whether the commitment is made in the sound exercise of the discretionary power vested in the Magistrate by law, and if he does not give adequate reasons the commitment may be quashed.

In this connexion the learned Public Prosecutor on whom I called to show cause, why the case should not be submitted to the High Court with a recommendation that the commitment be quashed has cited the following authorities. *Emperor v. Asha Bhatti* (1) which is a case very much on all fours with the present case; *Emperor v. Dharm Singh* (2) and *Diwanchand v. Emperor* (3).

The learned Public Prosecutor thus agrees that the commitment is illegal, and endorsing this view, I submit the case to the Hon'ble High Court with the recommendation that the commitment be quashed.

Order.—For the reasons recorded by the learned Sessions Judge I quash the order of commitment and direct the Magistrate to try the case in accordance with law.

V.B./R.K.

Commitment quashed.

(1) [1913] 15 Bom. L. R. 998 = 21 I. C. 897=1; Cr. L. J. 657.

(2) [1906] 8 A. L. J. 14=(1906) A. W. N. 28.

(3) [1914] 8 S. L. R. 23=25 I. C. 992=16 Cr. L. J. 664.

1930 Cr. Cases 346 (1)

(Lahore)

TEK CHAND, J.

Ali Hussain—Convict—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1315 of 1929, Decided on 31st January 1930, against order of Dist. Magistrate, Gurdaspur, D/- 9th August 1929.

Public Gambling Act, S. 4—It is not necessary that persons proceeded against should be actually arrested in gambling house—But prosecution must prove that he was seen in it.

In order to sustain a conviction under S. 4 it is not necessary that the person proceeded against should have been actually arrested in the gambling house in question but it is incumbent on the prosecution to prove that he was actually seen in the house. The mere fact that the person proceeded against was seen going from the direction of the gambling house to his own house is insufficient.

[P 346 C 2]

Ghulam Mohyuddin—for Petitioner.*Partap Singh*—for the Crown.

Judgment.—The petitioner *Ali Hussain*, alias *Hussain Shah*, of *Batala* was tried under Ss. 3 and 4, *Public Gambling Act* and convicted by the trial Magistrate for both offences. On appeal the learned District Magistrate held that it had not been proved that the house in question was owned by the petitioner. He accordingly set aside the conviction under S. 3; but he found the offence under S. 4 proved and maintained the sentence of one month's simple imprisonment. *Ali Hussain* has preferred a petition for revision to this Court.

The first ground urged in the petition, that the *Public Gambling Act* did not apply to the locality where the house in question is situate has not been pressed by counsel. He has, however, urged that the evidence on the record falls short of proving that the petitioner was "found" in the house in question at the time when it was raided by the police. The evidence relating to this matter consists of the statements of *Mr. Wall*, Superintendent of Police, (P. W. 1) *Mahmud Hassan* Sub-Inspector (P. W. 4), and *Muhammad Shafi*, Assistant Sub-Inspector (P. W. 6). Of these the first two are definite that *Ali Hussain* was not seen by them coming from the house which the police party had raided but was arrested by *Muhammad Shafi* from his house on the other side of the road. The only evidence, therefore, against

the petitioner is that of *Muhammad Shafi*, but his statement, as recorded before the District Magistrate, makes it clear that he did not see the petitioner actually in the house in question but saw him for the first time when he was running from the road into his own house on the opposite side.

Now, in order to sustain a conviction under S. 4, *Public Gambling Act*, it is not necessary that the person proceeded against should have been actually arrested in the gambling house in question, but, it is incumbent on the prosecution to prove that he was actually seen in that house. It is conceded that the evidence of *Muhammad Shafi* does not establish this. All that can be said to have been proved is that the petitioner was seen going from the direction of the house in question to his own house but obviously this is insufficient. In my opinion the case against the petitioner has not been established.

I accept the petition for revision, set aside the conviction and sentence and acquit him.

R.M./R.K.

Petition allowed.

1930 Cr. Cases 346 (2)

(Lahore)

ZAFAR ALI AND BHIDE, JJ.

Har Chand—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 312 and 382 of 1929, Decided on 24th June 1929, from order of Sess. Judge, Hissar, D/- 9th February 1929.

Penal Code, Ss. 99 and 105—Right of private defence is available to person wrongfully deprived of property, but wrong-doer has no such right.

The law does not require that when a person is being wrongfully deprived of property of which he is in possession he should leave the thief alone and run to a thana at a distance of a kos to seek redress from the police and such person has right of private defence, but the wrong doer has no such right. [P 348 C 1]

Nanwa Mal—for Appellant.

R. C. Soni for Govt Advocate—for the Crown.

Judgment.—Criminal Appeals Nos. 312 and 382 of 1929 arise out of a case in which the appellants were jointly tried and can be conveniently disposed of together.

The material facts alleged by the prosecution were as follows: *Udmi* and *Amilal* (appellants in Criminal Appeal

No. 329 of 1929) are brothers, while Har Chand (appellant in Criminal Appeal No. 312) is said to be their cousin. They were tenants of one Mirza Malik Muhammad Beg. Similarly Arjan, Balla two brothers and Sukh Dev, their uncle, were also tenants of the same landlord.

On 13th August 1928, the landlord fixed the turns of these two tenants as regards irrigation of their land with canal water. According to the arrangement then made Arjan and Balla were to irrigate their land from 11 a. m., to 5 p. m., on 14th August and the appellants Udmi and Amilal were to irrigate their land thereafter. At about 2 p. m., however, Udmi and Amilal appeared in Arjan's field and wanted to divert canal water to their field. Arjan objected, but the appellants persisted and started diverting the water. Arjan called out to the landlord's chaprasi Bashir who was in the neighbouring field. Bashir came and asked Udmi not to divert the water but he paid no heed to him. Thereupon a fight ensued. Amilal gave two lathi blows to Balla when he tried to prevent the water being diverted. Arjan grappled with Amilal when Har Chand suddenly appeared and gave him a blow with an axe on the head which caused his death. In the meantime Udmi also gave a kassi blow to Sukh Dev. When Arjan fell down fatally wounded the appellant decamped.

During the course of the trial the appellants Udmi and Amilal admitted that they tried to divert the water from Arjan's field but tried to make out that it was their turn and they had a right to do so. They alleged further that they themselves were beaten and fell down unconscious and professed ignorance as to what followed. Har Chand pleaded alibi but was unable to give any explanation as to why he should have been falsely implicated. None of the appellants produced any evidence in defence.

Har Chand has been convicted by the learned Sessions Judge of the murder of Arjan and sentenced to transportation for life. Udmi and Amilal have been convicted under Ss. 325 and 323, I. P. C., for causing grievous and simple injuries to Sukh Dev and Balla, respectively and have been sentenced to rigorous imprisonment for one year and six months on each count, the sentences to run consecutively.

There is no doubt whatever that the appellants Udmi and Amilal were in the wrong in trying to divert their canal water to the fields. They have alleged that it was their turn of water, but this allegation is not borne out by any evidence and is belied by the evidence of Mirza Malik Muhammad Beg, the landlord, who appears to be a respectable and disinterested witness. Arjan deceased had, therefore, clearly a right of private defence as regards the use of the canal water of which he was being wrongfully deprived. The appellants Udmi and Amilal had certain injuries on their person and these were apparently inflicted by the deceased and his companions. But under S. 105, I. P. C., they were justified in causing these injuries in the exercise of their right of private defence. As the injuries were inflicted on the appellants by the deceased and his companions in the exercise of their right of private defence, the appellants Udmi and Amilal had no right to retaliate. In the circumstances the injuries caused by the appellants Udmi and Amilal to Sukh Dev and Balla must be held to constitute offences under Ss. 325 and 323, I. P. C.

The learned counsel for the appellants Amilal and Udmi did not attempt to challenge the learned Sessions Judge's finding of fact as regards his clients but merely argued that the deceased Arjan had no right of private defence as the thana was only about a "kos" distant and there was, therefore, time to seek the protection of public authorities. This position seems to be wholly unsupportable. The appellants Udmi and Amilal were already in the field of the deceased and were wrongfully diverting the water. I doubt if the police would have interfered in the deceased's favour when the parties were disputing the turn of water, but in any case it would have taken the deceased some time to go to the thana and bring the police. But before their arrival he would have been deprived of the use of valuable water for a considerable time and his turn would also have probably come to an end. The position would have been different if the deceased had received intimation about the intentions of the appellants in advance and there was the possibility of his obtaining the assistance of the public authorities in time to pre-

vent the diversion of water. The law does not require that when a person is being wrongfully deprived of property of which he is in possession he should leave the thief alone and run to a thana at a distance of a kos to seek redress from the police.

As regards Har Chand, as already noted, he has not attempted to support his plea of "alibi" by any evidence and has not been able to offer any explanation as to why he should have been falsely implicated. The case against him seems perfectly clear. The learned counsel who appeared for him tried to make out that the offence was committed in a sudden fight or in the exercise of the right of private defence and that it would, therefore, fall at the most under S. 304 or S. 325, I. P. C. But this contention seems untenable. Although the fight was sudden, Har Chand had no justification for giving a blow to the deceased on the head with an axe and in doing so he must be held to have taken undue advantage of the deceased and also acted in a cruel manner. As regards the right of private defence, it has been already pointed out that Amilal himself being in the wrong, he had no right of private defence. Consequently, Har Chand too could not claim advantage of any such right in attempting to defend Amilal.

The convictions of the appellants must, in the circumstances, be upheld. The conviction of Har Chand being under S. 302, I. P. C., no lighter sentence, than transportation for life could be passed on him. Udmi and Amilal were themselves injured and, in view of all the circumstances, the sentences passed on them seem to be somewhat severe. At the same time they cannot be dealt with very leniently, as they started the trouble by wrongfully attempting to divert water to their fields. We accept their appeal only to the extent of making the sentences passed on them under Ss. 325 and 323, I. P. C., concurrent instead of consecutive. In other respects the appeals are rejected.

V.B./R.K. *Appeals partly allowed.*

1930 Cr. Cases 348

(Lahore)

AGHA HAIDAR, J.

Chothu Ram—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1087 of 1929, Decided on 31st January 1930, from order of Sess. Judge, Multan, D/- 2nd September 1929.

Criminal P. C., S. 476—Delay in starting proceedings under S. 476 should be discouraged.

An order under S. 476 should be made either at the close of the proceedings or so shortly thereafter that it may reasonably be said that that the order is part of the proceeding. The power conferred by S. 476 can be exercised by the Court only in the course of the judicial proceeding or at its conclusion or so shortly thereafter as to make it really the continuation of the same proceeding in the course of which the offence was committed. The delay in starting proceedings under S. 476 should not receive any encouragement, as it is highly unjust and improper: 31 *Mad.* 140 (F.B.) and 32 *Mad.* 49 (F.B.), *Foll.*; 43 *Bom.* 300, *not Foll.* [P 34] C 1, 2]

Gokul Chand Narang—for Appellant.

Mohammad Akbar Khan—for the Crown.

Judgment—A certain document purporting to be the will of one Moti Ram was recovered from the house of a man named Tola Ram by the Official Receiver of Multan on 28th July 1926. Moti Ram had died on 29th May 1926. A prosecution for forgery under S. 467, I. P. C., was started against Tola Ram, the alleged scribe of the document, and certain attesting witnesses. On 6th June 1927 the learned Sessions Judge of Multan, Mr. Currie, pronounced judgment in the case, convicting some of the accused while acquitting others. In this case Chothu Ram had appeared as defence witness 30 and Gobind Ram as defence witness 31. There was an appeal on behalf of the convict to the High Court and the decision of the learned Sessions Judge was mainly upheld, the High Court interfering only with the sentences. The date of the High Court decision is 21st May 1928. The record of the case together with a copy of the judgment of the High Court, I gather, was sent to the District Magistrate of Multan on 29 May 1928. It may be observed here that Chothu Ram (D. W. 30) and Gobind Ram (D. W. 31) had given evidence before the Sessions Judge on 22nd March 1927.

On 24th October 1928 the Public Prosecutor made an application to the successor-in-office of Mr. Currie, the Sessions Judge, Multan, asking him to take action under the provisions of S. 476, Criminal P. C., and file a complaint under S. 193 I. P. C., among other persons, against, Chothu Ram and Gobind Ram. The learned Sessions Judge, Mr. Anderson, on 2nd September 1929 granted the application.

A glance at these dates would at once show that the alleged false statement was made on 22nd March 1927 and the application by the Public Prosecutor for action under S. 476 was not made until 24th October 1928. From whichever point of time the period may be calculated, there cannot be any doubt whatsoever that the sanction proceedings have been inordinately delayed. The case law on the subject of delay is almost voluminous and by way of sample I may refer to *Rahimatullah Sahib v. Emperor* (1), where it was laid down by the Chief Justice and Wallis, J. (Miller, J. dissenting) that it was the intention of the legislature in enacting S. 476, Criminal P. C., that an order under that section should be made either at the close of the proceedings or so shortly thereafter that it may reasonably be said that the order is part of the proceeding. The matter came up again before another Full Bench of the Madras High Court consisting of five learned Judges and is reported in *Aiyakannu Pillai v. Emperor* (2). There also the Full Bench (Miller, J., dissenting) held that the power conferred by S. 476 can be exercised by the Court only in the course of the judicial proceeding or at its conclusion or so shortly thereafter as to make it really the continuation of the same proceeding in the course of which the offence was committed. In *Bhim Lal Sah v. Bisa Singh* (3) there are certain observations in which a delay of a month and a half was adversely commented upon. A different view was taken by the Bombay High Court in *Waman Dinkar v. Emperor* (4), but I would prefer to follow the Madras Full Bench decisions as they coincide

with my own opinion which I formed independently of the case law on the subject.

There cannot, therefore, be any doubt that in the present case the delay has not been satisfactorily explained and the reasoning of the learned Sessions Judge on this point does not appeal to me. He refers to a certain supplementary case against another accused person who had been absconding as accounting for the delay, but the learned Public Prosecutor before me has frankly conceded that he is not prepared to say that there was any connection between that case and the present proceedings. The record, as already mentioned above, had been sent down to the District Magistrate soon after the decision of the appeal in the High Court and there is no reason whatsoever why the Public Prosecutor should have waited for almost five months before making up his mind as regards the application which he eventually made on 24th October 1928. The delay in starting proceedings under S. 476, should not receive any encouragement, as it is highly unjust and improper that the apprehension of a threatened prosecution should continue to hang like the sword of Damocles over the head of any person. In this connexion the new sub-S. (3) which has been added to S. 476 by the amending Act of 1923 may be referred to.

Coming to the merits of the case as to how far it can be reasonably expected that the prosecution of Chothu Ram and Gobind Ram is likely to end in their conviction, it may be observed that Mr. Currie, the learned Sessions Judge, while dealing with the evidence of these witnesses in the original case observed that their evidence was "nil" or "valueless." Further on he makes the following observations :

"These witnesses, D. Ws. 13, 29 and 31 are as already remarked obviously false."

It may be noted that there is no mention here of D. W. 30 namely Chothu Ram and it is rather a big step to characterise the evidence of witnesses as "obviously false" when as already mentioned all that he had said about their evidence was that its value was nil or that the evidence was valueless. I may observe that the learned Judges of this Court on appeal while referring to the reasoning of the learned Sessions

(1) [1908] 31 Mad. 140=17 M.L.J. 584 (F.B.).

(2) [1903] 32 Mad. 49=1 I. C. 597=19 M. L. J. 42 (F.B.).

(3) [1918] 40 Cal. 444=18 I. C. 345=17 C. W. N. 290.

(4) [1919] 43 Bom. 300=51 I.C. 257=20 Bom. L. R. 998.

Judge on the question of the evidence of the defence witnesses simply observed as follows :

"For the reasons given by the learned Sessions Judge we reject the defence evidence on the point."

The judgment under appeal on this point reads like a piece of special pleading and does not carry any conviction to my mind.

Having regard, therefore, to the long and unexplained delay and to the observations of the learned trial Judge, Mr. Currie, as to the evidence of these witnesses, I do not think that any useful purpose would be served by continuing the harassment of these witnesses after all these years. It is very doubtful whether reliable and trustworthy evidence to support a conviction would be forthcoming and there is the further danger that on account of the lapse of years the appellants might be prejudiced and handicapped in their defence. Under all the circumstances I allow the appeals of Chothu Ram and Gobind Ram and set aside the order of the learned Sessions Judge.

V.S./R.K.

Appeals allowed.

1930 Cr. Cases 350 (1)

(Lahore)

SHADI LAL, C. J.

Yusaf and another—Accused—Petitioners.

v.

Municipal Committee, Murree—Respondent.

Criminal Revn. No. 1219 of 1929, Decided on 15th November 1929, reported by Sess. Judge, Rawalpindi, on 20th July 1929.

Criminal P. C., S. 423—Appeal—Alteration of sentence to whipping—Trial Court not empowered to pass that sentence—Sentence is illegal.

It is not open to an appellate Court to alter the sentence of the trial Court and substitute a sentence of whipping, a sentence not within the power of trial Court. Though such course be most suitable it must be considered to be an enhancement and hence becomes illegal.

[P 350 C 2]

*R. L. Anand—*for Petitioners.

Report.—The facts of this case are as follows :

On 11th September 1928, the Daroga of the Murree Municipal Forests, with four Forest Guards, caught 21 head of cattle grazing in a Reserved Forest. He proceeded to drive them off when six were rescued by Yusaf, Dulla and Dadu

accused. The matter was reported at the thana the same day. The accused were challaned before Lala Gokal Chand, Tahsildar, Magistrate, Second Class, Murree, who convicted all the three accused under S. 26, Cattle Trespass Act, and sentenced them to a fine Rs. 50 each.

One appeal, however, the learned District Magistrate upheld the conviction, but altered the sentence of fine to that of whipping 10 stripes each in the case of Yusaf and Dulla accused, holding them to be juvenile offenders. But in the case of Dadu accused, he reduced the fine to one of Rs. 20.

The learned District Magistrate on appeal from the order of the Tahsildar fining the petitioners Rs. 50 each came to the conclusion that they were juveniles, and ordered them to be whipped. Though this was undoubtedly a most suitable punishment for the offence, it would appear that it must be considered to be an enhancement of the sentence as the Tahsildar was not empowered to order whipping. I therefore, forward the case to the High Court with a recommendation that the order of the learned District Magistrate be set aside, and, the fine imposed on the present petitioners be reduced to Rs. 20 each, as imposed by the District Magistrate on their companion Dadu.

Order.—For the reasons recorded by the learned Sessions Judge I quash the order of whipping passed by the District Magistrate, and reduce the fine in the case of Yusaf and Dullah to Rs. 20 each.

V.B./R.K.

Order accordingly.

1930 Cr. Cases 350 (2)

(Lahore)

TEK CHAND, J.

Devi Das—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1916 of 1928, Decided on 14th December 1928, against order of Sess. Judge, Multan, D/- 15th October 1928.

(a) Criminal P. C., S. 439—Magistrate acting in contravention of law and admitting inadmissible and irrelevant evidence—Guilt established by legal evidence on record—New trial need not be ordered.

The mere fact that the magistrate has acted in contravention of the clear provisions of the law and that his findings are vitiated by a

consideration of inadmissible and irrelevant evidence is not by itself a ground for ordering a new trial or reversal of the conviction by High Court if the guilt is established by legal evidence on record. [P 352 C 2]

(b) Penal Code, S. 377—Sodomy—Stains of semen constitute important evidence.

In a charge of sodomy stains of semen constitute important evidence. Great weight must therefore be attached to the Chemical Examiner's report, [P 352 C 2]

B. R. Puri—for Petitioner.

D. R. Sawhney—for the Crown.

Judgment.—The petitioner, Devi Das aged 51 was convicted by the District Magistrate, Multan, of an offence under S. 377, I. P. C., for having committed unnatural offence with a 12 years' old "Biloch" boy, Ahmad, alias Hamid (P.W. 1), in an abandoned factory situate in the outskirts of the town of Muzaffargarh on 17th October 1927, at about 10 or 11 p.m. In view of his age and position, he was sentenced to one year's rigorous imprisonment. His appeal has been dismissed by the learned Sessions Judge, Multan, and he has preferred a petition for revision to this Court. As the learned District Magistrate in his judgment had relied largely upon the police diaries and the learned Sessions Judge had rejected the evidence of the Civil Surgeon Dr. H. J. Fordham (P. W. 5), and the report of the Chemical Examiner to the Punjab Government which were to a large extent inconsistent with the story for the prosecution, I found it necessary to examine the record for myself and to hear the counsel for the petitioner and the Public Prosecutor at length.

Before discussing the evidence for the prosecution on which the conviction is based, it is necessary to point out that the learned District Magistrate has acted illegally and with grave irregularity in referring in his judgment to the police diaries in disregard of the clear provisions of the law and numerous rulings of this Court and other Courts. S. 162, Criminal P. C., lays down in clear and unambiguous terms that no statement made by any person to a police officer in the course of an investigation under Chap. 14, or any record thereof : "whether in a police diary or otherwise, or any part of such statement or records, can be used for any purpose (save as hereinafter provided) at any enquiry or trial in respect of any offence under investigation at the time when such statement was made."

To this section is added the proviso, that when any witness is called for the

prosecution in such enquiry or trial whose statement has been reduced into writing by a police officer, the Court shall on the request of the accused refer to such writing and direct that the accused be furnished with a copy thereof in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by S. 145, Evidence Act. In Cl. (2) of the section a further exception is made in favour of the admission of dying declarations, and in S. 172 power is given to a criminal Court to send for the police diaries of a case under enquiry or trial before it and to use these diaries "not as evidence in the case, but to aid it in such enquiry or trial." The Court may use the diaries for contradicting the investigating police officer when he is giving evidence or such officer may use them to refresh his memory. The provisions of the statute on these points are clear and imperative and it is not necessary to refer at length to the numerous rulings bearing on them. So far as S. 162 is concerned it will perhaps be sufficient to refer to the recent decision of Addison and Skemp, JJ., in *Emperor v. Ibrahim* (1) in which it has been pointed out that the only way a witness can be contradicted by a statement made to the police under the provisions of S. 162, Criminal P. C., is to prove that portion of his statement to the police which contradicts his evidence and to put it to him under S. 145, Evidence Act, so that the witness may be given an opportunity of explaining the contradiction; and that statements made to the police "cannot be used at a trial in any other way." With regard to S. 172, Criminal P. C., reference may be made to the following directions contained in Vol. 2, the Rules and Orders of the High Court (p. 54) :

"The provision of S. 172, that any criminal Court may send for the police diaries, not as evidence in the case, but to aid it in any enquiry, or trial, empowers the Court to use the diary not only for the purpose of enabling the police officer who compiled it to refresh his memory, or for the purpose of contradicting him, but for the purpose of tracing the investigation through its various stages, the intervals which must have elapsed in it, and the steps by which a confession may have been elicited, or other important evidence may have been obtained. The Court may use the special diary, not as evidence of any date, fact, or statement referred to in it, but as containing indications

(1) A. I. R. 1928 Lah. 17=8 Lah. 605.

of sources and lines of enquiry and as suggesting the names of persons whose evidence may be material for the purpose of doing justice between the Crown and the accused. Should the Court consider that any date, fact or statement referred to in the police diary is, or may be, material, it cannot accept the diary as evidence, in any sense, of such date, fact or statement, and must before allowing any date, fact, or statement referred to in the diary to influence its mind, establish such date, fact or statement by evidence."

These directions are in accord with the rule laid down in the leading case *Queen-Empress v. Mannu* (2), which has been recently affirmed by their Lordships of the Privy Council in *Dal Singh v. Emperor* (3), and which is to the effect that :

"the special diary may be used by the Court to assist it in the enquiry or trial by suggesting means of further elucidating points which need clearing up and which are material for the purpose of doing justice between the Crown and the accused : but entries in the special diary cannot by themselves be taken as evidence of any date, fact or statement therein contained."

Now in this case the learned District Magistrate has not only referred in his judgment to the statements of some of the witnesses for the prosecution made to the police, which had not been proved as required under S. 162, and which even in that case could be used for the very limited purpose aforesaid, but he has also taken into consideration the statements made to the police during the investigation by persons who were not examined at all at the trial either by the prosecution or the defence. At p. 4 of the judgment, while referring to one Udho Ram, who could not be found by the police, the learned Magistrate has remarked :

"Udho Ram was called, but it was stated that he could not be found and he was eventually given up by the police. This is unfortunate for the case, as his statement before the police was particularly clear."

Again, at p. 5 he has stated :

"Maugha before the police made a similar statement, but he has not been produced in court. I venture, however, to mention this statement because therein he explains how it was that Udho Ram eventually came into the courtyard to look for Hamid."

In another part of the judgment he refers to his having drawn up a "rough timetable" of the event at the police station "extracted from the first information report and the Zimnis." The

learned Public Prosecutor has frankly admitted before me that in this matter the learned District Magistrate has acted in contravention of the clear provisions of the law and that his findings are vitiated by a consideration of inadmissible and irrelevant evidence. This, however, is not of itself a ground for ordering a new trial or reversal of the conviction but this Court has to see if the guilt of the petitioner is established by the legal evidence on the record. (His Lordship here considered the evidence and proceeded.) The result of the chemical examination of Hamid's loin cloth, with which the petitioner is alleged to have wiped himself off immediately after the crime, and of the chadar which had been spread on the charpoy also does not agree with his deposition. These articles are deposed to by the Sub Inspector and other prosecution witnesses to have had stains of semen. They were taken possession of without delay and sent in sealed covers for chemical examination, but Khan Sahib Sayad Muhammad Hussain, Assistant Chemical Examiner to the Punjab Government, who conducted the chemical examination has reported that he did not detect any semen on either of them. As pointed out by Taylor at p. 283 of the second volume of his *Principles and Practice on Medical Jurisprudence* (Edn. 2), "in a charge of Sodomy, stains of semen constitute important evidence." Great weight must, therefore, be attached to the Chemical Examiner's report and this contradicts Hamid's account of the occurrence in a very material particular. Thus we find that on both the above points the evidence of unimpeachable character led by the prosecution themselves casts serious doubts upon the correctness of the evidence of the boy. (After further considering the evidence on corroboration, the judgment proceeded.) After a careful consideration of the record and for the reasons recorded above I am of opinion that the guilt of the petitioner has not been established and that his conviction cannot stand. I accept this petition for revision set aside the conviction and sentence and direct that the petitioner be set at liberty forthwith.

V.B./R.K. Conviction set aside.

(2) [1897] 19 All. 890=(1897) A. W. N. 174 (F.B.).

(3) A. I. R. 1917 P. C. 25=44 Cal. 876=44 I. A. 137 (P.C.).

1930 Cr. Cases 353
(Calcutta)

SUHRWARDY, J.

Rakhal Chandra Dutta—Accused —
Petitioner.

v.

Purna Chandra Ghosh—Complainant
—Opposite Party.

Criminal Revn. No. 910 of 1929, Decided on 27th November 1929.

Bengal Food Adulteration Act (6 of 1919), Ss. 5, 6 and 7—It is no defence for accused to say that he had advertised that he was not selling pure foods and that purchaser knew the fact.

The Food Adulteration Act is intended to protect the public from using adulterated articles and therefore it has made it penal to sell these adulterated articles irrespective of the fact whether the purchaser knew the article to be adulterated or otherwise. Articles mentioned in S. 6 are ordinarily articles of food and it is no defence to say that these articles can be adulterated and sold in market with the publication of the fact that they are adulterated. [P 353 C 2]

Satindara Nath Mukerji and *Byomkesh Bose*—for Petitioner.

Siddheswar Chakravarty — for Opposite Party.

Anil Chandra Roy Chowdhury—for the Crown.

Judgment.—This rule has been issued on two grounds (1) that the elements necessary to constitute an offence under S. 6 (1), Bengal Food Adulteration Act 6 of 1919 have not been proved and (2) that as the mustard oil, the subject matter of the case was, sold to the Sanitary Inspector not as mustard oil but as mixed mill oil and as the sign-boards in the shop indicate that mixed mill oil for lighting purposes is only sold the conviction under S. 6 (1) of the Act is not sustainable. Both the grounds may be considered together.

The facts are that the Sanitary Inspector on the authority from the Chairman of the Municipality went to the shop of the accused and purchased a quantity of mustard oil which he says was for human consumption. After his purchase he divided the oil according to the Act into three parts one of which was kept with the shop-keeper. It was found on analysis that the oil sold was adulterated mustard oil and the owner of the shop was prosecuted and fined Rs. 200. It has been found by the trial Court that the oil was sold as mustard oil for human consumption and that the

oil sold was adulterated. Reading Ss. 5 and Ss. 6 and 7 of the Act together it would appear that the articles enumerated in S. 6 are presumed to be articles of food therefore it has been made penal to sell any such article in 'an adulterated condition, the presumption being that it was sold for human consumption. This is clear as in S. 5 of the expression "articles of food" is used whereas in S. 6 there is no express provision that the "articles mentioned in that section must be sold as articles of food. But the Act itself is for making provision for the prevention of adulteration of food and therefore the articles mentioned in S. 6 are considered to be articles of food and the sale thereof in an adulterated condition is made punishable. Now in this case the facts sufficiently proved and found by the lower Court are that the oil was sold by the petitioner to the complainant and that the oil was found to be adulterated. The petitioner says that he had put up a sign board on his shop that he was selling adulterated mustard oil. With regard to this sign board I am inclined to believe the Sanitary Inspector when he says that it was not there on the day of the occurrence but it has been subsequently put up. But in my judgment even if this sign board was on the shop it will be no defence to say that he had notified to the public that he was selling adulterated food.

The Food Adulteration Act makes it penal to sell adulterated articles. It does not excuse the offence on the ground that the purchaser knew that what he was purchasing was not pure food stuff. The Act was intended to protect the public from using adulterated articles and therefore it has made it penal to sell these adulterated articles to persons irrespective of the fact that the purchaser knew the article to be adulterated or otherwise. With regard to the articles mentioned in S. 6 they are ordinarily articles of food and it is no defence to say that these articles can be adulterated and sold in the market with the publication of the fact that they are adulterated. S. 7 of the Act makes the storing of adulterated things penal. In this case it is admitted that the accused sells in his shop ghee, flour, atta etc which are sold for human consumption. He also sells

mustard oil and there is no evidence and no allegation for what purpose the mustard oil which is said to be adulterated was sold in the shop except what is stated on the signboard. On the other hand there is evidence that mustard oil is purchased from his shop by people for consumption as an article of food. His own witness 2 says that no better stuff is available, that he always purchases mustard oil for human consumption from the shop though it was advertised as mixed oil. As I have said it is no defence to say that because it was advertised as mixed oil the seller though he sells the article for human consumption is entitled to plead that he had told the purchaser that it was not pure in defence in a prosecution under the Act. As the Act is intended for the safety of the people, in my judgment it should be construed liberally. It is no defence to the accused that the adulterated oil is stored in his shop for some purpose other than for consumption as an article of human food. I cannot say that even if he had taken that defence it would have been a good answer. But it is clear that the adulterated mustard oil is kept in his shop for being sold to persons for consumption as an article of food. In the sign board which he says he put up in his shop it is said that mustard oil is sold for lighting purposes. But there is no evidence that any one purchases it for that purpose. As I understand the sign board has come into prominence since this case. There is also evidence as found by the Magistrate that the accused's shop supplies to the locality the oil at a wholesale rate to small shop keepers who sell it by retail to the inhabitants of the locality for consumption as an article of food. The mischief therefore which is done by his selling adulterated oil in his shop is very great.

I am accordingly of opinion that on the evidence in the case the learned Magistrate has come to a right decision and the conviction must be sustained. This rule is discharged.

R.M./R.K.

Rule discharged.

1930 Cr. Cases 354

(Calcutta)

S. K. GHOSE, J.

Nagendra Nath Saha—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 505 of 1929, Decided on 6th December 1929.

(a) Trade mark—Infringement of—Similarity—Standard of comparison should be that of lay public and not that of experts.

For the purpose of establishing a case of infringement it is not necessary to show that there has been the use of a mark in all respects corresponding with that which another person has acquired an exclusive right to use. But if the resemblance in such as not only to show an intention to deceive but also such as to be likely to make unwary purchasers suppose that they are purchasing the article sold by the party to whom the right to use the trade mark belongs. Therefore the standard of comparison is not that of the experts, but it is that of the lay public, of the unwary purchaser: *Wotherspoon v. Avery*, (1872) L. R. 5 H. L. 508 *Rel. on.* [P 355 C 1]

(b) Merchandise Marks Act, S. 15—Offence mentioned in S. 15 is offence charged—Accused agreeing to give up use of trade mark—Limitation runs from date when complainant is again aware of infringement.

The offence mentioned in S. 15 is the offence charged. Where after original discovery of infringement of trade mark the complainant takes some action as the result of which the accused gives an undertaking not to make use of the trade mark and it does not appear from the evidence that the complainant actually knew that the infringement of the trade mark had continued, the limitation does not run from the date of the original discovery. It runs from the date on which the complainant is again aware of the infringement and a suit brought within one year from the date, i. e., within one year after discovery of offence charged is within time: *A. I. R. 1928 Cal. 495, Rel. on.*; 22 *Mad. 483, Dist.* [P 356 C 1]

Mrityunjay Chattopadhyay—for Appellant.

A. N. Choudhury—for the Crown.

Probodh Chandra Chatterji—for Complainant.

Judgment.—The case against the appellant is that he has infringed two trade-marks belonging to the complainant Manilal Anandji, one a white deer on a red back ground and the other composed of figures 4 and 5 on a black ground in the shape of a star on a yellow label. Both the marks were used as trade marks on packets of 'biri' sold by the complainant. The learned Chief Presidency Magistrate has found that in respect of the figures on the second trade-mark the complainant had no monopoly but as regards the rest of the device of

the second trade-mark, and as regards the first trade-mark, the prosecution case has been established. He has accordingly convicted the appellant under S. 482, I.P.C., and sentenced him to pay fine of Rs. 500 and of Rs. 200 respectively on the two counts and in default to undergo rigorous imprisonment for three months and two months respectively. In this Court it is not disputed that the complainant did not have the trade-marks as alleged by him. The question is as to whether it has been established that the appellant used false marks in respect of the two trade-marks produced by the complainant. I have before me three sets of trade marks which are relevant to the case and I may say at once that in minor details the trade-marks of the complainant and the trade-marks used by the accused are different: but that in essential matters, that is to say, as regards the general appearance, the prominent portion of the device, the colouring, and so forth the two sets of trade-marks are similar. This view was also taken by the learned Magistrate. The question is what is the standard of comparison? It has been held that, for the purpose of establishing a case of infringement, is not necessary to show that there has been the use of a mark in 'all respects corresponding with that which another person has acquired an exclusive right to use. But if the resemblance is such as not only to show an intention to deceive but also such as to be likely to make unwary purchasers suppose that they are purchasing the article sold by the party to whom the right to use the trade mark belongs. *Wotherspoon v. Avery* (1). Therefore the standard of comparison is not that of the experts. But it is that of the lay public, of the unwary purchasers. In the present case it would be correct to say that it would be standard of the ignorant people who use these sorts of 'biris' and purchase them from the bazar. In view of these considerations it seems to me that the learned Magistrate correctly held that the trade-marks which had been used by the appellant were false trade-marks. In the lower Court the accused also appears to have given an undertaking to drop the use of both trade-marks.

The next point which has been urged in support of the appellant, in so far as

the prosecution with regard to the stag brand is concerned is that it is barred by limitation, under S. 15, Merchandise Marks Act. It is pointed out that it is admitted and found that the complainant first came to know of the infringement in September 1927 and he brought the case in March 1929 and it is contended that the case was brought more than a year after the first discovery of the offence and that therefore it is barred by limitation.

In support of this I am referred to the cases of *Ruppell v. Ponnusami Teran* (2). In that case, however, it appears the complainant had not shown that he believed that the use of the alleged counterfeit trade mark has been discontinued after the first discovery in 1893. This case was considered in *Akshoy Kumar Dey v. Emperor* (3). There it was held that the word 'offence' under S. 15, Merchandise Marks Act meant the offence charged. Mr. Chaudhury for the Crown has pointed out that in the present case the offence charged is an infringement in June 1928 which is well within time. It is contended that in the case reported in *Akshoy Kumar Dey v. Emperor* (3) the decision went upon the supposition that it was not found that before 10th March 1926, which was the date of offence charged, the prosecution party was aware that the offence had been committed. In the present case, however, it is established that after the original discovery in September 1927 some action was taken by the complainant and as the result the appellant gave an undertaking not to make use of the trade-marks. It is contended that nevertheless the complainant must have known that the accused was going on infringing the trade-marks because their places of business are only a hundred steps apart. But it does not appear from the evidence that the complainant actually knew that the infringement of the trade-mark had been continued. No doubt, there was no written undertaking but there was a verbal undertaking and this is deposed to by the pleader P. W. 4 and the complainant himself. This part of the evidence has not been challenged by cross-examination. There are also the letters

(2) [1899] 22 Mad. 488.

(3) A. I. R. 1928 Cal. 495.

(1) [1872] 5 H. L. 508.

written by the complainant's agents to the accused and these were found in the "gadi" of the accused. They are of June 1928 and they refer expressly to the fact that the accused had given an undertaking. Therefore it comes to this that after the original discovery in September 1927, the accused had given an undertaking to desist from infringing the trademark any further and that there is nothing to show that before June 1928 the complainant was aware that there had been a fresh infringement. It is contended that nevertheless the limitation must run from the original discovery in September 1927. Mr. Chaudhury for the Crown has contended that if that be so, then the undertaking would be meaningless and that the complainant would be put upon his watch to see whether there was going to be another infringement within one year of the first discovery; and it might be that, if there was a subsequent infringement after one year of the original discovery, then the second offence not be punishable at all. This position reduces the argument advanced on behalf of the appellant to an absurdity. But as has been pointed out in the case referred to above that the offence mentioned in S. 15, Merchandise Marks Act, is the offence charged and this seems to me to be the only common sense view that can be taken in the present case. In this case the prosecution is clearly in within time. No other points are pressed in this appeal. The conviction of and the sentences passed on the appellant are confirmed. The appeal dismissed.

R.M./R.K.

Appeal dismissed.

* 1930 Cr. Cases 356

(Calcutta)

C. C. GHOSE AND PEARSON, JJ.

Panchanan Gogai and others—Accused
—Appellants.

v.

Emperor

Criminal Appeal No. 480 of 1929, Decided on 17th January 1930, against order of Addl. Sess. Judge, Assam Valley Dist.

(a) Evidence Act, S. 154—Hostile witness—Definition—Hostile witness is one who from his evidence shows that he is unwilling to tell truth.

A hostile witness may be defined as one who from the manner in which he gives his evidence (within which is included the fact that he is willing to go back upon previous statements

made by him) shows that he is not desirous of telling the truth to the Court. [P 358 C 1]

* (b) Criminal P. C.; S. 298—Judge should explain to jury situation arising in case of hostile witness—He should tell jury to reject evidence of such witness altogether—Omission to do so amounts to misdirection—Evidence of hostile witness cannot in part be relied upon and rest rejected—Evidence Act, S. 154—Criminal Trial.

The evidence of a hostile witness cannot in part be relied upon and the rest of it discarded or rejected. When a witness is declared hostile so that leave to cross-examine is granted to the party calling him, it is necessary that the Judge should explain what the position is, that then arises, namely, that by asking for leave to cross-examine the witness, the party calling him admits that he is not a witness of truth and one whose evidence is not entitled to credit, who is prepared to make one statement on oath at one time and another at another time and that the evidence of such witness should be rejected and left out of account in the minds of the jury. It is a rule which leans in favour of the accused and as such ought not to be departed from lightly. The Judge should tell the jury to reject the evidence of such witness altogether and his omission to do so amounts to misdirection: *A. I. R. 1929 Cal. 463; Alexander v. Gibson, 2 Camp. 556, Ref.* [P 358 C 1]

Narendra Kumar Basu and Abdul Kasem—for Appellants.

D. N. Bhattacharjee—for the Crown.

Judgment.—The accused in this case (*Panchanan Gogai, Gopal Gohain, Mohari Ahom alias Mohari Dursa, Kan Bap Baruah, Laghona Koar, and Ratneswar Ahom*) were found guilty by the jury in manner following i. e. *Pachanan and Kan Bap* were found guilty under Ss. 328 and 366, I. P. C., *Gopal and Mali Ali or Mohari* under S. 366, I. P. C. and the remaining two under S. 366 read with S. 107, I. P. C. The learned Additional Sessions Judge of the Assam Valley Districts, agreeing with the verdict of the jury has sentenced the accused to undergo various terms of imprisonment.

The main point which has been argued in this appeal before us arises with reference to the evidence of one *Sashi, Prabha*, a girl aged about 17, who was alleged to have been abducted. The case for the prosecution, shortly stated, was as follows: It appears that the marriage of *Sashi Prabha* with one *Lokenath* had been settled and the marriage was to have taken place on 6th May 1928. Her father *Durga Prosad* had been away from home for some time prior to the date of the occurrence hereinafter referred to. It is alleged that taking advantage of the absence of

Durga Prosad, the accused Panchanan in conspiracy with the accused Kan Bap Gopal and Mohari, and with the approver, Sona Ram, abducted the girl after making her unconscious. They also administered dhatura poison to the adult members of the family. The abduction took place on the night of 27th April and the girl was removed from place to place until she was brought to the house of one Haranath who was the brother-in-law of the accused Panchanan. Haranath sent a wire on 26th May to Durga Prosad and ultimately the police recovered the girl on 29th May. Sashi Probha appeared before the Magistrate for the first time on 11th June 1928.

The passage in the learned Judge's charge to the jury, to which exception has been taken before us, runs as follows:

"Of course in a case of abduction, the most important witness is the abducted girl but the abducted girl in this case has retracted all that she deposed in the lower Court. But before we discuss the evidence, you should remember some dates.

The occurrence took place on the night of 27th April, corresponding to 14th Baisakh. The marriage of Sashi Probha was to have been celebrated with Lokenath on 6th May i.e., 23rd Baisakh. Durga Babu left this house a few days before to purchase articles for marriage and for other important business, he was to return on 29th April. The negotiations of the marriage were going on for about six months or so. The girl was recovered on 29th May; Haranath sent a wire on 26th May. She was examined by the police at Sibsagar on 30th May. After her examination, she was sent to her father's house immediately. She remained at her father's house for four or five days, after which she again came to Sibsagar. She was again brought home two or three days before her father's death which took place on 14th June. Her sister, Ratna's marriage was celebrated with Lokenath on 6th May, the date on which her marriage with Lokenath was to have been celebrated. On 11th June she was produced before the Subordinate Divisional Officer to have her statement recorded under S. 164, Criminal P. C. An Honorary Magistrate was deputed to verify the statement so recorded. Sashi Probha was examined by the Committing Magistrate on 22nd August 1928. Durga Prosad died on 14th June 1928. Sashi Probha left her father's house in the night of 4th September. While her mother and her little sister Santi and the youngest brother, was alone living, Sashi Probha was again produced before the Magistrate on 5th September 1929, the date of commitment. On that date, Panchanan was sent to jail. Sashi Probha was allowed to go of her own free will to the house of Panchanan. The letter Ex. 7 which goaded her to take this fatal step is dated 29th August

1928. Sashi Probha was examined in this Court on 8th May 1929. Sashi Probha personally appeared before the Additional Judge, Mr. Mehta on 7th March 1929, to apply for bail describing herself as the wife of Panchanan Gogai."

The girl has spoken in four voices. The first three statements are substantially the same. In all the statements, she spoke of being drugged and then carried by force in an unconscious state. All these statements have been read before you and you have also heard her deposition here. The suggestion of the defence is that what she spoke on the previous occasions were tutored and it is only here that she has spoken the real truth. It is also suggested that what she spoke to Bheduri, Kameswari and others when she was being taken from place to place were false and intended to convey wrong impression. This suggestion is made in the cross-examination to anticipate the evidence to be given by these persons. You must bear in mind the adverse comments of the defence pleader about the delay in producing her before the Magistrate and also that she did not appear before the Magistrate voluntarily. It is for you to decide in what voice she spoke the truth. The determining test should be, what version has been corroborated by the independent evidence. It has been the attempt of the prosecution to prove that her first three statements have been so corroborated."

On behalf of the accused it has been contended before us that the learned Judge had misdirected the jury in not calling their attention to the fact that the girl had been declared hostile by the prosecution and that she was allowed to be cross-examined and further that in the circumstances which happened the learned Judge ought to have directed the jury that the evidence of the girl ought to be rejected altogether. In support of this contention reliance has been placed upon the case of *Emperor v. Satyendra* (1) at pp. 176 and 177 (of 37 C. L. J.). The learned Deputy Legal Remembrancer on behalf of the Crown has argued that it is not a hard and fast rule that when a witness is cross-examined by the party calling him his evidence must be rejected in toto and has drawn our attention to a number of cases in the Courts in this country, where a somewhat different view has been taken.

Before I proceed further, I desire to refer to the order of the learned Judge under S. 154, Evidence Act, allowing the prosecution to cross-examine the girl. The order is as follows:

"The Public Prosecutor after examining the witness for sometime and found out that the witness was making statements contrary to

(1) A. I. R. 1923 Cal. 463.

what she deposed in the lower Court—wants the permission of the Court to cross-examine her after she is declared hostile. The other side objects. I am of opinion that the permission should be granted."

The order of the learned Judge is not very happily expressed but I take it to mean that he having considered the submissions made by the prosecution exercised his discretion in the matter and gave leave for the cross-examination of the witness. This the learned Judge did, because the witness was clearly, in his opinion, one who was hostile. A hostile witness may be defined as one who, from the manner in which he gives his evidence, (within which is included the fact that he is willing to go back upon previous statements made by him) shows that he is not desirous of telling the truth to the Court. Where therefore one comes across a witness of this description, there is very high authority for the proposition that the evidence of such witness cannot in part be relied upon and the rest of it discarded or rejected: see *Alexander v. Gibson* (2). This case has been followed ever since 1881 and only in one case, namely, in the case *Bradley v. Ricardo* (3) it was not followed. Where the witness is declared hostile, so that leave to cross-examine is granted to the party calling him, it is in our opinion necessary that the Judge should explain to the jury what the position is that then arises, namely, that by asking for leave to cross-examine the witness, the party calling him admits that he is not a witness of truth and one whose evidence is not entitled to credit, who is prepared to make one statement on oath at one time and another at another time and that the evidence of such a witness should be rejected and left out of account in the minds of the jury. On principle we can see nothing why this rule which is in accordance with justice and fair play should not be adhered to. At any rate it is a rule which leans in favour of the accused and as such ought not to be departed from lightly.

In our opinion the learned Judge should have told the jury to reject the evidence of the girl altogether and that his omission to do so amounts to misdirection. The verdict of the jury must

therefore be set aside and with it the conviction and sentence. The question then arises as to what should be done. We have very carefully considered the position and have come to the conclusion in view of all the circumstances that it would not be unduly stretching the law if we were to direct that there need not be a retrial. The accused who are on bail will be discharged from their bail bonds.

R.M./R.K.

Order accordingly.

* 1930 Cr. Cases 358

(Calcutta)

C. C. GHOSE AND PEARSON, JJ.

Kartick Chandra Biswas and others—
Accused—Applicants.

v.

*Emperor—*Opposite Party.

Criminal Revn. Appln. No. 1290 of 1929, Decided on 11th December 1929, from order of Chief Presy. Mag., Calcutta, D/- 21st October 1929.

* Criminal P. C., S. 195—Where offence is not committed by parties to any proceeding while it is pending in respect of document produced, S. 195 does not operate as bar to cognizance of offence.

Certain criminal case in which K was on one side and R on the other, ended in a compromise. In these proceedings a certified copy of a municipal plan had been filed on behalf of R. The copy was taken out by a person identified as R by a pleader N. R made an application to the Chief Presidency Magistrate asking for enquiry into the matter, his complaint being that K and others had tampered with the original plan and had taken out the certified copy by giving a false receipt and on false identification by N. The Chief Presidency Magistrate, after examining R, issued warrant against K under Ss. 417, 419 and 430 109, Penal Code.

Held: that the offences were not committed by parties to any proceedings in Court while the said proceedings were pending in respect of documents produced or given in evidence in such proceedings. The offences were committed long after the proceedings had terminated and S. 195 did not operate as a bar to the cognizance of the offences. The allegations made in the complaint of R were such as must be inquired into. [P 260 C 2]

N.K. Basu and Kanaidhone Dutt—for Applicants.

Debendra Narain Bhattacharjee—for the Crown.

C. C. Ghose, J.—This rule must be discharged for the following reasons.

This rule was issued by my learned brothers Mittoo, J., and S. K. Ghose, J., on 30th September 1929, on the application of three persons, viz., Kartick Chandra Biswas, Bisheswar Biswas and

(2) 2 Camp. 556=11 R. R. 797.

(3) 8 Bing. 57=1 M. & Scott. 133=1 L.J.C.P.

Bhubaneswar Biswas. The matter of the application on which that rule was issued came up before this Court on a previous occasion in a slightly different form and in order to understand and appreciate the order that we propose to make, it is necessary to set out briefly, the circumstances giving rise to the present application.

In the year 1927 there were two criminal cases in which the petitioners or some of them were one of the parties and one Ramkrishna Saha or his men were the other party. These cases ended in a compromise and the result was that the proceedings in those cases terminated on 28th July 1927. In those proceedings a certified copy of a municipal plan had been filed on behalf of the said Ramkrishna Saha. This certified copy, it is alleged, was taken out by some person or persons, signing as or for Ramkrishna Saha on a receipt given for the purpose. The executant of the receipt was identified as Ramkrishna Saha by a pleader named Mr. Nares Chandra Sen. This took place on 25th May 1928. In August 1928, Ramkrishna Saha made an application to the Chief Presidency Magistrate asking for an enquiry into the matter, his complaint being that his name had been forged on the receipt aforesaid and the plan had been taken out by somebody not himself. This was followed up by another application made to the Chief Presidency Magistrate on 9th October 1928, in which he went into greater details and stated that Kartick Biswas and others had tampered with the original plan that was in the custody of the Calcutta Corporation and having done, that they removed the certified copy of the plan that was lying with the record of the police cases referred to above by giving a false receipt and with the false identification of the pleader Mr. Nares Chandra Sen. On this petition the learned Chief Presidency Magistrate, after examining the complainant Ramkrishna Saha and after certain preliminary orders which he passed, eventually issued warrants against the three petitioners under Ss. 417, 419, 420, 109, I. P. C. Thereafter the learned Chief Presidency Magistrate commenced an enquiry into the matter. In the course of the proceedings the learned Chief Presidency Magistrate came to enter-

tain some doubt as to whether a complaint by Dr. Sarbadhikary was necessary in a case of this kind but eventually thought it was. On 9th January 1929, he expressed himself thus :

"The forgery was actually a receipt for taking back the document but it appears, however, to be probably within the meaning of S. 195 (c) in respect of the document that was put in evidence."

He, therefore, suggested to Dr. Sarbadhikary to make formal complaint inasmuch as otherwise there might be difficulties in going on with the proceedings. It appears that on this matter being placed before Dr. Sarbadhikary the latter on 14th January 1929 made an order which runs in these words :

"I did not pass the order and I do not know anything about it. I cannot therefore, make this complaint."

On the same day, evidently by reason of the order aforesaid of Dr. Sarbadhikary, the learned Chief Presidency Magistrate recorded a further order which runs in these words :

"If the Magistrate takes the trouble to read the order, to look up the law and then see the reports he will be able to learn all about it. The C. C. I should appear before him and move him to make the necessary complaint. Otherwise the case cannot proceed."

It appears further that, therefore, Dr. Sarbadhikary was moved by the C. C. I and certain papers were put before him with the result that he on 15th April 1929 made the order which forms the subject matter of the appeal. That order runs in these words :

"After perusing the abovenamed papers, I am strongly of opinion that if any offence has been committed, it has been chiefly committed by the certifying pleader Mr. Nares Chandra Sen. He must, therefore, be made an accused in the case along with Bhubaneswar Biswas, Kartick Chandra Biswas and Bisheswar Biswas. Accordingly, all these four persons are made accused in this case."

On the strength of this order of Dr. Sarbadhikary the learned Chief Presidency Magistrate took cognizance of the case. Against the order of Dr. Sarbadhikary the petitioners preferred an appeal to this Court being Criminal Appeal No. 257 of 1929 : The appeal came on for hearing before my learned brothers Mukerji, and Jack, JJ., and by their order dated 28th August 1929, the learned Judges allowed the appeal and set aside the order which was made by Dr. Sarbadhikary. It is not necessary for us to go into the grounds of the order made by Mukerji and Jack, JJ., at length. Briefly stated, their points

were two in number: First, that S. 195, Criminal P. C., would not operate as a bar to the cognizance of any of the offences referred to hereinbefore and that Dr. Sarbadhikary in the circumstances which had happened was not competent to make a complaint under S. 476, Criminal P. C. It appears that the matter thereafter went back to the Chief Presidency Magistrate and warrants were issued for the arrest of the present petitioners. Thereafter the present petitioners came before Mitter and S. K. Ghose, JJ. and obtained a Rule, as stated above, on 30th September 1929, calling upon the Chief Presidency Magistrate to show cause why the proceedings against the petitioners should not be quashed on the following grounds, viz.:

For that the learned Magistrate has misconstrued the order of the High Court in holding that the case was one not covered by S. 195, Criminal P. C.;

For that what this Court had held was merely that no complaint by Dr. Sarbadhikary was necessary to prosecute the petitioners under S. 467, I. P. C. and

For that the allegations made in the petition of the complaint do not make out any case under Ss. 417, 419, 420/109, Penal Code or under S. 467, I. P. C.

So far as the first ground is concerned, we are of opinion that having regard to the order of this Court dated 28th August 1929, it is not open to the present petitioners to raise any such question as is referred to in the first ground. Their Lordships Mukerji and Jack, JJ. have held expressly that S. 195, Criminal P. C. would not operate as a bar to the cognizance of any offences hereinbefore referred to. Mr. Basu, however, has argued before us that having regard to the language of S. 195, Cl. 1, sub-S. (c), it is clear that the offences hereinbefore referred to were committed by parties to a proceeding in Court in respect of a document produced or given in evidence in such proceeding. We are of opinion that apart from the objection that such an argument is not admissible in this case having regard to what was laid down by Mukerji and Jack, JJ., it is quite clear on the facts of this case that the offences were not committed by parties to any proceedings in Court while the said proceeding was pending

in respect of documents produced or given in evidence in such proceeding. It is not necessary to recite the facts again; but it is sufficient from what has been stated above that the offences were committed long after the proceedings in Court had come to a termination. That being so, there is no substance whatsoever in the first ground taken by the present petitioners.

As regards the second ground, it is quite true that no complaint by Dr. Sarbadhikary, the Honorary Magistrate concerned was necessary in this case; and if that is so, then this ground which is really one for the purpose of explaining what was held by Mukerji, and Jack, JJ. on 28th August 1929, must fall to the ground along with ground 1.

As regards the third ground, it is one dealing with the facts. In view of the order which we propose to make, it is neither desirable nor convenient that we, at this stage should go into the facts at any length and express an opinion thereon. We are, however, clearly of opinion that the allegations made in the complaint of Ramkrishna Saha are such as must be enquired into and it is quite impossible, having regard to the events which have happened and having regard to the nature of the complaint made by Ramkrishna Saha, that this Court should take upon itself at this stage to direct that the proceedings against the present petitioners should be quashed. It is sufficient for us to observe that ample materials are existent on the record which demand an enquiry and, in this view of the matter, the only course that is open to us at this stage is to discharge the rule and to direct that the record should be sent back as early as possible.

So much for the case itself. We cannot part, however, with this case without referring to the explanation which has been submitted by Mr. Roxburgh. In our opinion, it is a matter of abiding regret that a Magistrate of Mr. Roxburgh's position and of his experience and ability and knowledge of the procedure obtaining under the Criminal Procedure Code should have addressed to this Court an explanation in the language which he has thought fit to adopt and use. It is necessary to remind the Magistrate that he has no

right to express himself in language of an annoyance nor to make sneering references to one of the Judges of this Court. Nothing is gained by using language wanting in decorum and politeness and the sooner Mr. Roxburgh gets rid of his present style of communications, the better. Reading the explanation as a whole, it strikes us that he has indulged in a criticism of Mukerji J.'s judgment—a proceeding in respect of which we must express our severe disapproval and condemnation.

Pearson, J.—I agree that this rule must be discharged for the reasons given by my learned brother. I only wish to say with reference to the latter part of the judgment of my learned brother that I endorse what he has said as regards the attitude of the learned Chief Presidency Magistrate as disclosed in his explanation and particularly the fact that it appears that the expressions to which objection may be chiefly taken appear to be based upon certain language attributed to one of my learned brothers which does not appear anywhere, so far as we can find, from the records in the proceeding. It has occurred to me that the word to which Mr. Roxburgh takes exception may have found place in a newspaper report which he has read. If so, I can only say that he has no business to utilize anything which he may have seen in the papers for the purpose of making adverse comments upon any Judge of this Court.

R.M./R.K.

Rule discharged.

1930 Cr. Cases 361

C. C. GHOSE AND PEARSON, JJ.

Chairman, Serajganj Local Board—
Complainant—Petitioner.

v.

*Budhiswar Patni and others—*Accused
—Opposite Parties.

Criminal Revn. No. 752 of 1929, Decided on 17th January 1930, from order of the Deputy Magistrate, Patna.

Bengal Ferries Act, Ss. 16 and 18 — "Distance" must be measured by reference to river frontage and not by land.

The land "distance" in S. 16 means distance by river. The distance must be measured by reference to the water frontage and not by land: *Blissett v. Hart*; (174) 125 E. R. 1923 *Huzzey and Field*, 150 E. R. 186 and *Anderson v. Jellet*, (1883) 9 S. C. R. 10, *Ref.*

Anil Chandra Rai Chowdhury — for Petitioner.

Mrityunjoy Chatterjee and Manindra Nath Banerji—for Opposite Parties.

C. C. Ghose, J.—The facts involved in this case, shortly stated as follows: The accused, who are four in number, were put on their trial before the Deputy Magistrate, Pabna on charges under S. 16 read with S. 28, Bengal Ferries Act, on the allegation that they were plying a private ferry at a place called Simla or Sakha without the sanction of the District Magistrate within two miles of the public ferry at Dhangora. The accused plead not guilty. Evidence was adduced on the point whether the offending ferry was within two miles of the public ferry at Dhangora. The Magistrate found on the record before him that the distance between the two places by river was 3 & 17/18 miles whereas by land it was 1 & 1/2 miles and he accordingly acquitted the accused, holding that the distance contemplated by S. 16, Bengal Ferries Act, was the distance by river and not by land. It is against this order of acquittal that the present rule has been obtained, and the point for consideration is whether the word "distance" in S. 16 of the Act means distance by river or by land.

Section 16, Bengal Ferries Act, runs as follows:

"No person shall except with the sanction of the Magistrate of the district, maintain a ferry to or from any point within a distance of two miles from the limits of a public ferry.

"Provided that, in the case of any specified public ferry, the Lieutenant-Governor, may by notification, reduce or increase the said distance of two miles to such extent as he thinks fit."

"Provided also that nothing hereinbefore contained shall prevent persons keeping boats to ply between two places, one of which is without, and one within, the said limits, when the distance between such places is not less than three miles, or shall apply to boats which the Magistrate of the District expressly exempts from the operation of this section."

A ferry is a franchise that no one can erect without a license from the Crown. It is in the nature of a highway and is the exclusive right to carry passengers across a river or stream or arm of the sea. It is *publici juris* and when a ferry is erected, another cannot be erected without an *ad quod damnum*. If a second ferry is erected without a license the Crown has a remedy by a *quo warranto*, and the former grantee has a re-

medy by action. *Blissett v. Hart* (1). The franchise of a ferry is not a grant of an exclusive right to carry across a stream by any means whatever, but only a grant of the exclusive right to carry across by means of a ferry. If, therefore, a person has a grant of a ferry another may not erect a second ferry upon the same river near to it, by which the former ferry is impaired. The erection of the second ferry in such circumstances will amount to a nuisance and an action will lie. What, however, amounts to a disturbance of a ferry must in each case be a question of fact: in other words the Court has got to determine what amounts to what is called sufficient proximity: see *Huzzey v. Field* (2). This question is determined by measurement of the distance from one terminus to another of the water frontage. An instructive case on this point is to be found in one of the Canadian reports: see *Anderson v. Jellett* (3). In that case, under a Crown license the town of *B* executed a lease to plaintiff granting the franchise "to ferry to and from the town of *B* to *A*," a township having a water frontage of about ten or twelve miles, directly opposite to *B*, such lease providing only for one landing place on each side, and a ferry was established within the limits of *B*. on the one side, to a point across the bay of *Q*., in the township of *A* within an extension of the east and west limits of *B*. Defendants established another ferry across another part of the bay of *Q*., between the township of *A* and a place in the township of *S*, which adjoins *B*, the termini being on the one side two miles from the western limits of *B* and on the *A* shore, about two miles from the landing place of plaintiff's ferry. It was held that the establishment and use of plaintiff's ferry within the limits aforesaid for many years had fixed the termini of the ferry and defendant's ferry was no infringement of plaintiff's right. The above propositions are deducible from the cases in England and elsewhere where English law prevails. They are of some assistance in determining the precise meaning of S. 16, Bengal Ferries Act.

In India legislation was first had with

respect to ferries in 1816 and Regn. 19 of that year laid down rules for the better management of ferries. Only authorized persons could erect ferries and unauthorized persons plying a ferry were liable to payment of fines not exceeding Rs. 100 or in default of payment of fine to confinement with hard labour not exceeding three months. Regn. 19 of 1816 was replaced by Regn. 6 of 1819 and by S. 6 of that regulation the exclusive right to public ferries was first declared to belong to Government and all private ferries in their vicinity were prohibited or suppressed, the language used being "immediate vicinity." See Clarke's Bengal Regulations, Vol. 2 p. 544. The expression "immediate vicinity" would in this context certainly connote neighbourhood on the river frontage. With the passage of time, it became necessary to define the limit or limits of the vicinity and it is thus we finally arrive at S. 16, Bengal Ferries Act where the vicinity is limited to two miles. I am therefore of opinion that the distance must be measured by reference to the water frontage and not by land. The Magistrate has pointed out certain considerations which cannot be overlooked. I would therefore discharge the rule and refuse to interfere.

Pearson, J.—I agree.

R.M./R.K.

Rule discharged.

* 1930 Cr. Cases 362

(Calcutta)

C. C. GHOSE AND PEARSON, JJ.

Sarat Chandra Bhattacharjee and others—Petitioners.

v.

Hari Charan De—Opposite Party.

Civil Revn. No. 10 of 1929 and Misc. case No. 207 of 1929, Decided on 5th December 1929, from order of Dist. Judge, Sylhet, D/- 12th April 1929.

(a) Jurisdiction—High Court—Bench taking criminal appellate and revisional business can entertain applications in connexion with orders by civil Courts under Ss. 195 and 196, Criminal P. C.

The Bench taking the criminal appellate and revisional business of the High Court is always authorized to entertain applications in connexion with orders made by civil Courts under Ss. 195 and 476, Criminal, P. C. 40 Cal. 477, *Rel. on.* [P 364 C 1]

* (b) Criminal P. C., S. 476—Preliminary inquiry although not legally necessary, should be held.

It is true that under the provisions of S. 476 a preliminary inquiry is not legally necessary.

(1) [174] 125 E. R. 1298.

(2) 150 E. R. 186.

(3) [1883] 9 S. C. R. 1.

But it has been laid down ever since the enactment of the present section that although a preliminary inquiry may not be legally necessary, it should in common prudence be held by every Court before it passes an order under S. 476. [P 364 C 2]

*** (c) Criminal P. C., Se. 476 and 476-B—In case of appeal under S. 476, reference to O. 41, R. 11, Civil P. C. is irrelevant—Provisions of S. 476-B shall be complied with.**

Where an appeal is pending under the provisions of S. 476-B it should be disposed of under the provisions of S. 476-B and reference to O. 41, R. 11, Civil P. C. in the order dismissing the appeal is irrelevant. An appeal from order passed under S. 476 is an appeal in exercise of statutory right of appeal and the provisions of S. 476-B should be complied with. The Court should issue notices to both the parties concerned in the matter, it should send for the record, examine the case and should come to an independent finding whether, under the circumstances, the petitioners would be put in jeopardy by a complaint being lodged against them. [P 364 C 2]

Sashadhar Roy (Sv)—for Petitioners.

Chandra Sekhar Sen — for Opposite Party.

Judgment.—This matter comes before us under somewhat peculiar circumstances and having regard to the lapse of time since the date of the original rule in this case being Civil Revision No. 10 of 1929, namely, 3rd May 1929, it is desirable to set out the facts which have given rise to the present application, on 24th September 1929. They are as follows :—It appears that petitioner 1 was plaintiff in a certain suit in the Court of the Munsiff of Karimganj in the District of Sylhet. The three other petitioners were his witnesses in the case. The plaintiff's suit was dismissed by the Munsiff on 5th October 1926. There was an appeal to the District Judge, but it was dismissed. A second appeal thereafter to this Court was summarily rejected under the provisions of O. 41, R. 11, Civil P. C. What has happened since then, shortly stated, is this. One of the defendants named Gopinath made an application to the Munsiff, who had succeeded the Munsiff who had tried the case in the first instance, for an order against the petitioners under S. 476, Criminal P. C. on the allegation that certain offences mentioned in S. 195, Criminal P. C. had been committed by the plaintiff and his witness. That application was disposed of by the Munsiff on 8th December 1928, the Munsiff holding that there was no case for enquiry and therefore for the lodging of a complaint under S. 476,

Criminal P. C. Gopinath did not prefer any appeal against the order of the Munsiff dismissing his application. But it appears that within a week or so another defendant of the name of Hari-charan who, it is alleged, is an uncle of Gopinath, made a substantive application on his own account for an order similar to that which was prayed for by Gopinath against the petitioners. This last mentioned application was disposed of by the Munsiff on 15th March 1929. The Munsiff held that there was a case for enquiry and he thereupon lodged a complaint under S. 476, Criminal P. C. on 27th March 1929. The petitioners thereupon preferred an appeal to the District Judge Mr. Edgley under the provisions of S. 476-B, Criminal P. C. It appears that Mr. Edgley without sending for the record and without issuing notices to both the parties concerned in this case summarily dismissed the appeal on 12th April 1929. Against that order the petitioners moved this Court and obtained a rule on 3rd May 1929, from my learned brother Mr. Justice Pearson sitting with Mr. Justice Mallik. That Rule being Civil Revision No. 10 of 1929 came on for hearing before Mr. Justice Graham and Mr. Justice Lort-Williams on 3rd September 1929, and the order that was passed by their Lordships on that date runs as follows :

"This rule is directed against an order of the District Judge of Sylhet dismissing an appeal summarily under O. 41, R. 11, Civil P. C. We discharge the rule on the ground that we have no jurisdiction in the matter."

Thereafter the present petitioners moved the Vacation Bench (Mitter and S. K. Ghose, JJ.) and obtained a rule on almost the same terms as were stated in the original rule No. 10 of 1929.

No doubt in Mr. Edgley's order reference is made to O. 41, R. 11, Civil P. C. But it is quite clear that Mr. Edgley had to dispose of the appeal which was pending before him under the provisions of S. 476-B, Criminal P. C. and under no other section. The reference, therefore, to O. 41, R. 11, Civil P. C. was clearly irrelevant in the circumstances. As regards the question whether the learned Judges, Graham, J. and Lort-Williams, J. had jurisdiction to dispose of the rule in the way in which such rules are ordinarily disposed of by this Court the position appears to

have been this. It appears that for a number of years when Sir Lancelot Sanderson was Chief Justice and more especially after the decision of the Full Bench in the case *Emperor v. Har Prasad* (1), the Bench taking the criminal, appellate and revisional business of the Court had always been authorized to entertain applications in connexion with orders made by civil Courts under Ss. 195 and 476, Criminal P. C. We have made enquires into the matter and we have satisfied ourselves that in the Daily List which was printed, it was specifically stated that the Criminal Bench were to deal with applications in connexion with orders made by Civil Courts under Ss. 195 and 476, Criminal P. C. Through some omission or other on the part of the office, this authorisation of the Criminal Bench had not been printed in recent years in the Daily List and, in consequence thereof, doubts arose whether the Criminal Bench had authority from the Chief Justice to deal with such applications. Those doubts are mainly responsible for the form of the order passed by Mr. Justice Graham and Mr. Justice Lort-Williams. Administrative action is being taken by the learned Chief Justice to prevent all such doubts in future. Be that as it may, it is perfectly clear that the order of 3rd September 1929, was passed by Graham and Lort-Williams, JJ. under a misapprehension. That being so, although the rule that was granted by my learned brothers, Pearson, and Mallik, JJ., was discharged on 3rd September 1929, we are of opinion that that order would not stand in the way of our disposing of this rule which was granted by the Vacation Bench on its merits. To hold otherwise would amount to a denial of justice. Besides, the present Criminal Bench have been specifically authorised by the learned Chief Justice to dispose of the present Rule on its own merits. That being so, we have felt ourselves completely at liberty to go into the whole matter for ourselves and see whether or not there is any substance in the contention put forward before us by Mr. Roy on behalf of his clients. It is perfectly clear that Mr. Edgley's order is unsupportable. Mr. Sen on behalf of the opposite party

has made a vigorous attempt, as indeed it was his duty to do so, to support that order. But, as stated above, Mr. Edgley has not complied with the provisions of S. 476-B, Criminal P. C., the appeal to him being one which was in the exercise of the petitioners' statutory right of appeal from the order passed by the Munsiff under S. 476, Criminal P. C. He has neither issued notices to both the parties concerned in the matter nor has he sent for the record and examined the case for himself and come to an independent finding of his own whether, in the circumstances disclosed, the present petitioners should be put in jeopardy by a complaint being lodged against them. That being so, if not for anything else, Mr. Roy is entitled to ask us to make the rule absolute. We have not been content with merely listening to the technical complaints made by Mr. Roy; but we have gone into the substance of the thing and we are of opinion that on the merits Mr. Roy's clients have a good case. The Munsiff who gave the sanction at the instance of the defendant Hari Charan did not make any enquiry before he made a complaint against the present petitioners. It is true that under the provisions of S. 476, Criminal P. C. a preliminary enquiry is not legally necessary. But it has been laid down ever since the enactment of the present S. 476, Criminal P. C. that although a preliminary enquiry may not be legally necessary, it should in common prudence be held by every Court before it passes an order under S. 476, Criminal P. C. That, as we understand, is the present case law in this Court. This preliminary enquiry was not held by the Munsiff. Further, it is to be remembered that the application was made to the Munsiff who, it may be noted again, was the successor of the Munsiff who had originally tried the case, nearly two years and a half after the disposal of the case itself. The Munsiff who made the order complained of had no knowledge of the case, had not seen the witnesses and had to rely on the judgments which had been pronounced by the primary Court and by the Court of appeal below. In addition to all this, there is the circumstance that one application, made by one defendant namely, Gopinath, had already been dismissed. That was a factor which

(1) [1913] 40 Cal. 477=17 C. L. J. 245=19 L. C. 197=17 C. W. N. 647.

should have been and had to be taken into consideration. But it does not appear from the order of the Munsiff that this was taken into consideration; indeed none of these circumstances were ever taken into consideration by Mr. Edgley who had to dispose of the appeal. In these circumstances, in our opinion, it would not be just and proper that Mr. Roy's clients should be put to further trouble, inconvenience and expense. We think this is one of the cases in which this Court should interfere and put an end to these proceedings. We, therefore, direct that the rule be made absolute, that Mr. Edgley's order be set aside and that the complaint which had been made by the Munsiff at the instance of Hari Charan and all proceedings following thereon be set aside.

R.M./R.K. *Rule made absolute.*

• 1930 Cr. Cases 355 •
(Calcutta)

SUBHRAWARDY, J.

Bishnu Pada Dey — Accused—Petitioner.

v.

Corporation of Calcutta — Opposite Party.

Criminal Revn. No. 1083 of 1929, Decided on 27th November 1929.

Calcutta Municipal Act (1923), Ss. 271 and 278 (1)(b)—Whether there is proper access to privy is question in which corporation is not interested and requisition for that purpose is not covered by S. 278(1)(b)—It has to see only whether accommodation is sufficient and privy is in sanitary condition.

The words "take such other order" must be construed ejusdem generis with the words preceding. Whether proper access is available to a privy by people living in a particular portion of a house is a question in which the corporation is not prima facie interested. The tenants having just grievance can take such steps for securing proper access as the law provides but the corporation is only entitled under the Municipal Act to see that privy is in a sanitary condition, and the privy accommodation is sufficient. A requisition by the corporation that proper access should be provided to a privy is not, therefore, covered by S. 278 (1) (b). [P 365-C 2]

Mrityunjay Chattopadhyaya and Rabin-drath Mukherjee—for Petitioner.

Probodh Chandra Chatterjee and Gopendra Krishna Banerjee—for Opposite Party.

Judgment.—This rule has been issued against the conviction of the petitioner for not complying with the requirements of S. 278 (1) (b), Calcutta Municipal Act 1923. The requisition with which we

are concerned in this case was to the effect that the petitioner should provide access to the northern connected privy of the first floor through the nearest verandah. The question which I am called upon to determine in this case is first whether the requisition is one which the corporation was entitled to issue under the Act; and secondly, whether the corporation has the right to say that access to the privy provided by the petitioner is insufficient. S. 278 (1) (b) authorizes the corporation to renew, repair, cover, recover, trap, ventilate, pave and pitch, cleanse, flush or take such other order with the same (including a privy) as the corporation may think fit to direct. It is argued on behalf of the corporation that the requisition is covered by the words "take such other order." In my judgment this contention is not sound. The words "take such other order" must be construed ejusdem generis with the words preceding, whether proper access is available to a privy by people living in a particular portion of a house is a question in which the corporation is not prima facie interested. It is a tenanted house and the tenants living in the first floor may have just grievance that they have no proper access to the privy. They can leave the premises if they like or they can take such steps for the purpose of securing access as the law provides; but the corporation is only entitled under the Municipal Act to see that the privy is in a sanitary condition. I am clearly of opinion that the requisition made by the corporation in this case is not covered by S. 278 (1) (b). It appears that there was a partition decree between the joint owners of this house and the first floor was allotted to the petitioner and he was required under the decree to provide access to the privy. The corporation is trying to execute that decree.

It further appears that petitioner has provided a wooden ladder from the ground to the privy. The corporation objects to this mode of access on the ground that it will be too inconvenient for the occupants of the first floor to go down to the ground and from that mount up the privy. This is a question which is beyond the function of the corporation to raise. It is not the case for the corporation that the privy is in an insanitary condition. The only objection

is that it is inconvenient for the petitioner's tenants to use the privy. This is a matter which is between the petitioner and his tenants. In this connexion reference may be made to S. 271 which provides as follows :

"When any premises intended for human habitation are without privy or urinal accommodation or if the corporation are of opinion that the existing accommodation therefor available for the persons occupying the premises is insufficient, inefficient or for sanitary reasons objectionable, the corporation may, by written notice require the owner to provide such additional privy as they may prescribe or to make such structural or other alterations in the existing privy or urinal accommodation as they may prescribe."

The corporation if it thinks that the privy accommodation for the occupants of the first floor is not sufficient it may take such steps as it is authorised under the Act to do. But it cannot insist upon the owner to provide facilities for the tenants.

In my judgment the rule must be made absolute and the order of the Municipal Magistrate imposing fine upon the petitioner should be set aside. The fine, if paid, will be refunded.

R.M./R.K.

Rule made absolute.

1930 Cr. Cases 366

(Calcutta)

MUKERJI, J.

Pran Nath Kundu—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 182 of 1929, Decided on 8th May 1929, against order of Sub-Deputy Magistrate, Rajbari, D/- 15th October 1928.

(a) **Easement — Right of way — Three kinds enumerated.**

In India just as much as in England there are three distinct rights of way. First there are private rights in the strict sense of the term vested in particular individuals or the owners of particular tenements and such rights commonly have their origin in grant or prescription. Secondly, there are rights belonging to certain classes of persons, certain portions of the public, such as the freemen of the city, tenants of a manor or the inhabitants of a parish village. Such rights commonly have their origin in custom. Thirdly, there are public rights in the full sense of the term which exists for the benefit of all the King's subjects and the sense of these is ordinarily dedication. 15 *Cal.* 460 (F. B.). *Foll.* [P 367 C 1]

(b) **Easement—Public right of way can be acquired by user or dedication to public in general.**

A public right of way in the full sense of the term and as to all King's subjects is unson-

nected with dominant tenements. Such right of way may be acquired by user or dedication to the public in general. In this connection the fact that there were no thoroughfares at the termini is not of much importance on the point of dedication, but the question whether public in general use the way as pathway or only the inhabitants of the village or some other village do, are questions of considerable materiality. For where the privilege to use a road is enjoyed by a particular section of the public community or by inhabitants of two or three villages and not by others the road is not a public road. 25 *W. R.* 233 and 9 *All.* 481, *Ref.* [P 367 C 2, P 368 C 1]

(c) **Easement—Public right of way which have their origin in custom—Evidence to support user sufficient to raise presumption of dedication must be cogent.**

Ways permitted to be used by a section of the public or ways used by all in particular cases are private ways which have their origin in custom and such customary ways can be converted into an ordinary highway after user by the general public sufficient to raise the presumption of dedication, but the evidence in support of the public claim must be cogent. *Brookbank v. Thompson*, 2 *Ch.* 311; *Furquhar v. Newbury Rural District*, 1 *Ch.* 12; *Bermondsey v. Brown*, L. R. 1 *Eq.* 204, *Ref.* [P 368 C 1]

(d) **Penal Code, Ss. 283 and 341—S. 283 does not contemplate pathway with regard to which there is no testimony of universal user sufficient to raise presumption of dedication to public.**

A pathway, which lies over a private land and which is used by the villagers and perhaps by the inhabitants of some of the villages, but with regard to which there is no testimony of universal user sufficient to raise a presumption of dedication to the public, is not a public way within the meaning of S. 283. To establish a customary right of way to the same pathway the Court must be satisfied of the reasonableness and certainty of the user and that such user was not permissive nor exercised by stealth or force and that the right has been exercised for such length of time as to suggest that by agreement or otherwise the usage has become the customary law of the particular locality: 17 *All.* 87; 31 *All.* 257; 20 *Mad.* 39, and 23 *Bom.* 666, *Ref.* [P 368 C 2]

Surajit Ch. Lahiri for *Suresh Ch. Talukdar*—for Petitioner.

Order.—The proceedings in this case originated in an application addressed to the Circle Officer of Pangsia Circle by which a number of persons complained that the petitioner Prannath Kundu had placed some refuse etc., on a public road running through plots 511, 512 and 513, which was in use for a very long time, in order to convert it into land in his possession and had thus caused inconvenience to the applicants. It prayed that the public road, right be cleared up and opened to the public as before. It was forwarded by the Circle Officer to the

Sub-Divisional Magistrate who summoned the petitioner under Ss. 283 and 290, I. P. C. The case was tried by another Magistrate who eventually convicted the petitioner under Ss. 283 and 426, I. P. C. and sentenced him to pay a fine of Rs. 20, in default to undergo simple imprisonment for one month. On appeal the District Magistrate has altered the conviction to one under S. 341, I. P. C. keeping the sentence intact. The learned District Magistrate has found that the path lies on the land of the accused and to that extent it is not a public path, but that the public have been using it for over twenty years and that right of way has been established. The petitioner's contention is that those findings, and for the matter of that the evidence, is not sufficient for the conviction of the petitioners.

In the Full Bench decision of this Court in the case of *Chuni Lal v. Ram Kissen Sahu* (1) Wilson, J., in one of his classical judgments, agreed in by the other members of the Bench, explained that in India just as much as in England there are three distinct classes of right of way:

"First there are private rights in the strict sense of the term, vested in particular individuals or the owners of particular tenements, and such rights commonly have their origin in grant or prescription. Secondly there are rights belonging to certain classes of persons, certain portions of the public, such as the freemen of a city, the tenants of a manor or the inhabitants of a parish or village. Such rights commonly have their origin in custom. Thirdly, there are public rights in the full sense of the term which exists for the benefit of all the Queen's subjects; and the sense of these is ordinarily dedication."

The first question that falls for determination is, to which class of rights does the right alleged to be infringed in the present case appertain? In the application to which I have referred the way is described as a public way. The evidence bearing on the matter stands thus:

P. W. 1 "The public of the village Magura-dangi and others walk by this path. . . . The path is 4 or 5 cubits wide and 5 or 6 rasis long. It does not go beyond his (meaning witness's,) house. From witness's house it goes to accused's house and then by Sham Lal Kundu's house and thence to the Railway line."

P. W. 2—"The path is 6 cubits wide. The path from the accused's house up to the railway line to the north and then east is raised, but not so on the south up to the house of P. W. 1."

P. W. 3 "The path was used by public for a very long time for over 20 years."

P. W. 4 "The path does not meet the halot on the south. It passes along the south east of house of P. W. 6 and then along the south of his house. The path is not a raised one. The witness comes southward from his house and going along the south of the house of P. W. 1 and then east, he uses the path, P. W. 3's house is south of witness's, and he goes eastward by the south of the house of P. W. 1 and then east and then uses the path in question. Another halot to the south of the house of P. W. 1 is 200 cubits away from the path alluded to by the witness along the south of the house of P. W. 1"

P. W. 5 Witness, P. W.'s and the public walk over it. There is no other path for going to that direction."

It has been found that the plots over which the path is alleged to pass belong to the petitioner. The evidence quoted above shows that the way begins at or near the house of P. W. 1 and ends at or near the railway line and does not join any highway or public thoroughfare at either end. It also shows taken at its highest that the inhabitants of this village and possibly of other villages, use the way, but such user must be for the purpose of going to or from one of the houses abutting on the way, for the termini of the way are not on any highway or public thoroughfare. A public right of way in the full sense of the term and as to all the King's subjects is unconnected with any dominant tenement. Such right of way may be acquired by user of or dedication to the public in general. But as the Judicial Committee has pointed out in the case of *Muhammad Rustam Ali Khan v. Municipal Committee, Karnal City* (2)

"in order to constitute a valid dedication to the public of a highway by the owner of the soil, there must be an intention to dedicate, there must be an animus de-dedicandi, of which the user by the public is evidence and no more"

It has also been pointed out in that case that while there may be dedication to the public for a limited purpose as for instance, an access to a particular building, or a footway, horseway or driftway, there can be no such thing in law as a public right of way constituted by dedication to only a section of the public. The fact that there are no thoroughfares at the termini is consequently of not much importance on the point of dedication, but the question

(1) [1898] 15 Cal. 45 (F. B.).

(2) A. I. R. 1920 P. C. 43=1 Lah. 117=47 A. 25 (P. C.).

whether the public in general use the way as a pathway or only the inhabitants of this village and also of some other villages do so is a question of considerable materiality. Where the privilege to use a road is enjoyed only by one particular section of the community or by inhabitants of two or three villages and not by others, the road is not a public road *S'am v. Nonee* (3), *Fattelyab v. Mohammad* (4), where there is the intention to allow not the public generally but merely visitors to or traders with the people of the village, or ways allowed to be used by villagers to go to a church or a market or the common fields of a village such ways are not regarded as public ways but private ways, and they generally have their origin in custom. *Brocklebank v. Thompson* (5). Such a customary way can be converted into an ordinary highway after user by the general public sufficient to raise the presumption of dedication *Farquhar v. Newbury Rural District* (6), but the evidence in support of the public claim must be cogent *vestry or Bermondsey v. Brown* (7). See *Peacock's Law of Easements* 3rd Edn. p. 237 footnote. The evidence of user such as there is in this case does not support an inference of dedication for the use of the public in general and the pathway alleged is not one which S. 283, I. P. C. contemplates.

Section 283, I. P. C. being out of the way, it will have to be considered whether one of the other two kinds of rights has been established so that the case may come under S. 341, I. P. C. In the present case there is no question of the complainant, whose case is that the obstruction put upon the way has prevented him from going in a particular direction has acquired a right of way by either grant or prescription. The question really is whether the prosecution has established a customary right of way on the part of the villagers, amongst whom the complainant is one, to use this land as a pathway. The English common law rule of the im-

memorial user is not required to establish a custom in India, and it has been held that it is sufficient if the Court is satisfied of its reasonableness and certainty and that the user on which it is founded was not permissive nor exercised by stealth or force and that the right had been enjoyed for such a length of time as to suggest that by agreement or otherwise the usage has become the customary law of the particular locality. *Kuar Sen v. Mamman* (8); *Shadi Lal v. Mohammad Isaq Khan* (9). *Palaniandi Tevan v. Puthirangonda Nandan* (10), *Mohidin v. Shirlingappa* (11). For the conviction of the petitioner under S. 341, I. P. C. this customary right of way has necessarily to be proved by the prosecution in order to make out that the complainant had the right to proceed on the pathway in some particular direction. The difficulty of proving a customary right of way, with all its requisite elements, upon the oral testimony of two or three witnesses, who are only able to say that for over 20 years the way has been used by the villagers, is considerably enhanced by the exception to the definition contained in S. 339, I. P. C. It is extremely difficult in a case of this nature to say that the accused who has caused the obstruction did not in good faith believe that he had a right to obstruct the further user of his land as a pathway.

For this reason I am of opinion that this conviction cannot be supported. The rule is made absolute. The petitioner's conviction and sentence are set aside. The fine, if paid, will be refunded.

Before parting with the case I may point out that in cases of this nature the law has provided for a remedy in the shape of proceedings under S. 133, Cr. P. C. which speaks of "obstruction" on "any way" and not merely "public way." The original application of the complainant and his co-applicants clearly suggested that course, but unfortunately it was not adopted, for reasons which are not apparent. Those proceedings were clearly more appropriate than a prosecution for a criminal offence.

V.B./R.K. Conviction set aside.

(3) 25 W. R. 233.

(4) [1887] 9 All. 434=(1887) A. W. N. 82.

(5) [1903] 2 Ch. 344=72 L. J. Ch. 626=19 T. L. R. 285=89 L. T. 209.

(6) [1903] 1 Ch. 12=78 L. J. Ch. 170=25 T. L. R. 39=7 L. G. R. 364=78 J. P. 1=100 L. T. 17.

(7) [1866] 1 Eq. 204.

(8) [1895] 17 All. 87=1895 A. W. N. 10.

(9) [1911] 88 All. 257=9 I. C. 198=8 A. L. J. 10.

(10) [1897] 20 Mad. 389.

(11) [1899] 23 Bom. 666=1 Bom. L. R. 170.

1930 Cr. Cases 369

(Allahabad)

YOUNG, J.

Mohammad Husain—Applicant.

v.

Mt. Nanhi—Opposite Party.

Criminal Revn. No. 461 of 1929, Decided on 29th October 1929, from order of Dist. Magistrate, Bijnor, D/- 4th June 1929.

(a) Criminal P. C., S. 435 (1)—Revision application filed before Sessions Judge or District Magistrate bars another application before the other.

The construction of sub-S. (4) clearly is that where either the Sessions Judge or District Magistrate has had an application in revision, in the same matter, before them, moved by either party, the other local district Court would have no jurisdiction to hear a further application in the same matter : 26 *Mad.* 477 and 110 *P. R.* 1912 *Cr. Ref.* [P 370 C 1]

(b) Criminal P. C., S. 435—District Magistrate cannot order retrial—He can act under S. 436 only—High Court alone can order retrial.

A District Magistrate has no jurisdiction to order a retrial of a case. He can order, if he so wishes, on proper grounds, under S. 436, a further inquiry into the complaint, but it is reserved to the High Court in S. 439, to use any of the powers conferred on a Court of appeal, which would include the right of ordering a retrial. [P 370 C 2]

(c) Criminal P. C., Ss. 253 and 436—Order of discharge should be set aside only when prima facie incorrect and further evidence necessary.

An order of discharge should only be set aside very sparingly and only when it can be said either to be perverse or prima facie incorrect and there is a suggestion that any further evidence might be forthcoming.

[P 371 C 1]

K. O. Carleton and T. A. K. Sherwani
for Applicant.

A. M. Khawja—for Opposite Party.

Judgment.—This is an application in revision from an order in revision of the District Magistrate of Bijnor. A complainant brought a charge under S. 406, I. P. C., against the applicant. The matter came before a Special Magistrate and he discharged the applicant. The complainant went in revision to the District Magistrate who, purporting to act under S. 436, Criminal P. C., ordered a retrial. The applicant comes in revision to the High Court against the order of the District Magistrate.

Mr. Khawja, on behalf of the complainant, raises a preliminary objection to the case being entertained by the High Court. He contends that the applicant should not be heard by the High Court,

until he has first made an application in revision to the Sessions Judge, and he prays in aid the authority of *Sharif Ahmad v. Qabul Singh* (1). In that case a Bench of this Court decided that :

"as far as the practice of this Court is concerned, an application to the lower Court should be considered an essential step in the procedure, and that should be so whether the District Magistrate or Sessions Judge has power to grant the relief or not. In future, therefore, failure on the part of the applicant to submit his application to the lower Court will operate as a bar to the application being entertained by this Court."

- It is contended that the applicant in this case should have first of all filed an application in revision in the Court of the Sessions Judge as a preliminary step to an application to the High Court in accordance with the ruling quoted above. It is contended that the District Magistrate's Court is an inferior Court to the sessions Court within the meaning of this ruling, and it is contended that this is made clear specially in matters of revision by the explanation following S. 435 (1), Criminal P. C., which enacts that :

"all Magistrates, whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of S. 437."

I am of opinion that this preliminary point is misconceived and has no force. It is to be noted that the case of *Sharif Ahmad v. Qabul Singh* (1) was dealing with an application in revision from an order convicting the applicant and sentencing him to a fine of Rs. 10. In that case the conviction was by a Magistrate and no application had been made in the matter in revision to either the District Magistrate or the Sessions Judge. In the matter before me an application in revision has been made to the District Magistrate by the complainant and it is clear, in my view, that sub-S. (4), S. 435, therefore, applies. The sub-section enacts that :

"if an application under this section has been made either to the Sessions Judge or District Magistrate, no further application shall be entertained by either of them."

It is contended by the complainant that this sub-section should be construed so as to mean :

"an application under this section has been made to either Court by the applicant to the High Court,"

and that the sub-section would not apply where the application to the lower

(1) A. I. R. 1921 All. 30=48 All. 497.

Court had been made by the opposite party in the High Court. If effect were given to this contention of the complainant, it would mean that the applicant in revision to the High Court, having already applied to the District Magistrate in revision on the same point, would have then to go to the Sessions Court as a mere formality, because the Sessions Judge would have no power to pass an effective order; he would merely be a sort of conduit pipe through which the applicant would have to travel before he reached the High Court. This would mean additional expense and delay to the parties for no effective purpose. If the Bench of this Court in *Sharif Ahmad v. Qabul Singh* (1), had made a rule of practice enforcing such a step upon applicants in revision, I would, of course, be bound by it. But, as I have pointed out, the case of *Sharif Ahmad v. Qabul Singh* (1), has no real application to the present case. The construction of sub-S. (4) clearly must be that where either the Sessions Judge or District Magistrate has had an application in revision in the same matter before them, moved by either party, the other local District Court would have no jurisdiction to hear a further application in the same matter. This reading of the subsection accords, in my view, with common sense. I am confirmed in my view on this point of law by decisions of other High Courts in India: see the case of *Kalimuthu v. Emperor* (2). In that case an application in revision was made to the Sessions Judge, which was dismissed. The District Magistrate then took up the case *suo motu* and made an order contrary to the decision of the Sessions Judge. It was held in that case under Cl. (4) of S. 435 that the District Magistrate's order was invalid. In *Emperor v. Waryam* (3) the Punjab Chief Court held that S. 435 (4), Criminal P. C., applied to all cases in which either a District Magistrate or a Sessions Judge had taken action, or had refused to take action, under Ss. 435, 436, 437 and 438 of the Code and that the words "further application" in S. 435 mean another application in respect of the order in question of the inferior criminal Court.

It is clear that the provisions of S. 435 (4) were enacted for the purpose of avoiding a conflict of opinion between two local Courts of co-ordinate jurisdiction.

The preliminary objection having been disposed of, it is contended by the applicant that the order of the District Magistrate in this case, ordering a retrial, ought to be set aside.

In the first place, the order of the District Magistrate is clearly illegal and improper, in that a District Magistrate has no jurisdiction to order a retrial of a case. He can order, if he so wishes, on proper grounds, under S. 436, Criminal P. C., a further inquiry into the complaint, but it is reserved to the High Court in S. 439, Criminal P. C., to use any of the powers conferred on a Court of appeal, which would include the right of ordering a retrial. The order of the District Magistrate is, therefore, bad. It is competent for this Court to amend the order of the District Magistrate to one competent to him under S. 436. But as any order under S. 436 would be clearly improper in this case, it is unnecessary to amend it.

The case for the complainant was that she had paid Rs. 700 to the accused for the purpose of his discharging a debt due by her deceased husband to a certain moneylender one Piare Lal. She alleged in her complaint that the accused had never paid the money to the moneylender, but had appropriated it to his own use and, therefore, had committed a criminal breach of trust. The complainant called evidence before the Magistrate. She proved herself that she had paid the money to the accused and that is accepted by both Courts as being a fact. She also called Piare Lal, the moneylender and the moneylender gave evidence that on 23rd October 1928, Mohammad Husain, the accused applicant, paid him Rs. 700, and that he (Piare Lal) had struck the debt for this amount out of his *hahikhate* and returned the bond to the applicant. The prosecution closed its case. On the evidence before him the Magistrate came to the conclusion, which was entirely proper, that the prosecution had failed to make out any case under any section of the I. P. C. It is clear, of course, that no criminal breach of trust had been proved. The prosecution had pro-

(2) [1908] 26 Mad. 477.

(3) [1913] 110 P.R. 1912 Cr.=18 I.C. 886=117 P.L.R. 1918.

ved the receipt of the money by Moham-mad Husain and the payment of it by him to the moneylender, as he was instructed to do. The applicant was, therefore, entitled, if he felt so inclined, to submit that no case had been made out and that it was unnecessary for him to make a statement or enter upon his defence. The District Magistrate, however, in an application in revision has delivered himself of a judgment which it is almost impossible to understand. He says,

"it is clear that the money had been deposited by the accused with Piare Lal, but it was deposited not on behalf of the plaintiff but on behalf of the accused himself."

As there was no evidence of this before the learned Magistrate, it is difficult to know how he so found, but even if the facts be as stated, it could not make the accused guilty of a criminal offence. It is perfectly clear that the applicant was entitled, on the evidence of the prosecution itself, to an order of discharge.

It has been laid down in this Court on many an occasion that an order of discharge should only be set aside very sparingly and only when it can be said either to be perverse or *prima facie* incorrect and there is a suggestion that any further evidence might be forthcoming. In this case it is impossible to say that the order was perverse or incorrect, and it has never been suggested that the prosecution did not call all the evidence it could on this matter, or that it would be possible on any further enquiry to call any further evidence. Indeed, on the evidence of the money lender himself, it would be impossible to call any other evidence which could alter the nature of the finding of the Court. On that evidence alone the accused was entitled to be discharged. I accept the application, discharge the order of the District Magistrate and restore the order of the trial Court.

V.B./R.K. *Application allowed.*

1930 Cr. Cases 371

(Allahabad)

DALAL, J.

Anand Behari Lal—Applicant.

v.

Emperor—Opposite Party.

Criminal Misc. Case No. 472 of 1929,
Decided on 2nd December 1929.

Criminal P. C., S. 167 — Magistrate has no power to investigate and keep person in custody for purposes of investigation—**Criminal P. C., S. 202.**

Where a Magistrate receives a complaint he should either himself examine one or more complainants and take action under S. 202, or if he is taking action on his own knowledge, he should transfer the proceedings completely to another Magistrate so that Magistrate may proceed to enquiry or trial after recording the statement of the complainant. It is also open to him to make report to police who can take action under S. 167. But so far as can be gathered from provisions of the Code a Magistrate has not the powers of a police officer to investigate and keep an accused person in custody for the purposes of such investigation: custody can only follow where definite charge has been made and complainant has been examined. [P 371 C 2 P 372 C 1]

Kumuda Prasad—for Applicant.

U. S. Bajpai—for the Crown.

Judgment. — The learned Government Advocate has now obtained particulars and I am made acquainted with the proceedings taken by the District Magistrate of Farrukhabad. It appears that the District Magistrate received a complaint from a patwari school teacher that he had not received his salary during the time he was on leave. It appears to have been the duty of the applicant Anand Behari Lal to distribute the pay, and the District Magistrate suspected that Anand Bihari Lal was guilty of embezzlement. He immediately issued a warrant for Anand Bihari Lal's arrest and directed a subordinate Magistrate to hold an inquiry. There has been no examination of the complainant as is emphatically directed in S. 200, Criminal P. C., see S. 202 (1) (a). There does not appear to be any authority given to a Magistrate to keep an accused person in custody just as is given to the police under S. 167 of the Code to enable the police to carry out further investigation. In my opinion custody can follow only where a definite charge has been made and the complainant has been examined. The learned Government Advocate suggested that the District Magistrate had taken action under S. 190 (1) (c) upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that such offence had been committed. If such was the case the District Magistrate had no jurisdiction under S. 191 and he ought to have transferred the inquiry preparatory to commitment to session.

or trial to a subordinate Magistrate and was not entitled to take action under S. 202 himself. It is apparent that he did not make a complete transfer from the fact that he entertained the application for bail himself on 20th November last. It is desirable that action should be taken according to law. Either the District Magistrate himself should examine one or more complainants and take action under S. 202 of the Code, or, if he is taking action on his own knowledge, he should transfer the proceedings completely to the Court of a Subordinate Magistrate so that Magistrate may proceed to inquiry or trial after recording the statement of the complainant. So far as can be gathered from the provisions of the Code, a Magistrate has not the powers of a police officer to investigate and keep an accused person in custody for the purposes of such investigation. It was also open to the District Magistrate to make a report to the police who could then have taken action under S. 167 of the Code.

As matters stand at present Anand Bihari Lal is entitled to bail. I direct his release on bail on his own bond in Rs. 2,000 with two sureties in Rs. 2,000 each to the satisfaction of the District Magistrate. If there is any apprehension subsequently that Anand Bihari Lal in spite of giving sureties is likely to abscond any Magistrate trying the case is permitted to cancel this order for reasons to be stated in writing and order the arrest of Anand Bihari Lal.

V.B./R.K. *Order accordingly.*

1930 Cr. Cases 372

(Allahabad)

DALAL, J.

Sultan Singh—Applicant.

v.

B. Maya Ram Radha Swami—Opposite Party.

Criminal Misc. Case No. 379 of 1929,
Decided on 11th December 1929.

Criminal P. C., S. 491 (1) (b)—Power given by S. 491(1) (b) has to be exercised with caution and not in case where there is dispute as to who should be guardian of minors.

The power under S. 491 (1) (b) is to be exercised in matters of urgency, where, for instance the father is suddenly deprived of the custody of his sons and there is danger to the life of the sons in the transferred custody. It is a remedy for a person deprived of his liberty. The power therefore has to be exercised with cau-

tion and not in a case where there is a dispute merely as to who should be guardian of particular minors. [P 372 C 2]

Kumuda Prasad, H. P. Sen, K. D. Malaviya and Hari Ram Jha—for Applicant.

B. Malik—for Opposite Party.

Order.—The applicant Sultan Singh is father of two minor sons and the opposite party Maya Ram is father of the applicant. The minor boys are at present under the charge of Maya Ram. They have been, according to the applicant's own affidavit, under the charge of Maya Ram since 1925. This application is made for a direction of the nature of a habeas corpus under S. 491 (1) (b), Criminal P. C. That section gives power to this Court whenever it thinks fit to direct that a person illegally or improperly detained in public or private custody within the limits of its appellate criminal jurisdiction may be set at liberty. In the very nature of things the power would be exercised in matters of urgency, where, for instance, the father is suddenly deprived of the custody of his sons and there is danger to the life of the sons in the transferred custody. It is stated in Wharton's Law Lexicon that this, the most celebrated prerogative writ in the English Law, is a remedy for a person deprived of his liberty. The power, therefore, has to be exercised by this Court with caution and not in a case where there is a dispute merely as to who should be guardian of particular minors. In the present case the applicant has permitted his sons to be in the custody of their grandfather for four years and this application is merely a cheap way in which he desires to establish his guardianship over the boys. It further appears that even prior to 1925 the boys were living with Maya Ram. Such a statement has been made in an affidavit of Maya Ram and not been denied by a counter-affidavit filed by Sultan Singh. The case, therefore, clearly is not one of urgency. There may be some difference of opinion between High Courts as to whether a suit should lie in case of Sultan Singh never before having been in charge of his boys, or whether S. 25, Guardians and Wards Act would be applicable : see *Achhralal v. Ohimantal (1)* and *Sukhdeo Rai v. Ram Chandar (1)* [1916] 40 Bom. 600 = 37 I. C. 215 = 19 Bom. L. R. 682.

Rai (2). However that may be, a civil remedy is open to the applicant wherein a District Court or a civil Court may fully inquire as to whose custody would be most beneficial to the sons. This Court is not the Court for such an inquiry. There is no cause so far as can be made out from the affidavits for interference. I dismiss the application. *F.V.S./R.K. Application dismissed.*

(2) A. I. R. 1924 All. 622=46 All. 706.

1930 Cr. Cases 373

(Allahabad)

KING, J.

Bhaya Lal—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 486 of 1929, and Criminal Appeal No. 710 of 1929, Decided on 14th December 1929.

Court-fees Act, S. 19 (17) — Application by counsel on behalf of, and purporting to be from, prisoner is exempted under S. 19 (17).

An application filed by an advocate or counsel on behalf of the prisoner and purporting to be from the prisoner himself, "petition by a prisoner" within the meaning of S. 19 (17), and the fact that it was an adjournment application made by the counsel for his personal convenience is immaterial: *A. I. R. 1922 U. B. 14; 14 N. L. R. 77 and A. I. R. 1924 Rang. 160, Rel. on.* [P 374 C 1]

Sailanath Mukerji—for Applicant.

U. S. Bupai—for the Crown.

Judgment.—This is a reference for a decision whether a certain application filed by an advocate on behalf of a prisoner in jail is chargeable with a court-fee.

The application in question was filed by an advocate on behalf of the prisoner on 12th November 1929, and purports to be from the prisoner himself. The application runs as follows:

"That my counsel will be absent from Allahabad between 14th and 21st November 1929, both days inclusive. It is prayed that the above mentioned case be not put up on the days list between the above mentioned dates."

The learned advocate, who appears on behalf of the advocate who presented the petition, has argued that the application is exempted from liability to court-fee under S. 19 (17), Court-fees Act, 1870. This clause runs as follows: "Petition by a prisoner or other person in duress or under restraint of any Court or its officers."

Undoubtedly the application in question is a petition on behalf of a prisoner, and the only question is whether

it should be held to be a "petition by a prisoner" within the meaning of S. 19 (17).

It is conceded that certain classes of applications made to the High Court on behalf of prisoners are in practice held not to be chargeable with court-fee, for example:

(1) Applications for bail on behalf of prisoners in jail. (2) Applications for summoning records of other cases which are required for arguing the prisoners' appeal. (3) Applications for revision on behalf of prisoners in jail.

Also it is conceded that appeals on behalf of prisoners in jail are admitted by this Court without payment of any court-fee although such appeals may not be signed by the prisoner in jail or come from the prisoner through the Superintendent of the jail.

It appears to have been tacitly conceded, therefore, in view of the practice followed in such cases, that applications which are made on behalf of prisoners in jail are considered as equivalent to applications by prisoners.

I have been referred to several reported cases in which this question has been considered by different High Courts. In the case of *Jagannath Kahar v. Emperor* (1), it was held by the Upper Burma Judicial Commissioner's Court that an application for bail signed only by the advocate of a prisoner is an application made by the prisoner himself, and under S. 19 (17), Court-fees Act, it is not required to be stamped. The view taken by the Court was that an application made by the advocate of a prisoner should be treated as equivalent to an application by the prisoner himself.

In the case of *Emperor v. Maroti Teli* (2), it was held by the Nagpur Judicial Commissioner's Court that a petition of appeal presented by a prisoner not personally but through his pleader is exempted from court-fees under Cl. 17, S. 19.

In the case reported in *A. I. R. 1924, Rangoon*, p. 160 it was held by the Rangoon High Court that a petition of appeal or revision signed and filed by an advocate or pleader on behalf of a prisoner under an authority signed by a

(1) A. I. R. 1922 U. B. 14=4 U. B. 72.

(2) [1918] 14 N. L. R. 77=45 I. C. 158=19 Cr. L. J. 494.

prisoner need not bear a court-fee stamp. At the present day it is not necessary for the prisoner to give his advocate a written and signed authority, but the reason for the decision still holds good, namely, that it is the less a petition by a prisoner because it is filed on his behalf by an advocate.

I agree to the view taken by the Courts in these cases. In interpreting a fiscal statute the Court is entitled to demand that the liability of the subject should be clearly established, and in the present case I see no reason why the maxim "qui facit per alium facit per se" should not be applicable. No cases have been shown to me in which a contrary view has been held.

It has been argued by the learned Government Advocate that, although the petition purports to be on behalf of the prisoner, practically it is in the interests of the advocate himself. He contends that the petition was not really in the interests of the prisoner because it meant that the hearing of his appeal would have to be adjourned and that, therefore, he would not have a chance of release from jail so soon as he would otherwise have done. I am not prepared to accept this contention because when a prisoner appoints an advocate to conduct his appeal he presumably wishes the advocate to do so personally. If the advocate appointed is for some reason unable to appear on certain dates and desires that the appeal should not be heard during his absence I think that he would be considered to be acting in the interests of his client if he asks for an adjournment in order to enable him personally to argue the case as desired by his client. In the present case although the advocate's personal convenience was no doubt partly responsible for the application I am not prepared to hold that the application was not made, partly at least, in the interests of the prisoner.

In my opinion, therefore, the application in question should be held to be made "by the prisoner" although it was actually presented through his advocate on the prisoner's behalf. It follows that under S. 19 (17) the application is not chargeable with any court-fee and I decide accordingly

V.B./R.K.

Reference answered.

1930 Cr. Cases 374

(Allahabad)

MEARS, C. J.

Gokul Prasad and others—Applicants.
v.

Emperor—Opposite Party.

Criminal Misc. Case No. 73 of 1929,
Decided on 4th March 1929.

(a) Criminal P. C., S. 526.—Ground for transfer.

The fact that a Magistrate, fifteen years before, had been a class-fellow of somebody who was either a complainant, a respondent or an advocate in the case is not a fit ground for transfer, [P 374 C 2]

(b) Legal Practitioners Act, S. 13—Mere fact that opposite party happens to be member of the same profession is not a circumstance which entitles a member of the Bar to refuse to undertake the case against him: See *A. I. R.* 1929 All. 367.

It is very important that men at the Bar should understand that they are members of a public profession. That is by their very calling they engage and undertake to, act for anybody who fulfils certain conditions. Therefore if a client comes to them with proper instructions and prepared to pay a fair and proper fee and invites them to undertake a case of a kind, which they are accustomed to do and they refuse, such refusal amounts to professional misconduct and should be punished as such. [P 375 C 1]

K. N. Jaghate—for Applicants.

The Government Advocate U. S. Bajpai—for the Crown.

Order.—This is a transfer application in which Gokul Prasad and others ask that a case now before a Special Magistrate, Captain Bijai Prasad Singh, may be transferred to some other competent Magistrate's Court outside the district of Benares.

The affidavit in support of this application is untrue in one important respect. Para. 11 runs as follows :

"That the learned trying Magistrate was a class-fellow of B. Sahadeo Singh, Advocate, and is on terms of intimacy with him."

The statement "on terms of intimacy with him" is a falsehood. The Magistrate in his explanation has said :

"About fifteen years ago Babu Sahadeo Singh Advocate, was my class-fellow for a few months. I knew him then very casually and after that I have never met (him) as a friend or intimate and have never exchanged any social visits as he is not known to me well."

If a case was to be transferred on every occasion on which a Magistrate fifteen years before had rubbed shoulders with somebody who was either a complainant, or a respondent or an advocate in the case the whole of the

judicial work in this country would come to an end.

The learned Magistrate in his explanation has said :

" that the real reason underlying this application is not any apprehension that the applicants will fail to receive justice from me but has been done to harass the other side. "

The incidents out of which this case arises are said to have taken place on 2nd November 1928, and we are now in the month of March and the case has not been concluded.

I refuse this application for transfer. A copy of this order is to be sent to the learned Magistrate with an expression of my wish that he will use all reasonable expedition to sweep this, and apparently some connected cases, off his file as soon as he can.

There is one other point that should be mentioned, and that arises from a statement contained in para. 15 of the affidavit which runs as follows :

" That legal practitioners of influence having been involved in the case as accused, the petitioners have failed to get standard (sic) legal assistance from the local Bar. "

It is very important that men at the Bar should understand that they are members of a public profession. That is by their very calling they engage and undertake to act for anybody who fulfils certain conditions. Therefore if a client comes to them with a proper instructions and prepared to pay a fair and proper fee and invites them to undertake a case of a kind which they are accustomed to do and they refuse, such refusal amounts to professional misconduct, and should be punished as such. I should like this to be communicated by the Magistrate to any of the members of the local bar who appear not to be aware of that rule. That is to say, a man at the Bar has no right whatever to refuse a case if proper instructions are given and proper fees are tendered to him and the work is of a class which he is accustomed to do. The mere fact that the opposite party happens to be a member of the same profession is not a circumstance which entitles him to refuse to undertake the case.

K.N./R.K. *Application rejected.*

1930 Cr. Cases 375

(Allahabad)

SEN, J.

Luttur and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Ref. No. 675 of 1929, Decided on 11th December 1929, by Addl. Sess. Judge, Benares, D/- 16th September 1929.

(a) Criminal P. C., S. 526 (8)—Section is mandatory — Deviation makes proceedings illegal.

Section 526 (8) embodies a statutory mandate which Courts ought to respect and obey and consequently if subsequent to an application under that section the Magistrate without granting adjournment proceeds with the case, the trial becomes illegal and not merely irregular and curable under S. 537. *A. I. R.* 1924 All. 533; *A. I. R.* 1923 All. 660 and *A. I. R.* 1924 All. 268, *Rel. on.* [P 376 C 1, 2]

(b) Interpretation of Statutes—Where rule of law is absolute in terms, it must be given effect to—Criminal P. C., S. 526 (8).

Where a rule of law is absolute in terms, the said rule has got to be observed and duly given effect to, and it is no province of a Magistrate to deviate from the said rule. [P 376 C 2]

S. N. Verma—for Applicants.

M. Waliullah—for the Crown.

Judgment.—The facts of the case which have given rise to this reference are set out in extenso in the judgment of the Additional Sessions Judge of Benares, dated 16th September 1929, and require no recapitulation.

Luttur Balai, Ram Nath and Raghu were on their trial before a Special Magistrate of Jaunpur, under S. 324, I. P. C. During the progress of the trial one Luttur had applied to the Magistrate under S. 526 (8), Criminal P. C., for stay of proceedings to enable him to move the High Court for the transfer of his case. The application was granted, and the case was adjourned. Luttur did not apply to the High Court for the transfer of the case. He applied to the District Magistrate for a transfer, but his application was rejected, and he submitted to the order.

On 17th May 1929, Balai made a similar application, but his application was refused. A second application was made by Balai, on 18th May 1929, but this application shared the same fate. Between 18th May, and 23rd May 1929, there were holidays in the lower Courts and also in the High Court consequent upon the Id-uz-Zoha. On 23rd May

1929, Balai presented an application in the Court of the Magistrate stating that he had been to Allahabad to instruct his counsel to make the necessary application under S. 526, Criminal P. C., for the transfer of his case and that the application was going to be made immediately upon the opening of the High Court. He prayed further for the adjournment of the case till the matter had been finally disposed of by the High Court. This application was dismissed. Between 17th May 1929, and the date of the actual decision of this case, the proceedings in the Court of the Magistrate continued. The proceedings terminated in the conviction of all the four accused persons upon whom non-bailable sentences were passed. They moved the learned Additional Sessions Judge of Benares for the revision of the conviction, and the matter has been submitted to this Court under S. 438, Criminal P. C.

Under S. 526 (8) where an accused notifies to the Court before which the case is pending his intention to make an application under this section, the Court is bound to adjourn the case for such a period as will afford a reasonable time for an application to be made to the High Court, and an order obtained thereon. S. 526 (8) embodies a statutory mandate, which the Courts below ought to respect and obey. There has been a catena of decisions of this Court and of other High Courts in favour of the view that the rule referred to above is imperative. Some of the later decisions may be referred to. *In re, Sartaj Singh v. Emperor* (1), Sulaiman, J., held that after the application for transfer had been made to a Magistrate, the trying Magistrate should not have recorded any evidence at all but should have adjourned the case at once. In *Walidad Khan v. Emperor* (2) Dalal, J., held that the provisions of S. 526 (8), Criminal P. C., were mandatory, and must be enforced. In *Bacridi v. Emperor* (3), Walsh and Banerji, JJ., held that where an application under S. 526 (8), was presented, it was the duty of the Court to stay all judicial proceedings.

The learned Magistrate has submitted

an explanation, which does not seem to me to be at all satisfactory. Where a rule of law is absolute in terms the said rule has got to be observed and duly given effect to, and it is no province of a Magistrate to deviate from the said rule upon any grounds of expediency. Further, it does not appear that, when Luttur made the application under S. 526 (8), he was doing so on behalf of himself and the other three other co-accused. The Magistrate might well have asked the other three accused persons at the time as to whether they too wanted to avail themselves of the adjournment to make an application to the High Court jointly with Luttur or severally on their individual account. This was not done. In refusing the applications, dated 17th and 18th May 1929, the Magistrate has acted in contravention of an absolute and imperative enactment. The progress of the case in his Court between 17th May 1929, and the date, when the application of Balai was finally rejected by the High Court, was illegal, and not a mere irregularity cured by S. 537, Criminal P. C.

I accept the recommendation of the learned Additional Sessions Judge, set aside the conviction and sentence of the applicants and direct a retrial. The witnesses examined between 17th May 1929, and the date, when the final order was passed by this Court, on the application of Luttur, should be recalled, and an opportunity afforded to the accused persons to cross-examine them. Let it be distinctly understood that no aspersion is cast upon the trying Magistrate in any shape or form. There can be no doubt that the said Magistrate will deal with the case fairly and justly. In view of all the circumstances of the case, I do not think that I should make an order of transfer of this case from the Court of Mr. Biqar Hussain to that of any other Magistrate. Let the papers be returned.

V.B./R.K.

Order accordingly.

(1) A. I. R. 1924 All. 533.

(2) A. I. R. 1928 All. 660.

(3) A. I. R. 1928 All. 288.

1930 Cr. Cases 377

(Calcutta)

RANKIN, C. J.

Ismail Biswas and others—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1189 of 1929, Decided on 3rd December 1929.

(a) Penal Code, S. 430—Offence under S. 430 is grave form of mischief as defined in S. 425 and elements of S. 425 must be proved.

Offence under S. 430 is particularly a grave form of the offence of committing mischief as defined in S. 425. It is necessary to prove in such cases the elements that constitute mischief under S. 425. No doubt a person who takes water from a tank causes loss but it should be shown that whether he has caused a diminution of the supply of water for agricultural purposes. [P 377 C 2]

(b) Evidence—Sufficiency of—Evidence that person has occupation of lands and that he takes water from tank to irrigate it is good evidence of fact that he has right to do so—Easement.

The evidence that a person has the occupation of lands and that he has been taking water to irrigate his lands through a channel from a tank is good evidence that he has some right to do so. This is not one of those things that can be concealed. The fact of enjoyment of such a right is some evidence of the right itself. [P 377 C 2]

Bireswar Bagchi—for Petitioners.

Mrityunjoy Chatterjee and Gopal Chunder Mookerjee—for the Crown.

Judgment.—In this case the petitioners have been convicted of an offence under S. 430, I. P. C., that is, of committing mischief by doing an act which caused or which they knew to be likely to cause a diminution of the supply of water for agricultural purposes. This offence is perhaps a particularly grave form of the offence of committing mischief which is defined in S. 425:

"Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously."

Now it appears that the tank in question is in the middle of two others. It appears that the complainant has a channel from which he has been getting the water of the tank in question to irrigate his lands. The finding of the Courts below is that the petitioners have cut a new channel in another part of

the tank and they have been taking water to their own lands across a certain road.

At the hearing of the case, it was necessary, first of all, to prove the elements that constituted "mischief" under S. 425, I. P. C. and that involved showing that the petitioners knew that they were likely to cause wrongful loss or damage to the public or to any person. The first question is whether this conviction should be set aside on the ground either that it is not shown that this question of wrongful loss or damage is made out or that it is shown that the question has been wrongfully dealt with by either of the Courts below. It appears to me that, if the evidence is that a person has the occupation of lands and has been taking water to irrigate his lands through a channel from this tank, that is pretty good evidence that he has some right so to do. This is not one of those things that can be concealed or that can be done behind the back of people so that no body in the neighbourhood can possibly get to know of it. It is done openly and on the face of it, it appears to me that the fact of enjoyment of such a right as that is some evidence of the right itself. Now, when the case came before the District Magistrate it is complained that he did not deal sufficiently with this matter. I am bound to say, as I read the grounds of appeal before him, that I see no indication that the accused persons on that appeal were suggesting to him that the complainant did not have the right to take water from the tank to irrigate the lands. It appears to me that what was then complained of was the finding of the Magistrate to the effect that the complainant was in possession of it. The Magistrate says that that is so. In the notice of appeal to the District Magistrate it is said that it was never admitted that the three tanks were in the position of the complainant; but the question which was before the Court and about which the witnesses spoke was about the right to take water. That suggests that the mistake of the Magistrate was that he thought that the accused admitted the right to possession of the tank whereas he only admitted the right to take water. In my judgment there was no occasion at all on the part of the District Magistrate, on the case

coming before him, to deal expressly or fully with this question whether or not the complainant was a person who had a right to take water, so that even assuming that the accused had no right it was shown sufficiently that the complainant was a proper person to be heard to complain. In the same way, it seems to me that it was entirely nugatory and idle to ask, in the circumstances of this case, for a finding from the District Magistrate in terms following the language of S. 430, I. P. C. No doubt a person who takes water is causing loss and here one has to show whether he has caused a diminution of the supply of water for agricultural purposes. In my opinion, the facts in this case and the case which came before the District Magistrate render it entirely trivial to complain that it is not shown that the amount of water taken diminished the supply of the complainant's water. It has been pointed out to me that there is paragraph in the grounds of appeal which says that it is not shown how much water the accused people took. That is a paragraph which is criticizing the passage in the judgment of the trial Judge where he said that these accused had only got a little bit of land and that it was entirely unnecessary for them to get water from this tank. These two criticisms to my mind come to nothing.

It has been complained very much that the Magistrate took a wrong view in saying that the question before him was not a question of title and that the question of possession of the tank was not of primary importance. Of course, if a case was made to the effect that, though he had been out of possession one of the accused had his title to the tank, the Magistrate could not find wrongful loss until he dealt with that claim of title. The claim of title in the part of the accused in such a case has to be dealt with. In this case, what was said is that the tank belonged to another mouza altogether, it belonged to another landlord altogether and that these people who were tenants of that landlord had acquired a right of easement by continued user. In this particular case, it was not necessary to investigate questions of the documentary title very far because on the facts of the case the Courts were both satisfied that the ac-

cused people had cut a new channel and the accused themselves, among other things, made a case which rendered their position very difficult as regards this matter because as is pointed out they called witnesses to show that the second channel had existed for a number of years and that the accused had been in the habit of irrigating their lands by means of it.

One version was that the channel ran beside the bund of the tank but did not cross the road, another was that it crossed the road, and another was that there was no channel to cut across the road but that water overflowed. The Courts below have found that this story of there having been a channel there before is entirely untrue and that entirely negatives any question of easement right in the accused persons. A case was referred to in which it was pointed out that certain tenants were prosecuting their landlord for interfering with the tenant's right to water for agricultural purposes. In that case, if the facts are looked into, the tank in question was admitted to belong to the landlord, the water was admittedly the landlord's and the landlord had admittedly the right to settle the fishery right; and the tenants were prosecuting the landlord, therefore, for doing something with the landlord's own water; and, in order to show that there was any right in them to complain, they had to establish that they had right of easement in what was *prima facie* the landlord's. In that case it turned out that the claim of the tenants to make good their right to take water raised difficult questions and this Court pointed out the these questions were of a character difficult to determine in a mere police Court. That is not this case. That decision is not to be read as wiping S. 430 out of the Penal Code altogether. This is a case where somebody who made a claim to an easement which is found to be false was taking water from somebody else's tank. In my judgment, the complainant has shown to have a perfectly good right to complain if he has shown that he has been openly in enjoyment of the water of that tank. In my opinion, in this case there is no force in the submission of these accused before the District Magistrate that the complainant had no right to take water from the tank. In

these circumstances, I think that the Rule must be discharged.

R.M./R.K. Rule discharged.

* 1930 Cr. Cases 379 (Calcutta)

GRAHAM AND LORT-WILLIAMS, JJ.
Supdt. and Remembrancer of Legal
Affairs, Bengal—Appellant.

v.

Bhajoo Majhi—Accused—Respondent.
Criminal Govt. Appeal No. 1 of 1929,
Decided on 2nd September 1929, against
order of Sess. Judge, Maldah.

(a) Criminal P. C., S. 274 (2)—Objection
as to jury raised for first time in appeal
against acquittal cannot be entertained.

An objection as to the constitution of the
jury raised for the first time at the hearing of
an appeal against acquittal cannot be enter-
tained. [P 379 C 2]

* (b) Evidence Act, S. 27—Out of state-
ment containing confession only such por-
tion as leads to discovery is admissible.

Per *Graham, J.*—S. 27 being a proviso to the
preceding sections must be strictly construed
and any relaxation must be sparingly allowed,
care being exercised to see that the purpose and
object of Ss. 25 and 26 are not rendered nug-
atory by any lax interpretation. [P 380 C 1]

A statement made by an accused while in
police custody which contains a confession of
guilt and also supplies information in conse-
quence of which a discovery is made is not ad-
missible in its entirety under S. 27, but only
so much of it is admissible as relates distinctly
or immediately to the discovery. [P 380 C 1]

Per *Lort-Williams, J.*—S. 27 is not a proviso
to either S. 24 or S. 25. It follows that some
restricted or limited meaning narrower than
the natural meaning must be attached to the
words in S. 27. [P 380 C 2]

The practice in England now is and doubt-
less was at the time when the Evidence Act
was passed to allow to be stated in evidence
that in consequence of information received
from the prisoner certain facts had been dis-
covered, thus to the extent of fixing the pri-
soner with knowledge. To this extent evi-
dence under S. 27 may be given. [P 382 C 1]

D. N. Bhattacharyya—for Appellant.
A. K. Dhar—for Respondent.

Graham, J.—This is an appeal by
the Superintendent and Remembrancer
of Legal Affairs, Bengal against the ver-
dict of the jury and order of acquittal
passed thereon by the Sessions Judge of
Malda on a charge under S. 302, I. P. C.

The case for the prosecution was that
the accused *Bhajoo Majhi* murdered
one *Baneswar* on the night of 25th
February 1928, the motive for the crime
being alleged to be a love intrigue be-
tween the accused and the deceased's
wife *Munia*.

The jury brought in a unanimous ver-
dict of not guilty and the learned Judge
accepting it acquitted the accused.

In support of the appeal against that
order two main grounds have been
urged, firstly, that the jury was not con-
stituted according to law, as there were
only seven jurors instead of nine as
required by S. 326 (1) read with the
proviso to S. 274 (2), Criminal P. C.
This ground has not as a matter of fact
been taken in the petition of appeal and
was only put forward at the 11th hour.
We do not think, therefore, that it ought
at so late a stage so be entertained.
It appears moreover that no objection
of any kind was raised at the trial, nor
has any allegation been made that the
accused were prejudiced in any way.

This ground accordingly fails and
must be disallowed. The second ground
urged on behalf of the appellant is that
the learned Sessions Judge erred in re-
jecting evidence as to certain statements
and conduct of the accused in pointing
out places at which discoveries of im-
portance were made as a consequence
of the information given by him. These
statements are referred to in para. 8 of
the petition of appeal, and the question
which arises in connexion with them is,
whether they should have been allowed
to go in evidence in their entirety, that
is to say, including the admissions said
to have been made by the accused that
he had killed the deceased and had
thrown his body into the river, or whe-
ther only so much of the information
given by the accused as related to the
actual discovery of the blood stains near
the tree and the articles of clothing in
the river was admissible.

The answer depends upon the con-
struction to be put on S. 27, Evidence
Act. That section is in the nature of a
proviso to the preceding S. 26. S. 26
reads as follows :

"No confession made by any person whilst
he is in the custody of a police officer, unless
it be made in the immediate presence of a
Magistrate, shall be proved as against such
person."

Section 27 goes on to say :

"Provided that, when any fact is deposed to
as discovered in consequence of information
received from a person accused of any offence,
in the custody of a police officer, so much of
such information, whether it amounts to a
confession or not, as relates distinctly to the
fact thereby discovered, may be proved."

The precise meaning to be attached to S. 27 is not altogether free from difficulty, and it is possible to interpret it as allowing even a confession of guilt to go in provided it has led to discovery. On the other hand it may be read as meaning no more than that the facts discovered may be proved excluding the actual confession. So far as this Court is concerned the more restricted interpretation has been given to the section, and it appears to be well settled that only so much of the information can be allowed to go in as relates distinctly or immediately to discovery. That seems to be the correct view of the section. The language bears that interpretation, and I do not think it can ever have been the intention of the legislature to admit statements containing an actual confession of the crime. A distinction is apparently drawn between that part of the information which leads directly to discovery of material facts, and that part of it which cannot in itself be held to lead to any discovery, the principle underlying the distinction being that discovery affords some guarantee of the truth of a portion of the statement, but not necessarily of the whole. If that portion of the statement or information which contains a confession of the commission of the crime, were admitted there would be a great temptation for the police to drag in statements of this nature. It has been held over and over again that the prohibition contained in Ss. 25 and 26, Evidence Act against false and fabricated confessions must be strictly applied. S. 27 being a proviso to the two preceding sections must be strictly construed and any relaxation must be sparingly allowed, care being exercised to see that the purpose and object of Ss. 25 and 26 and the safeguard provided in S. 27 are not rendered nugatory by any lax interpretation.

Section 27, it is true, says "whether it amounts to a confession or not" and it may be argued that these words favour the wider interpretation. But in using these words the legislature had, as I think, in mind the meaning of the word confession, viz. :

"an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed the crime,"

and it means, therefore, no more than this that so much of the information as

leads to discovery may be proved, even if the facts discovered lead to an inference of guilt. For statements of this kind obviously do suggest a very strong inference of guilt although taken by themselves they would fall short of proof.

In my judgment the Sessions Judge was right in adopting the restricted view of S. 27. This ground, therefore, also fails. The appeal is dismissed and the accused if in custody will be released.

Lort-Williams, J.—There is a school of legal thought in India which holds that in construing Acts of the Indian legislature, the natural meaning of the sections should be given effect to regardless of previous decisions, and especially of decisions other than those of Indian Courts. The Evidence Act in general and S. 27 in particular are examples which in my opinion, indicate the falsity of this point of view.

If their natural meaning were given to the words of S. 27 regardless of their parentage and history, I am satisfied that the result would be contrary to the intention of the legislature. It would be so wide as to render S. 26 practically useless. "Relates to" means ordinarily, "is connected with" or "has reference to" while "distinctly" means "clearly" or "definitely" or "positively" or "undeniably" or "undoubtedly" (see the Oxford Dictionary.) If, therefore, so much of the information as is clearly connected with, or has reference to, the fact thereby discovered, is admissible under S. 27, it is difficult to see where the line can be drawn. The presence of S. 26 to which S. 27 is only a proviso, shows that this conclusion cannot have been intended. I agree with Mahmood, J., in his most learned interesting judgment in *Queen Empress v. Babulal* (1), at p. 520 that S. 27 is not a proviso to either S. 24 or S. 25. It follows that some restricted or limited meaning, narrower than the natural meaning must be attached to these words.

The Evidence Act, as stated by Sir James Fitzjames Stephen in his introduction, is little more than an attempt to reduce the English Law of Evidence to the form of express propositions ar-

(1) [1884] 6 All. 509=(1884) A. W. N. 229 (F.B.).

ranged in their natural order with some modifications rendered necessary by the peculiar circumstances of India.

The English Law of Evidence consists mostly of negative rules declaring what is not evidence. It is almost wholly judge-made law, formed by degrees, to meet the exigencies of particular cases and comparatively of very modern date, to which have been added the glosses which successive textbook writers have put upon the decisions of the Judges. The Evidence Act, as stated by Woodroffe, was drawn up chiefly from Taylor on Evidence, and he based his treatise largely on the work of former authors. S. 27 was an attempt to apply the English Law of Evidence about information unduly obtained from a prisoner to information given by an accused while in the custody of a police officer and is merely a paraphrase of Taylor's, para. 902 (see the Edn. 11, p. 614). The words "relates distinctly", are taken directly from that source. And reference to the decision upon which his paragraph is based *R. v. Butcher-postea* (2) shows that the words were his own invention, or that of a previous author, and are not to be found in the decision itself.

It is necessary, therefore, to ascertain what meaning Taylor himself attached to these words. Para. 902 reads as follows:

"When, in consequence of information unduly obtained from the prisoner, the property stolen, or the instrument of the crime, or the body of the person murdered, or any other material fact, has been discovered, proof is admissible that such discovery was made conformably with the information so obtained. The prisoner's statement as to his knowledge of the place where the property or other article was to be found, being thus confirmed by the fact, is shown to be true, and not to have been fabricated in consequence of any inducement. It is, therefore, competent to prove that the prisoner stated that the thing would be found by searching a particular place, and that it was accordingly so found; but it would not, in such a case of a confession improperly obtained, be competent to inquire whether he confessed that he had concealed it there. So much of the confession as relates distinctly to the fact discovered by it may be given in evidence, as this part at least of the statement cannot have been false."

The crucial words are in the last line. Only that part of the statement which cannot have been false is admissible. For example that the prisoner stated

that the thing would be found by searching in a particular place and that it was accordingly so found but not that he confessed that he concealed it there.

The difficulty of applying these English rules about information unduly obtained, and their unsuitability, to the Indian situation where information is given by an accused while in the custody of a police officer is manifest. Under the English rule it is assumed that the prisoner has confessed, but that his confession must be excluded because being obtained improperly, it may be false. His admission, however, of knowledge about the whereabouts of the thing cannot be false, because it is discovered subsequently in the place indicated by him. But the position in India is that confessions to or while in the custody of a police officer are excluded because if alleged to have been made to the police officer, they may have been invented by him and if made to others while in the custody of a police officer, they may have been induced by him and may be false. In neither case is the discovery of the thing any guarantee that the accused had knowledge of its whereabouts.

Phipson (Edn. 6, p. 270), states that facts disclosed in consequence of inadmissible confessions are receivable if relevant and where property has been discovered or delivered up in this way so much of the confession as "strictly relates" thereto will be admissible, for these portions at least cannot be untrue, but independent statements not qualifying or explaining the fact though made at the same time will be rejected. It will be observed that his statement of the rule is much narrower than that of Taylor, being restricted to property which has been discovered or delivered up, nor does he use Taylor's word "distinctly" but the word "strictly" which is the word used in the reporter's note of the case of *R. v. Butcher* (2) tried at Maidstone Summer Assizes in 1798, which is the main authority relied upon by both Taylor and Phipson.

Phipson moreover states that the earlier rule admitted the facts but excluded the accompanying statements *R. v. Warwickshall* (3), and the reporter in the note above referred to,

(2) [1798] 1 Leach. C. C. 285.

(3) [1783] 1 Leach. 268.

goes on to quote Mr. East 2, C. L. 658, as saying:

"But it seems that this opinion namely the opinion expressed in the note to *R. v. Butcher* (2) must be taken with some grains of allowance, for even in such case the most that is proper to be left with the jury is the fact of the witness having been directed by the prisoner where to find the goods and his having found them accordingly, but not the acknowledgment of the prisoner having stolen or put them there which is to be collected or not from all circumstances of the case and this is now the more common practice."

And Taylor in a note to para. 902 says that Ld. Eldon laid down the rule somewhat more strictly saying in *Harvey's* case (4), that where the knowledge of any fact was obtained from a prisoner, under such a promise as excluded the confession from being given in evidence, he should direct an acquittal, unless the fact proved, would itself have been sufficient to warrant a conviction without any confession leading to it.

Whether or not the rule laid down by the Judges at one period was as wide as is suggested in Leach's note upon *R. v. Butcher* seems to me very doubtful and the evidence on this point is extremely meager, see especially: *R. v. Griffen* (5), where the Judges were divided *R. v. Jones* (6), *R. v. Mosey* (7). I am satisfied from personal experience that it has not been the practice so to apply it in England during the last quarter of a century, and I do not believe it to be the law in England today. In my opinion Ld. Eldon's view is the correct one. However, I have no doubt that the practice in England now is, and doubtless was at the time when the Evidence Act, was passed, to allow to be stated in evidence that in consequence of information received from the prisoner, certain facts had been discovered, thus to that extent fixing the prisoner with knowledge.

And to this extent, I am satisfied that such evidence may be given under S. 27.

This was the view taken by the learned Sessions Judge, and I am of opinion that he was right in excluding the remaining part of the statement of the accused, which the Crown has urged should have been admitted, apart

altogether from the wider question which I have been discussing, I do not consider that the facts discovered in this case were discovered in consequence of the prisoner's alleged statement that he felled the deceased, and threw his body into the river, but in consequence of the prisoner taking the witnesses to the spots referred to in the evidence and pointing out to them the marks in the grass and the clothing of the dead man. On the second point taken by the prosecution, I do not think that this Court ought to listen to any argument by the Crown against an acquittal, which is based on a technical objection about the constitution of the jury. Especially in view of the fact that no objection was raised at the trial, and that this point was not even included among the grounds of appeal but was raised for the first time at the hearing.

For these reasons, I am of opinion that this appeal should be dismissed.

R.M./R.K. *Appeal dismissed.*

1930 Cr. Cases 382

(Calcutta)

MUKERJI, J.

Dhanoo and others—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 400 of 1929, Decided on 15th May 1929, against order of Sess. Judge, Tipperah, D/- 21st February 1929.

Criminal P. C., S. 107—Several persons bound over to keep peace—Individual finding showing reason for each person's liability is necessary.

Where in a case under S. 107 several persons are bound over to keep the peace there must be individual finding showing how each person against whom order is made deserves to be so treated. The mere fact that the persons were followers of one party or other will not justify making an order in lump against the whole body of men. [P 383 C 1]

Surajit Chandra Lahiri for *Nurul Huq*—for Petitioners.

Order.—The defect that is noticeable in the judgment of the learned Sessions Judge is that he has not dealt with the evidence which would justify the order as against each of the 14 accused persons who were the appellants before him, separately and individually. This defect would not have been of much materiality if the inquiring Magistrate

(4) [1800] 2 East. 658.

(5) [1809] R. & R. 151.

(6) [1809] R. & R. 152.

(7) [1784] 1 Leach. 265.

had done so in passing the order that he did. That officer, it appears, considered it sufficient to find that all the accused belong to a party known as "Rahimuddin's party" or "Abani Babu's party" Rahimuddin being the immediate leader, Abani Babu the guiding or controlling authority and the remaining accused persons being Abani Babu's tenants and adherents. Considerations such as these are not sufficient for making an order in a lump against a body of men. Facts and figures have to be given showing how each person, against whom the order is to be made, deserves to be so treated.

The Rule is made absolute, and the judgment of the learned Sessions Judge being set aside it is ordered that the petitioner's appeal be reheard by the Additional Sessions Judge.

V.B./R.K.

Rule made absolute.

1930 Cr. Cases 383

(Calcutta)

RANKIN, C. J. AND PATTERSON, J.

Peary Mohan Saha—Accused—Petitioner.

v.

Harendra Nath Roy—Complainant—Opposite Party.

Criminal Revn. No. 832 of 1929, Decided on 5th September 1929, from an order of Dy. Magistrate Naraingung, D/- 30th April 1929.

Bengal Food Adulteration Act (1919)
S. 6 (1)—Both owner and servant selling come under S. 6 (1).

Section 6 (1) applies, not only to master or owner of the adulterated article sold, but also the servant or agent who sells such article : *Brown v. Foot*, (1892) 66 L. J. 649 and *Hotchin v. Hindmarsh*, (1899) 2 Q. B. 181, *Inf.*

[P 384 C 2]

Suresh Chandra Taluqdar and Syama Prosanna Deb—for Petitioner.

Birbhusari Dutta—for Opposite Party.

Rankin, C. J.—The accused in this case has been convicted of an offence under Cl. (1), S. 6, Bengal Food Adulteration Act 1919. The offence charged was committed on 25th January 1929 and consisted in the accused having sold to a Health Officer a quantity of mustard oil which was not derived exclusively from mustard seed. The accused has been fined Rs. 150 and ordered to undergo two months' simple imprisonment in default of payment.

This rule was issued on the grounds that Cl. 1, S. 6, Bengal Food Adultera-

tion Act does not apply to the facts of the case, and that S. 6, makes the master or owner of the article sold guilty of an offence but not the servant.

* It is clear that the sale was made by the accused in his capacity of servant of a certain firm which used the name of one Josada Lal Roy Chowdhury. Josada Lal is dead, but there is no question that the accused sold the mustard oil as a servant of the proprietors of the said firm and that he is a servant and not a partner therein.

The Act in question applies to the province of Bengal outside Calcutta and it is in the power of the local Government to extend any of the sections of the Act to any local area outside Calcutta. The prosecution in this case was sanctioned by the Chairman of the Municipality of Naraingunge. So far as Calcutta itself is concerned, the provisions against the adulteration of food were contained in S. 495, Municipal Act of 1899, and in the Calcutta Municipal Act of 1923, S. 407 contains similar provisions to those which we are now concerned with in the Act of 1919.

The contention of the accused is that the opening words of the first clause of S. 6 of the Act of 1919 are designed to constitute the sale of mustard oil in contravention of the provisions of the section, an offence on the part of the master or principal on whose behalf the sale is made, but that the servant or other person selling on behalf of the principal is not guilty of an offence by reason of his act. He contends that this section is not to be construed in the light of the interpretation put by English decisions upon similar, but somewhat different, words in S. 6 of the sale of Food and Drugs Act 1875 (38 and 39 Vic. Cap. 63), but is to be arrived at by the Court upon a consideration of the terms of the Bengal Act by themselves. The material words are as follows :

"No person shall directly or indirectly himself or by any other person on his behalf sell, expose for sale or manufacture or store for sale any of the following articles etc."

The accused's contention is that the phrase "himself or by any other person on his behalf" points to a principal who may either sell at his own hand and on his own account or by some other person on his behalf. This, it is said is en-

forced by the use of the word "vendor" in Cl. (3) of the section.

On the other hand, it is contended for the prosecution that the words "directly or indirectly, himself or by any other person on his behalf" cannot and are not intended to cut down the effect of the words "no person shall sell;" that the acts which are made offences by the section are physical acts; that the question of the party who is responsible as a matter of contract to the purchaser is irrelevant; that the servant in such a case as the present is a person who does the prohibited act himself, and that the effect of the words in a case like the present is to make both the servant and the master liable as offenders against the section. In other words the contention of the prosecution is that the words to which I have referred elaborate and emphasize the prohibition against certain classes of acts being done at all, and declare explicitly the meaning which in *Brown v. Foot* (1892) 66 L. T. 649; 17 Cox. C. C. and *Hotchin v. Hindmarsh* (1899) 2 Q. B. 181 was put upon the words "no person shall sell" in S. 6 of the sale of Food and Drugs Act of 1875.

No doubt only a master or principal is a person who has a choice of selling himself or by any other person on his behalf, and the contention of the defence, as the Magistrate has in this case observed, at first sight looks like a sound view. It is also true that in *Hotchin's* case T. W. Chitty arguing for the prosecution said:

"possibly if the Statute had used the term 'vendor' that might have been construed strictly as meaning the person who has the property in the article."

Ordinarily one would not refer to a person as "himself selling" except in a case in which selling by a servant or agent was contemplated as a thing to be negatived.

The Magistrate has argued, on general principles, that the legislature to effect its purpose must have intended by the words now under consideration to make the act of the servant an offence, because the provisions of the law as to abatement would be insufficient to enable the purpose of the prevention of adulteration to be effectively attained. This line of reasoning is certainly precarious. No doubt a desire to prevent the

sale of adulterated articles may be attributed to the legislature, but it is a question of the correct meaning of the words used by the legislature, whether it has thought fit to bring a servant within their scope. It is by no means inconceivable that an Indian legislature might consider it unfair or inadvisable to penalize the servant, and it is no part of the duty of the Court to go beyond the immediate meaning of the words in question.

In my opinion the real question for determination is whether or not there is sufficient in the words of the section to show that it is directed against the physical acts of selling, exposing for sale etc. If so, then, as Coleridge, C. J. said in *Hotchin's* case:

"A person who takes the article in his hand and performs the physical act of transferring the adulterated thing to the purchaser is a person who sells within this section."

As used in an Indian statute, I do not think that the word "vendor" throws any light upon this question, as it is common to speak of petty traders or hawkers as vendors.

The present case is one in which the Health Officer exercised his powers under the Cl. 3, S. 10, which says that

"any person in possession or exposing the same for sale shall be bound to sell such quantity."

Clause. 1, S. 11 speaks of "the seller or agent selling the article." It appears to me, therefore, that the agent or servant is within the prohibition of the words "no person shall sell." The legislature is not necessarily contemplating a person who has a choice to sell at his own hand or by any other person on his behalf. It is concerned to make the act of selling an act which is imputable both to the person with whose hand it is committed and to any other person, if such there be, on whose behalf it is committed. Precisely similar language will be found in the Sale of Tea Act, 1922 (12-13 Geo. V. C. 29) and that it is intended to hit the servant is shown clearly by Cl. 6 of the schedule thereto. The accused in this case is a person who himself sold and as such was, in my opinion, rightly convicted.

The rule must, therefore, be discharged.

Patterson, J.—I agree.

V.S./R.K.

Rule discharged.

1930 Cr. Cases 385

(Lahore)

AGHA HAIDAR, J.

Ghulam Hussain — Accused — Appellant.

v.

Emperor — Opposite Party.

Criminal Appeal No. 1201 of 1929, Decided on 27 January 1930, from order of First Class Magistrate, Montgomery, D/- 30th November 1929.

(a) Evidence Act, S. 118 — Child of tender years unable to give relevant information about offence under S 376, I P. C., should not be examined — Criminal trial — Penal Code S. 376.

Where the Court is of opinion that the child upon whom an offence under S. 376, I. P. C. is committed is unable to give relevant information in the matter by reason of tender years and consequent immaturity of judgment, it should not examine the child at all: 38 All. 40, *Foll. 41 Cal. 406, not foll.* [P 385 C 2]

(b) Evidence Act, S. 6 — Unless offence under S 376, I. P. C. and statement by girl of occurrence to her father form *res gestae*, much value cannot be attached to the statement even if it be admissible.

In absence of definite and reliable evidence that the outrage upon a girl in an offence under S. 376, I. P. C. and her statement of the occurrence to her father constitute together *res gestae* much value cannot be attached to the statement even if it is held to be admissible. [P 386 C 1]

Mohammad Munir — for Appellant.

Chandra Datta for Govt. Advocate — for the Crown.

Judgment. — The appellant, Ghulam Hussain, has been convicted of an offence under S. 376, I. P. C. by a Magistrate of the First Class exercising powers under S. 30, Criminal P. C. and sentenced to a term of seven years' rigorous imprisonment, including three months' solitary confinement. He has appealed to this Court through his counsel Mr. Mohammad Munir.

The story for the prosecution is that, on 17th May 1929 at about noon Mt. Nabbo (P. W. 1), daughter of Muhammad Khand Pathan, (P. W. 2), aged about six years, was playing not very far from the Veterinary Hospital at Dipalpur when she was lifted and carried away by the appellant, a young man of 18–20 years, to some neighbouring bushes where he raped her. The accused was never medically examined. Three days after the occurrence Mt. Nabbo was examined by a doctor, and there can be no doubt that the child had been the victim of a diabolical

outrage upon her person. The question for determination is whether the appellant was the real culprit

There is no eye-witness to the actual offence. Haq Nawaz (P. W. 5) who says that he saw the child with the appellant, and that her private parts were at the time bleeding, is a disreputable witness and has been rightly disbelieved by the trial Magistrate. There remains the statement of Mt. Nabbo herself. The trial Magistrate before examining Mt. Nabbo, did not record any proceedings to the effect that he had satisfied himself that the child was sufficiently intellectually developed so as to understand the questions put to her and convey the relevant information to the Court. If the Court was of opinion that, by reason of tender years and consequent immaturity of judgment, the child was unable to do this, it ought not to have examined it at all, vide *Emperor v. Dhani Ram* (1). A similar view was expressed by me in *Criminal Appeal 648 of 1926* (decided on 8th October 1926) with the concurrence of the learned Chief Justice. A somewhat different view was taken in a case reported as *Nafar Sheikh v. Emperor* (2), but with respect to the learned Judges I would prefer to follow the *Allahabad* case. In the absence of any such proceedings as were indicated in the *Allahabad* case the value of the statement made before the Court by Mt. Nabbo, such as it is, is considerably reduced. In the direct question put to her she no doubt suggests that the appellant forcibly took her towards the canal minor and there raped her, but in cross-examination she stated she told her father that the appellant was not the man when he was shown to her at the thana. In her re-examination she said that she was not asked at the thana as to who had raped her. She was examined as defence witness 4 and deposed that she did not identify the accused at the thana, and that she told the Munshi that he was not the man. And in the same breath she said that she told him (meaning thereby Munshi) that the accused was the man who had raped

(1) [1916] 38 All. 40 = 31 I. C. 1005 = 18 A. L. J. 1072.

(2) [1914] 41 Cal. 406 = 18 C. L. J. 582 = 20 I. C. 741 = 18 C. W. N. 147.

her. The trial Magistrate realized these discrepancies in the statements of the girl, but tried to explain them away by remarking that the questions that were put to the girl were ambiguous and not at all clear. If these questions were misleading and ambiguous it was the duty of the Magistrate to record them while the girl was giving her evidence. There was nothing to prevent him from putting a few questions to the girl in order to get at the truth. He did not do anything of the kind. Moreover, when she was examined as a defence witness, she was not cross-examined by the Crown at all and her divergent statements remain unexplained.

The evidence of the two lads, Jawala Ram, (P. W. 3) and Ram Lal (P. W. 4), is not of much value. They simply say that at about noon they saw the accused carrying the girl. This, I need hardly say, is wholly insufficient to prove the guilt of the appellant.

I may also mention that the first information report was not made till 6.30 p. m. although the scene of the occurrence is only about 500 karams from the thana. The father of the girl, Muhammad Khan (P. W. 2), had been examined on behalf of the prosecution. He had not seen the occurrence himself and was only informed by his son, Nawab, that Mt. Nabbo had been injured. Nawab, who at peshi time went to the well where Mohammad Khan was working, informed him that Ghulam Hussain accused had taken away Mt. Nabbo while she was playing. Her further said that on enquiry the girl told him that she was taken away and raped by "Ghulam" and not Ghulam Hussain accused. It does not appear what was the interval of time between the outrage upon the child and the statement which she is alleged to have made to her father. In the absence of any definite and reliable evidence that the outrage and the statement constituted together *res gestae* much value cannot be attached to this statement even if it is held to be admissible. We do not know what other persons had had conversations with the girl in the meantime. I gather that the mother of the girl is alive and I attach very great importance to the fact that she was not produced by the pro-

secution as a witness. There cannot be any doubt whatsoever that the girl, when taken to her parent's house, immediately after the outrage, must have made a clean breast of the whole affair to her mother and her evidence as to what the child told her would have been of very considerable value. Therefore, the case against the appellant remains doubtful, and I am not satisfied in my mind, having regard to the evidence on the record, that he is the real culprit. The result is very unfortunate, for a dastardly and brutal crime has undoubtedly been committed upon the person of an innocent child and the perpetrator of the crime has not been brought to book. As already stated, the case against the accused is not free from doubt and I, therefore give him the benefit of doubt, set aside his conviction and sentence and order that he be set at liberty.

The police investigation was clearly mismanaged and the prosecution does not seem to have been properly conducted, but this does not concern me.

R.M./R.K.

Conviction set aside.

* 1930 Cr. Cases 386

(Lahore)

BROADWAY AND TAPP, JJ. :

Emperor

v.

Sada Singh and others—Convicts-Respondents.

Criminal Appeal No. 1012 of 1929, Decided on 6th January 1930, against order of Addl. Sess. Judge, Lahore, D/- 14th August 1929.

* (a) Penal Code, Ss. 114, 109 and 302—Sentence to abettors different from that to principals is illegal.

Four accused were sent up for trial, under S. 302. Two of them were convicted under S. 302, and were sentenced to transportation for life. The other two were found guilty of abetment and were found to be present when offence was committed and were sentenced to imprisonment for seven years.

Held: that the sentence of seven years in respect of two of the accused was illegal. The two accused were liable to receive either the capital sentence or one of transportation for life. [P 397 C 2]

(b) Criminal P. C., S. 439 (1)—Whether discretionary power can be exercised when sentence is illegal—*Quaere*.

It is doubtful whether the discretionary power under S. 439 (1) can be exercised in a case in which the sentence is manifestly illegal. [P 398 C 1]

(c) Criminal P. C., S. 439 (4)—Accused charged under S. 302, convicted under

S. 302/109, Penal Code—His conviction amounts to acquittal, under S. 302—Criminal-P. C., S. 417.

Where an accused being charged under S. 302 is convicted under S. 302/109 his conviction under S. 302/109 can be regarded as an acquittal on the charge under S. 302 and an appeal from such acquittal is competent: *A. I. R. 1928 P. C. 254, Rel. on.* [P 388 C 1]

(d) Penal Code, S. 34—Several persons accused of murder and proved to be present at time of commission of offence are guilty under S. 34.

Where four persons are accused of having committed murder and have been proved to have been present at the time of the commission of the offence, all of them are guilty. Even if two of them are alleged to have taken no active part in the affair, yet they are constructively liable on the application of S. 34: *A. I. R. 1925 P. C. 1, Rel. on.* [P 390 C 1]

Abdul Rashid - for the Crown.

Dr. Nand Lal - for Respondents.

Tapp, J. - The four appellants Sohan Singh, Nawab, Sada Singh and Dhara Singh, Jats of Kot Rattan Singh, were sent up for trial under S. 302, I. P. C., for having caused the death of Teja Singh on the night of 19th April at about 10 p. m. Sada Singh and Dhara Singh are brothers and Sohan Singh is the son of Sada Singh while Nawab is their tenant and the following pedigree-table shows the relationship of the first three persons with the deceased and Kundan Singh (P.W. 3), one of the three eye-witnesses:

Budh Singh.

Rattan Singh.

Jowala Singh.

Fauja Singh.

Teja Singh
(deceased.)

Kundan Singh
P.W. 3.

Sada Singh
(accused.)

Dhara Singh
(accused.)

Hazara Singh

Sohan Singh
(accused.)

Three of the assessors were of opinion that Sohan Singh and Nawab were guilty of a murder while Sada Singh and Dhara Singh were innocent and the learned Additional Sessions Judge partly agreeing with them convicted Sohan Singh and Nawab under S. 302, I. P. C. and for certain reasons sentenced each to transportation for life. Sada Singh and Dhara Singh were found guilty of abetment of murder under S. 302/109,

I. P. C., and each sentenced to seven years' rigorous imprisonment. According to the evidence and the finding of the learned Additional Sessions Judge both Sada Singh and Dhara Singh were present when the offence was committed and in the circumstances S. 114 would also apply, but the learned Additional Sessions Judge appears to have completely overlooked the provisions of both Ss. 109 and 114 in the punishment he awarded. The sentence is clearly illegal as in the absence of any express provision, and there is none in the case of murder S. 109 provides the same punishment for an abettor as for a principal and S. 114 requires that when an abettor is present at the commission of the offence abetted by him he is to be deemed a principal. The punishment provided for murder is either death or transportation for life. One or other of these two sentences must be imposed and while this is discretionary there is no other alternative. It was not, therefore, open to the learned Additional Sessions Judge to impose a sentence of seven years' rigorous imprisonment in the case of Sada Singh and Dhara Singh who as abettors pure and simple or as principals in the second degree (as found) were liable to receive either the capital sentence or one of transportation for life.

The Local Government through the Government Advocate has preferred an appeal against the acquittal of Sada Singh and Dhara Singh on the charge of murder and has prayed that in any event the illegal sentence of seven years should be enhanced and the legal sentence of death or transportation for life inflicted. There is also a prayer for the enhancement of the sentence of transportation for life in the case of Sohan Singh and Nawab to one of death. The petition is clearly a combination of an appeal and a petition for revision and in the circumstances any discussion of the contention advanced by Dr. Nand Lal, the learned counsel for the convicted appellants, that there has been no acquittal in the case of Sada Singh and Dhara Singh would be of purely academic interest.

If there has been no acquittal then under sub S. (1), S. 439, Criminal P. C. we have full powers to enhance the sentence as the restriction imposed by sub-S. (4) would not come into opera-

tion. The exercise of this power is certainly discretionary but to me it seems doubtful whether in the present case where the sentence is manifestly illegal, any such discretion could be exercised. The various authorities cited by Dr. Nand Lal have no bearing on this particular aspect of the present case. I am, however, of opinion that the course adopted by the local Government in treating the conviction of Sada Singh and Dhara Singh under S. 302, 109, as an acquittal on the charge of murder under S. 302, I. P. C., is in accordance with the decision of their Lordships of the Privy Council in *Kisan Singh v. Emperor* (1), in which it was held that a conviction under S. 304, I. P. C., was to be regarded as an acquittal on the charge of murder which was the indictment in that particular case. I would hold, therefore, that the appeal by the Local Government is competent and has been rightly preferred.

Coming now to the facts, the case for the prosecution may be stated as follows: There was some ill-feeling between the deceased and his three collaterals (appellants) on account of the latter being in possession of a larger share of the shamilat land of the village of which their common ancestor Budh Singh appears to have been the sole proprietor.

Some 15 or 16 days before the occurrence Sada Singh had also appropriated Teja Singh's turn of water and according to Kundan Singh (P.W. 3) there were daily quarrels between them. On the night in question the deceased and his tenant Janu (P.W. 2) while on their way to their threshing floor stayed to watch an acrobatic performance by some Natts (acrobats). The appellants Sohan Singh and Nawab and Ghulam Muhammad (P.W. 4) were also there and the former invited the deceased to sit beside him on a charpoy. After a while the appellants Sohan Singh and Nawab left and later the deceased and Janu went on to their threshing floor. On the way they were accosted by all the four appellants who abused the deceased. Sohan Singh and Sada Singh were armed with chhavis and Nawab and Dhara Singh with dangs. Sohan Singh dealt the deceased a blow on the hand with his chhavi while Sada Singh

struck him on the head. Dhara Singh and Nawab used their danges.

The cries of the deceased and Janu were heard by Kundan Singh and Ghulam Muhammad who both ran in that direction and saw the four appellants assailing the deceased. On the approach of Kundan Singh and Ghulam Muhammad the appellants ran away.

Teja Singh was placed on a charpoy and taken to the Chunian police station four miles distant where he himself made the first information report at 2 a. m. on 20th. In this he mentions the cause of ill-feelings and the facts as set out above.

Teja Singh was then taken to the dispensary and the Assistant Surgeon considering his condition to be serious suggested that his statement should be recorded. This was done at 4 a. m. by the Naib Tahsildar of Chunian (P.W. 4). This is practically a repetition of the first information report. Despite medical treatment Teja Singh died at 5 p. m. on 20th and the autopsy disclosed an incised wound on the head, a second between the ring and middle finger of the right hand cutting the palm, a third on the left hand cutting all the metacarpal bones except that of the thumb, a fourth on the right leg cutting a few muscles, tendons and blood vessels and a fifth on the right thigh skin deep. The right sixth rib was fractured and there was a contusion on the right arm. Death was due to shock and haemorrhage, principally the latter.

During the course of the investigation two chhavi blades were produced by Wallu (P.W. 8), a blacksmith of Majra at the instance of Sohan Singh and Nawab who had made them over the Wallu. One of these was found to be stained with human blood. A dang which had been left with Chiragh Din (P.W. 10) of majra by Nawab at the same time was also recovered at the instance of these two appellants. Sohan Singh and Nawab were not in the village when the police arrived and when produced before the Sub-Inspector he found that the chadar of Sohan Singh and the kurta of Nawab were blood-stained. Their other garments appeared to be new and the investigation showed that they had disposed of their blood stained clothes at Okara by giving them to some beggars. A blood-stained chadar given to him by

(1) A. I. R. (1928) P. C. 254=50 All. 722=55 I.A. 390.

Nawab was recovered from a beggar named Abdulla (P. W. 18) and a blood-stained kurta given to him by Sohan Singh from another beggar named Bahadur (P. W. 19). All the above four garments were found to be stained with human blood. It is also in evidence that when Sohan Singh and Nawab made over the chhavi blades to Wallu at Majra, they each borrowed a pair of shoes from Ida and Maulu of that village (P. Ws. 12 and 13) before going on to Okara. One shoe identified as belonging to Sohan Singh was found at the spot.

The appellants denied all the allegations made against them and attributed their implication to one Raisham Singh of Harchoke, though in his statement at the trial Nawab named one Sohan Singh, a cousin of the deceased, as being at the bottom of the case.

Raisham Singh it is stated was inimical to Sikh appellants on account of a dispute with Sada Singh over the lambardari and further it was alleged that the son of the deceased was betrothed to a relative of Raisham Singh.

Dr. Nand Lal contended that Raisham Singh prompted and influenced the deceased into naming the appellants as his assailants because Raisham Singh accompanied the deceased to the thana and was present when the report was made and the dying declaration recorded.

Beyond this, there is nothing to support this argument and in my opinion it is quite insufficient to show that Raisham Singh is responsible for the appellants being falsely implicated.

Sohan Singh and Dhara Singh further pleaded alibis, and Sada Singh illness.

In support of Sada Singh's plea of illness two medical practitioners of Chumian and Kot Radha Kishen deposed to having treated Sada Singh for intestinal colic and given him an enema on 9th April. They did not attend him again and their opinion as to whether Sada Singh could have been well again in 2, 3, 10 or 15 days is not of any value. It seems obvious that if Sada Singh did not require any further medical attention, the treatment was efficacious and made him quite fit and well again. In any case, it does not follow that because a man was suffering from

intestinal colic on the 9th, he would still be ill on the 19th. The evidence of Dhara Singh (D. W. 3), a brother-in-law of Sada Singh as to the latter only being able to move about with the aid of a stick on the night of the occurrence and as to Sohan Singh being away at Handal at the time is of no value and his evidence in my opinion was rightly disbelieved by the learned Additional Sessions Judge.

The evidence as to the absence of Dhara Singh and Nawab is also worthless and does not prove anything in their favour.

In connexion with the first information report and the dying declaration of the deceased Dr. Nand Lal pointed out a few minor omissions which in my opinion are perfectly immaterial.

He characterized the direct evidence of Jamu, Kundan Singh and Ghulam Muhammad as interested because the first was a tenant of the deceased, the second was his nephew and also his stepson and the third had been a tenant. These in my judgment are wholly inadequate reasons for rejecting the testimony of these witnesses whose evidence I consider has been rightly believed by the learned Additional Sessions Judge fully supporting as it does the first information report and the dying declaration of the deceased.

Reference was made to a panchayat having been held and as to this body having found that Sada Singh and Dhara Singh were not concerned in the affair because Kundan Singh and Ghulam Muhammad are alleged to have so said before the panchayat.

Apart from evidence of this nature being inadmissible it is obviously valueless and cannot possibly detract from the clear and convincing prosecution evidence both direct and circumstantial, and which in my opinion undoubtedly establishes the guilt of the appellants. In view of such evidence the adequacy or inadequacy of motive is of minor importance. As a rule there is no love lost between collaterals and it needs but little to change this into open hostility and ill-feeling which generally finds expression in occurrences like that in the present case.

I am also of opinion that the appellants Sada Singh and Dhara Singh are guilty as principals and have

been wrongly held to have been abettors. They were certainly present and according to the evidence Sada Singh was responsible for the wound on the head of the deceased. Even if, as the learned Additional Sessions Judge thinks (though wrongly in my view) that these appellants took no active part in the affair, they would be constructively liable on an application of S. 34, I. P. C., as this provision of law has been interpreted by their Lordships of the Privy Council in *Barendra Kumar v. Emperor* (2).

The question of sentence presents some little difficulty, but after giving the matter my careful consideration I do not think a capital sentence is called for in the case of the respondents, Sohan Singh and Nawab. I am not prepared to agree with the learned Additional Government Advocate that the assault was a premeditated and planned affair. It was I think a chance encounter and there was no deliberate intention to kill the deceased. If there had been, this could very easily have been achieved seeing that two of the assailants were with armed chhavis and yet no serious injuries were inflicted on any vital part.

The incised wound on the left hand though serious cannot I think be regarded as individually fatal.

For the above reasons I would dismiss the appeal and affirm the convictions and sentences of Sohan Singh and Nawab. I would accept the appeal preferred by the Local Government against the acquittal of Sada Singh and Dhara Singh on the charge of murder under S. 302, I. P. C., convict them of this offence and enhance the sentence of seven years' rigorous imprisonment to one of transportation for life in the case of each of these two appellants.

R.M./R.K. 'Order accordingly.'

(2) A. I. R. 1925 P. C. 1=52 Cal. 197=52
I. A. 40 (P.C.).

1930 Cr. Cases 390 (Lahore)

SHADI LAL, C. J.

Zarin Khan and another—Accused
—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1257 of 1929, Decided on 22nd November 1929.

Opium Act, S. 9 (c)—Where two persons are in joint possession of opium less than two of them could hold separately neither is guilty.

If it is proved that a person is in possession on behalf of others as also of himself of opium the total quantity of which is less than all the joint owners are entitled to possess he would not be guilty of any offence.

Two persons were found in possession of 9 mashas of chandu, the amount allowed by law to each person being 6 mashas i. e. they were in joint possession of less than the two of them could have held separately.

Held: that neither of them could be convicted of an offence under the Opium Act: 84 P. R. 1905 Cr. and 81 P. R. 1902 Cr. Rel on; 10 P. R. 1901 Cr., Ref.; 13 P. R. 1897 Cr., Dist.

[P 392 C 1]

Mahomed Amin—for Petitioners.

Report.—On information received that the house occupied by Zarin Khan and Allah Bakhsh was used as a common gaming house and that gambling was going on there, the police raided the house to find that no gambling was going on as anticipated, but, on the other hand, they found a number of articles and apparatus showing that chandu smoking was going on and two phials containing chandu were found therein. The evidence shows that Allah Bakhsh was caught inside the house while Zarin Khan managed to run away and make good his escape when the police entered the house. The chandu found in the two bottles was put into one and on being weighed, it was found that the total weight was 9 mashas. The two accused Zarin Khan and Allah Bakhsh, were accordingly challaned under S. 9(c), Opium Act for being in possession of more chandu than could be legally possessed by them, the total amount of chandu that can be legally possessed by one person being half a tola, i. e., 6 mashas. The lower Court found that the two accused were in joint possession of 9 mashas of chandu found in the house and it accordingly convicted both the accused and sentenced them to a fine of Rs. 50 each or two month's rigorous imprisonment in default.

The two accused have come up in revision to this Court urging, firstly that the prosecution have failed to establish that the total amount of chandu found was 9 mashas as alleged and further that both the accused were present at the time of the raid, it being urged that Zarin Khan was away at Muzaffargarh at the time. The joint possession of chandu in question was denied.

So far as the merits of the case go I am of opinion that the facts as found are correct. The prosecution story has been deposed to by Lala Amar Nath, Sub-Inspector of Police, Mr. Warburton, Inspector of Police and Allah Ditta, P. W., and I can see no reason to doubt the truth of the statements made by them. I hold it, therefore, as established that the two accused were found in joint possession of the 9 mashas of chandu as alleged by the prosecution. Learned counsel for the appellant has urged that even taking the facts as alleged by the prosecution to be true, still, as each of the appellants was entitled to hold 6 mashas the joint possession by them of 9 mashas was not an offence. As against this contention I have been referred to the notes on p. 25 of the Punjab Excise Manual, Vol. 1. Herein it is stated, (about the middle of the page) that when several persons are in joint possession of any quantity of an excisable article, each is regarded in possession of the whole. This view was taken by Bullock, J., in an unpublished ruling noted in *Queen-Empress v. Salaru* (1) but was not followed in that judgment or in *Queen-Empress v. Wazir Singh* (2) or in any later judgment. The quotation *Queen-Empress v. Wazir Singh* (2) appears to be a mistake for *Crown v. Sadiq* (3). A reference to *Queen-Empress v. Salaru* (1) shows that an accused was charged with having more than one tola of chandu in his possession in contravention of the rules under the Opium Act. He did not deny that 2½ tolas were found in his house but his defence was that there were four inmates of the house and that they all smoked chandu. The accused had been acquitted by the Sessions Judge on appeal on the finding that there were other inmates of the house who smoked chandu and that, therefore, the amount in the possession of each was less than one tola allowed by law. On appeal by Crown against this acquittal it was held that the accused had not proved that as a matter of fact, a certain number of persons living in one house had joined in the purchase of the drug and that it was actually held by one for the use of all. Further it was held that as it is the posses-

sion of more than one tola of intoxicating drugs that constitutes the offence and not the amount that the person in possession may himself own, accused had been rightly convicted on the ground that he was in possession of 2½ tolas although there may have been three persons each using a fourth of it, and accused's own share may have been only a fourth. As regards the unpublished judgment of Bullock, J., referred to in this judgment the learned Chief Judge stated that he was somewhat doubtful if the proposition can be stated in such wide terms as set out in the judgment of Bullock, J. He definitely stated that he preferred to reserve his opinion as to the effect of a joint possession until such possession was in fact proved. We thus see that the proposition set out in the Punjab Excise Manual on p. 25 has not been subscribed to in the judgment quoted therein, i. e., *Queen-Empress v. Salaru* (1).

Furthermore, the present case is distinguishable from the ruling cited. In that case one person was found in possession of more than the quantity of opium that is permissible by law to be held by any one person. He alleged that he held it for himself as also for others and that his share was less than the quantity allowed by law. It was found that this allegation had not been established. In the present instance two persons have been held to be jointly in possession of 9 mashas of chandu, the amount allowed by law to each person being 6 mashas. Thus they were jointly in possession of less than the two of them could have held separately. Furthermore, it is in evidence that the chandu found was in two separate bottles and that the total weight of the contents of both bottles was 9 mashas. Since the accused have been held to have been jointly in possession, the presumption is that each held his own share in separate bottle, but it has not been shown what the weight of the contents of each bottle was. Again in *King-Emperor v. Buta Singh* (4), it was held that the defence to a charge under the Opium Act of being in possession of a greater quantity of opium than allowed by law, that other persons living in his house also consumed opium is of no avail, unless it is conclusively shown

(1) [1837] 13 P. R. 1897 Cr.

(2) [1901] 10 P. R. 1901 Cr.

(3) [1902] 31 P. R. 1902 Cr.

(4) [1935] 34 P. R. 1905 Cr.

that the possession of the accused was the joint possession of himself and other and that he held on behalf and for the use of all. In this judgment *Crown v. Sadiq* (3) has been cited. It is clear from this judgment that the proposition set out in the notes of the Excise Manual is not correct. According to this ruling, if it is proved that a person is in possession on behalf of others as also of himself of opium, the total quantity of which is less than all the joint owners are entitled to possess, he would not be guilty of any offence. The case is, however, a doubtful one since not one but two persons have been found in joint possession of a quantity which is less than the two of them could possess, if held separately. In these circumstances I am of opinion that the conviction cannot be maintained. I accordingly accept the revision and refer the case to the High Court with the recommendation that the petitioners be acquitted and the fine inflicted on them be remitted.

Order.—For the reasons recorded by the learned Sessions Judge I quash the conviction and direct that the fines, if realized, be refunded to accused.

R.M./R.K. *Conviction quashed.*

1930 Cr. Cases 392 (1)

(Lahore)

ZAFAR ALI AND JOHNSTONE, JJ.
Rahman—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1165 of 1929, Decided on 22nd January 1930, against order of Sess. Judge, Lyallpur, D/- 19th November 1929.

Penal Code, S. 300—Abuse by deceased who is person of low caste to her husband does not constitute grave provocation though it may be sudden—Lesser punishment should however be given.

R a Bharai by caste and an agriculturist by occupation was accused of murdering his wife in a quarrel by means of an axe. He pleaded grave and sudden provocation and in support of the plea produced a witness who had heard the deceased calling the accused "a pig, son of pig."

Held: that such abuse could not constitute grave provocation specially in the case of a low caste of man of the class of the accused, accustomed to the use of abusive language. But the accused could be said to have acted without premeditation under some provocation which though not grave was sudden and deserved lesser sentence than sentence of death.

[P 392 C 2]

Zafarullah Khan—for Appellant.

D. R. Sawhney—for the Crown.

Judgment.—The appellant *Rahman*, aged 40 years, is a Bharai by caste and an agriculturist by occupation. He has been convicted of the murder of his wife Mt. *Rahman* and has been sentenced to death.

The deceased was only 30 years of age and was pregnant. She had been married for some 10 years and the couple had all along lived amicably together and had three sons. On the fateful day she was late in taking to the appellant at his field his midday meal. He remonstrated with her for having come late, whereupon an altercation ensued and she abused him. He picked up an axe and inflicted with it two blows on her neck which almost severed her head from the trunk. He admitted that it was he who thus caused her death but he pleaded grave and sudden provocation. In support of this plea there was the evidence of one of the prosecution witnesses, namely, Wallu (P. W. 3) that he heard the deceased calling the appellant "a pig, son of a pig." But such abuse cannot constitute a grave provocation, specially in the case of a low caste man of the class of the appellant accustomed to the use of abusive language. But all the same there can be no denying the fact that the appellant acted without premeditation under some provocation which, though not grave, was sudden. In view of this circumstance the learned Public Prosecutor supports the contention of the appellant's counsel that the appellant deserves the lesser sentence.

We, therefore, alter the sentence to one of transportation for life and accept the appeal to this extent.

R.M./R.K. *Order accordingly.*

1930 Cr. Cases 392 (2)

(Lahore)

AGHA HAIDAR, J.

Guranditta and another—Convicts—Petitioners.

v.

Emperor—Opposite Party.

Criminal Rwn. No. 1531 of 1929, Decided on 24th January 1930, against order of Dist. Magistrate, Gurdaspur, D/- 12th April 1929.

Penal Code, S. 504—Temperament of individual concerned is not to be judged—

Court should find out of what effect abusive language would have been in ordinary circumstances.

In dealing with S. 504 the Court has not to Judge the temperament or the idiosyncrasies of the individual concerned. It should try to find out what in the ordinary circumstances would have been the effect of the abusive language used. Where there is no doubt that the abusive language used might ordinarily have resulted in broken limbs or at least in an affray and consequent breach of the peace an offence under S. 504 is committed: 10 *Mad.* 353 and 1 *U. B. R.* 290, *Rel. on.* [P 393 C 1, 2]

Nawal Kishore—for Petitioner.

Judgment.—The applicants abused one, Charan Das, an Aggarwal Bania. The applicants are also Banias. The applicants have been convicted under S. 504, I. P. C., and sentenced by a 3rd Class Magistrate to pay a fine of Rs. 10 each. They went up in appeal to the District Magistrate and their appeal was dismissed. They came up in revision to this Court. A point was taken by Mr. Nawal Kishore at the preliminary hearing that there was no finding as regards any apprehended breach of the peace as required by S. 504, I. P. C., and that, therefore, the conviction was bad in law. It may be observed that this point was never taken in the grounds of appeal in the Court below, or in the grounds of revision in this Court. However I allowed Mr. Nawal Kishore to argue this point.

Admittedly the applicants used abusive language towards the complainant.

It was argued that the complainant was a man of a placid temperament, and as he belonged to a very peaceful community it was not likely that there would have been a breach of the peace as a result of the abuse in which the petitioners indulged. This is not the correct way to look at the matter. The applicants are also Aggarwal Banias, and if they could indulge in the "most filthy and provocative words," to quote the trial Magistrate, there is no reason why their adversary, the complainant, should not have abused in the same terms. Moreover, in dealing with S. 504, I. P. C., we have not to Judge the temperament or the idiosyncrasies of the individual concerned. We should try to find out what, in the ordinary circumstances, would have been the effect of the abusive language used. There cannot be any doubt that the abusive language used in the present case might

ordinarily have resulted in broken limbs or at least in an affray, and consequent breach of the peace. There are authorities in support of this view, e.g., *Queen Empress v. Jogayya* (1) and *Queen Empress v. Mi Te* (2).

In my opinion the application is without any merits, and there is no substance in the point of law raised by Mr. Nawal Kishore at the time of arguments. The application is dismissed.

R.M./R.K. *Petition dismissed.*

(1) [1887] 10 *Mad.* 373.

(2) [1892-93] 1 *U. B. R.* 290.

1930 Cr. Cases 393

(Lahore)

DALIP SINGH, J.

Lilu and another — Accused Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1707 of 1929, Decided on 27th January 1930, against order of Dist. Mag. Karnal, D. - 31st July 1929.

(a) Criminal P. C., Ss. 110 and 112—Evidence as to mere suspicion on particular isolated occasions is insufficient for purposes of S. 110.

Evidence as to mere suspicion on particular isolated occasions is not sufficient evidence at all for the purposes of a case under S. 110, Criminal P. C. What is necessary is evidence to prove that the man is by habit a thief. Evidence can no doubt be led of his general reputation about the matter and that he was suspected in a particular case by a particular person or the police of having committed a theft. But there must be a large number of cases before it can be held to be proved on this evidence alone that he is by habit a thief. [P 394 C 1, 2]

(b) Criminal Trial—Evidence — Procedure recording evidence against two persons in one case and then considering it as evidence against one is illegal.

A and *B* were given notice under S. 112 Criminal P. C., to show cause as to why they were not to be bound down with bonds and securities. There was no joint trial nor was there any intention of having a joint trial. The Magistrate recorded the evidence against both in one case and then proceeded to consider it as evidence in the case against *B*.

Held: that the procedure in recording the evidence was illegal. *B's* case was never tried at all and the orders passed against him under S. 118, Criminal P. C., and S. 7 Habitual Offenders Act could be set aside. [P 394 C 1]

Rama Nand—for Petitioners.

Ram Lal—for the Crown.

Order.—Two men, *Lilu* and *Bhuru*, were given notice under S. 112, Criminal P. C., to show cause as to why they

should not be bound down with personal bonds and securities in Rs. 1,000 with one surety each for a period of three years because they are cattle lifters and burglars etc. The notice also directed them to show cause why their movements should not be restricted to their village for the said period. The notice did not cite the Habitual Offenders Act. The evidence was all recorded in one case, namely, that of Lilu and then the Court proceeded to pass orders against both under S. 118, Criminal P.C., and under S. 7, Habitual Offenders Act restricting their movements for a period of two years. The appeals were dismissed by the learned District Magistrate, and the petitioners have come on revision.

The learned counsel contends *inter alia* that there is no sufficient evidence to justify the orders passed so far as Lilu is concerned. The learned counsel for the Crown points out that the evidence against Lilu consists of two men who deposed to his having received bhunga on two occasions and the evidence of one lambardar and one zaildar about his reputation as a thief, also that of two police officials. In my opinion this is insufficient to justify an order under S. 118 or under S. 7, Habitual Offenders Act. I, therefore, accept the petition qua Lilu and set aside the order passed against him.

As regards Bhuru it is perfectly clear that his case has never been tried at all. There was no joint trial, nor was there ever any intention to have a joint trial. What has happened is this. The Magistrate recorded the evidence against both in one case and then proceeded to consider it as evidence in the case against Bhuru. I, therefore, accept the petition qua Bhuru and set aside the order passed against him. It is open to the Crown, if so advised, to bring a fresh case against Bhuru as really speaking there never has been a trial of his case at all.

I should like to point out that the Courts below have erred hopelessly in procedure in this case. I have already pointed out the illegality about the recording of evidence. Further, it would have been better, though perhaps not essential, to specify that the petitioners were being asked to show cause under the Habitual Offenders Act as well as

under S. 112, Criminal P. C. Secondly, the provisions of S. 9, Habitual Offenders Act, should have been complied with. Thirdly, evidence as to mere suspicion on particular isolated occasions is not sufficient evidence at all for the purposes of a case under S. 110, Criminal P. C. What is necessary is evidence to prove under S. 110 (a) that the man is by habit a thief. Evidence can no doubt be led of his general reputation about the matter and evidence that he was suspected in a particular case by a particular person or by the police of having committed a theft. But there must be a large number of such cases before it can be held proved on this evidence alone that he is by habit a thief. He was never given any notice under S. 110(f) so the appellate Court was wrong in taking this subsection into consideration against him.

R.M./R.K.

Order set aside.

1930 Cr. Cases 394

(Lahore)

ADDISON AND DALIP SINGH, JJ.
Jagan Parshad — Accused — Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1814 of 1929, Decided on 29th January 1930, against order of Addl. Dist. Magistrate, Delhi, D/- 18th November 1929.

Criminal P. C., S. 439 — Interlocutory matters in criminal Courts should not be interfered in revision.

There is ordinarily no justification for a High Court to take up in revision what are really interlocutory matters in a criminal Court: A.I.R. 1926 Oudh 280, *Foil*. [P 394 C 2]

Qabul Chand for *Shamair Chand* — for Petitioner.

Addison, J. — We agree with the decision of the Chief Judge in *Kashi Ram v. R. L. Dikshit* (1) that there is ordinarily no justification for a High Court to take up in revision what are really interlocutory matters in a criminal Court. There is nothing in this case to take it out of the ordinary rule and we dismiss the petition.

R.M./R.K.

Petition dismissed.

(1) A. I. R. 1926 Oudh 280=1 Luck. 48.

1930 Cr. Cases 395

(Lahore)

TAPP, J.

Naurang Rai and others—Accused—Petitioners.

*v.

Emperor—Opposite Party.

Criminal Revn. Petn No. 134 of 1930, Decided on 21st January 1930, from order of Dist. Judge, Delhi, D/- 15th July 1929.

Criminal P. C., S. 476—It is not necessary that words "expedient in the interest of justice" should appear in order under S. 476—It is sufficient that Court is of opinion that enquiry is expedient.

The words "expedient in the interest of justice" are not a formula or incantation which must of necessity appear in every order made under S. 476. S. 476 merely requires that the Courts concerned should be of opinion that the interests of justice render it expedient that an inquiry should be made into any offence referred to in S. 195 (1) (b) or (c). It is sufficient that the Court arrives at such an opinion and also that there is a reasonable prospect of the conviction of the accused there being sufficient evidence to support prosecution. Whether the evidence is believed or not or will be sufficient to justify the conviction of the accused is quite another matter. [P 395 C 2]

Nawal Kishore—for Petitioners.

Jagan Nath Aggarwal—for the Crown.

Judgment.—This purports to be an appeal against the order of the District Judge, Delhi directing the prosecution for giving false evidence and forgery under Ss. 193 and 471, I. P. C., of three persons Naurang Rai, Kastur Chand and Radha Kishan. It has, however, been conceded in view of the decision of this Court in *Mahomed Idris v. Emperor* (1) that no appeal lies and accordingly I propose to treat the appeal as a petition for revision.

It appears that in certain execution proceedings between the respondent, Dalu Ram and the petitioner Naurang Rai as decree-holder and judgment-debtor respectively the latter on 1st July 1927 produced a receipt purporting to be signed by the decree-holder who denied the authenticity of the signature and the alleged payment to him. The petitioners, Kastur Chand and Radha Kishan, alleged payment to and execution by the decree-holder. The executing Court held that the receipt was not genuine in its order dated 31st October 1927 and on appeal by Naurang Rai the

judgment-debtor the District Judge on 19th November 1927 also came to the same conclusion. On 20th December 1927 the decree-holder made an application under S. 476, Criminal P. C., in the Court of the District Judge for the prosecution of the three petitioners and three other persons for forgery and perjury. This application was returned by the District Judge with the direction that it should be filed in the Court executing the decree where it remained pending for over a year and four months till the 22nd April 1929 when the Subordinate Judge who had succeeded the officer to whom the application had been made dismissed it on the ground that he did not find there were sufficient grounds for directing prosecution of the persons referred to above. On appeal by the respondent Dalu Ram the learned District Judge disagreed with this view and holding after an examination of the record that there were sufficient grounds for believing that the receipt was a forgery and sufficient evidence justified the launching of a prosecution, directed that a complaint be filed against the three petitioners.

Now, I can find nothing in the order of the learned District Judge to throw any doubts on the correctness, legality or propriety of the finding arrived at by him. It was urged by the learned counsel for the petitioners that the learned District Judge had not stated that it was "expedient in the interests of justice" that the petitioners should be prosecuted and that there was a reasonable prospect of their conviction after trial. Now the words "expedient in the interests of justice" are not a formula or incantation which must of necessity appear in every order made under S. 476. This section merely requires that the Court concerned should be of opinion that the interests of justice render it expedient that an enquiry should be made into any offence referred to in S. 195, sub-S. (1), Cl. (b) or Cl. (c) and that the learned District Judge did arrive at such an opinion is sufficiently obvious from his order. He has also arrived at an opinion that there is a reasonable prospect of the conviction of the petitioners as there is sufficient evidence to support a prosecution. Whether this evidence is believed or not and will be sufficient to justify the conviction

tion of the petitioners is quite another matter and one with which the learned District Judge is not concerned nor would it be proper for him to express any opinion in this connexion.

For the above reason I see no ground for interference with the order of the learned District Judge and dismiss the petition.

R.M./R.K. *Petition dismissed.*

*** 1930 Cr. Cases 396**
(Lahore)

ZAFAR ALI AND BHIDE, JJ.

Gaman and another -- Convicts -Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 491 of 1929, Decided on 2nd December 1929, from order of Addl. Sess. Judge, Multan, D. 27th March 1929.

*** Criminal P. C., S. 151—Order for arrest without emergency contemplated by S. 151 is illegal and person whose arrest is attempted may offer resistance and if constables use force towards him causing injury, the person has right of private defence—Penal Code S. 99.**

If without any emergency for arrest contemplated by S. 151, a police officer arrests or attempts to arrest a person, the arrest or the attempt to arrest is not only not strictly justifiable by law but is illegal and the person who is arrested or attempted to be arrested, is entitled to offer resistance. If further, such person apprehends hurt at the hands of armed constables sent for the arrest, and such constables use criminal force towards such person, who retaliates it causing them simple injury it cannot be said that he has exceeded his right of private defence: 24 Cal. 320 and A. I. R. 1926 Lah. 19, *Rel. on.* [P 397 C 2; P 398 C 2]

Hakumat Rai--for Appellants.

Abdul Rashid--for the Crown.

Zafar Ali, J.—The five men whose names are given in the margin (viz : 1. Khairu 2. Mohammad Azim 3. Gamun 4. Rshim 5. Hassan) were tried together by the Additional Sessions Judge of Multan on alternative charges under Ss. 307, 109 and 333, I. P. C. with the result that he acquitted the first two and convicted the rest of hurt under S. 324, I. P. C., and sentenced each to rigorous imprisonment for one year. These three convicts have appealed, and the Local Government has also appealed against the acquittal of Khairu and Mohammad Azim, and for the conviction of all five under S. 307 or S. 333, I. P. C. coupled with S. 149, I. P. C., or enhancement of the sentences under S. 324, I.P.C.

The various incidents mentioned by the prosecution may briefly be described thus:

(1) On 29th November 1928, Gamun appellant was beating a student of the Multan Islamia, High School when Ghulam Mohammad, Head Constable (P.W. 4), who was attached to the police post near there, interfered and separated them and scolded Gamun, Gamun felt insulted and said to the Head Constable something to the effect that he would take revenge. The Head Constable was the only witness produced about this incident. The student's name was mentioned but he was not produced.

(2) On 8th December 1928 at about 10-30 a. m. the Head Constable left the police post for the tahsil to perform his duty there as a Naib Court. On the way, as he struck into the Am Khas garden, Gamun and others fell upon him and beat him with fists, kicks and sticks. He was rescued by two constables and others but none of them was put in the witness-box, and so the Head Constable was the solitary witness produced about this assault upon him.

(3) The above incident was soon reported to the Police Inspector Mr. Warburton who rang up the Superintendent of Police on the telephone and apprised him of what had befallen the said Head Constable. The Superintendent of Police gave instructions for the arrest of the assailants of the Head Constable under Ss. 107 and 151, Criminal P. C. The Inspector (P. W. 6) conveyed those instructions to the Sub-Inspector on the phone. The latter made an entry in the station diary as to what had been communicated to him, and then went to the Inspector at the tahsil and, after receiving further verbal instructions from him, he came back to the police station and made another entry in the diary embodying all that he was told by the Inspector. Then, with eight constables all in uniform, he proceeded to the residence of the four brothers Gamun, etc., who it was stated had beaten the Head Constable. Some more constables and Seth Narain Das or Naru Karar joined the Sub-Inspector on the way.

(4) The police or prosecution version of what took place further on and at the house of the four brothers was this : When the Sub-Inspector's party emerged from the Delhi Gate, Nimun accused was seen coming from the opposite direction.

Seeing the police he ran back and disappeared. When the party reached the house of the accused they found its door fastened from inside. They knocked at it but it was not opened. In the meantime the four brothers and their cousin Hassan Bakhsh appeared on the scene with knives in their hands and shouting "Ali, Ali." The Sub-Inspector told them that he had come to arrest them and not to fight with them. These five men, however, proceeded to attack some of the constables and caused injuries to three of them. The police succeeded in arresting three out of the five assailants, namely, Gamun, Hassan Bakhsh and Nimun. The three constables who were attacked received incised wounds.

Now, the first question to be determined is whether there was any justification for the order made by the Superintendent of Police for the arrest of the assailants of the Head Constable under Ss. 107 and 151, Criminal P. C.

Section 151 runs thus :

"police officer knowing of a design to commit any cognizable offence may arrest without orders from a Magistrate and without warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented."

Apart from S. 151, there is no provision in S. 107 for the arrest of any person.

The Superintendent of Police did not appear in the witness-box to state what was the information received by him upon which he ordered the arrest. In the instructions given by the Inspector to the Sub-Inspector which the latter reduced to writing it is nowhere stated that the assailants of the Head Constable threatened to kill him. When the Inspector appeared in the witness-box he stated that the Head Constable told him that his assailants had threatened to kill him. He further stated that he phoned to the Superintendent of Police and repeated to him all that the Head Constable had told him. But he did not specifically state that he phoned to the Superintendent of Police that the assailants of the Head Constable had threatened to kill him. Even assuming that the assailants did utter that threat before leaving the Head Constable, there was nothing to indicate that they intended to carry out that threat and could do so unless immediately prevented by arrest. There was no old deadly feud

at the bottom, and the Head Constable had been sufficiently punished for his interference in the quarrel between Gaman and the student, and he was now at the police post where there could be no danger of any further molestation by the accused. In these circumstances there was no occasion for ordering their arrest under the provisions of S. 151, Criminal P. C., and the contention to the contrary possesses no force.

The next question is whether the Superintendent of Police acted in good faith. S. 52, I. P. C., lays down that nothing is said to be done or believed in good faith which is done or believed without due care or attention. There is nothing to indicate that the Superintendent of Police exercised due care and attention. On the other hand, it appears from what has been stated above that he was hasty and careless. The direction that he gave for arrest cannot therefore be said to have been given in good faith.

It is further clear that the police had no jurisdiction to arrest as the assailants were, according to the information then received by the Sub-Inspector of Police and entered by him in the diary, only four in number and their offence was punishable under no other provision of the Penal Code than S. 323. No emergency for arrest which S. 151 contemplates having been shown to have existed, the attempt, to arrest on the part of the Sub-Inspector was not only "not strictly justifiable by law," but was illegal. Therefore neither Cl. (1) nor Cl. (2), S. 99, I. P. C., could afford protection to him. *Queen Empress v. Jogendra Nath Mukerjee* (1), is in point. In that case a District Magistrate issued a warrant for the arrest and production of a witness for the purpose of giving evidence at an investigation held by the police, and in attempting to execute such warrant the police arrested the wrong person and were assaulted in the attempt. And Ghose and Gordon, JJ., held that :

"apart from the fact that the attempt to arrest was made on the wrong person a District Magistrate has no authority to issue a warrant for the production of a witness at an investigation by a police officer : but only before his own Court under Ss. 76 and 81, Criminal P.C."

"Held, also, that as the investigation was held by a police officer under Chap. 14, Ori-

iminal P. C., the proper course was for the Sub-Inspector of Police to require the attendance of the witness under S. 163, Criminal P. C., and on failure by her to comply with such order, prosecute her under S. 174, I. P. C."

"Held, also, that the accused were justified in their resistance, and that no offence, either under S. 143 or S. 183, I. P. C., was committed, and that they should be acquitted."

. This ruling was followed in *Haq Dad v. Emperor* (2), and it was held that S. 99 was inapplicable where the action of the Sub-Inspector of Police was wholly without jurisdiction.

In the present case the Sub-Inspector was not competent to execute the Superintendent's order for arrest as the order was illegal.

Coming now to the factum of the assault on the three constables it may be observed at first that the account thereof as given by the police is not corroborated by any independent trustworthy witness. Besides the Sub-Inspector and the constables, only two other witnesses were produced, namely, Narain Das and Nawab. The former, according to his own showing is a helper of the police inasmuch as he not infrequently attends police investigations, and the latter is a sarbarah lambardar whose duty it is to help the police and who was, after all, a chance witness. No witness was produced from the locality where the assault took place, though several people from there must have been attracted to the spot in consequence of the arrival of so many police men in uniform and the noise of their scuffle with the accused. The story that the five accused came up all of a sudden to deliver an attack on 13 policemen is on the face of it highly improbable as they could not have imagined that they could overpower them. The defence story that the police entered the house of the accused and caused annoyance by interfering with their womenfolk seems probable though no evidence was produced in support of it. In any case the police version, improbable as it is, is not supported by any independent evidence and cannot therefore be believed in its entirety.

In all these circumstances we are not prepared to conclude that the lower Court was manifestly wrong in disbelieving the prosecution evidence as against the two accused who bore no in-

juries and who were not arrested on the spot. They no doubt absconded for a few days but they did so probably for fear of arrest and not necessarily because they had taken part in the scuffle with the police. Further we find that there was no intention on the part of the assailants to inflict any fatal injury and no dangerous injury was as a matter of fact caused.

We are of opinion that the finding of the Additional Sessions Judge that the injuries received by the constables were simple is correct in view of all that has been stated above and there could be no conviction either under S. 307 or S. 333, I.P.C. The appeal by the Local Government therefore fails and we dismiss it.

As regards the appeal of the convicts it is clear that they were entitled to offer resistance to their arrest which was illegal. As regards the circumstances under which they did so, the evidence, as stated above, is not satisfactory, but it may safely be presumed that they apprehended hurt at the hands of the constables who were admittedly all armed with lathis. These lathis were actually used as the three appellants received a number of injuries. They were therefore, justified in causing to their assailants the simple injuries that they did, and the right of private defence that they had against unlawful arrest was not exceeded.

We therefore accept their appeal and acquit them.

V.B./R.K.

Appeal allowed.

* * 1930 Cr. Cases 398 (Lahore)

FFORDE AND ADDISON, JJ.
(Swami) Chida Nand - Convict - Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1236 of 1929, Decided on 2nd December 1929, from order of Sess. Judge, Delhi, D/- 29th July 1929.

* * Penal Code, Ss. 153-A and 295-A—Article printed in periodical exclusively subscribed by Hindus under signature of correspondent which had effect of causing excitement amongst Mahomedans—Editor held responsible and liable under Ss. 153-A and 295-A irrespective of fact how it came to notice of Mahomedans.

C, was Editor, printer and publisher of a periodical called Shuddhi Samachar, printed in Hindi language and script and having ten

thousand subscribers all Hindus. The periodical contained a signed article contributed by a correspondent, contents of which were such that if read by Mahomedans they were likely to promote feelings of enmity and hatred between the Hindus and the Mahomedans. Some Mahomedans somehow got to know of the contents of the article in question with the result that at a meeting held in Juma Mosque, Delhi speeches were made protesting against the article and condemning what was contained therein.

Held: that it was immaterial how article came to the notice of the Mahomedans and C was held responsible for the result making him liable under Ss. 153-A and 295-A, Penal Code: *A.I.R. 1927 All. 649* and *A.I.R. 1927 Lah. 594*, *Rel. on. A. I. R. 1927 Lah. 570*, *Dist.*

[P 399 C 1, 2, P 400 C 2]

J. L. Kapur for *Badri Das* and *Gobind Ram Khanna*—for Petitioner.

Abdul Rashid and *Suraj Narain*—for the Crown.

Reference order by

Jai Lal, J.—The petitioner Swami Chida Nand has been convicted under Ss. 153-A and 295-A, I. P. C., and has been sentenced to six months' rigorous imprisonment and a fine of Rs. 300 separately under both the sections. The sentences, however, have been ordered to run concurrently. The Sessions Judge of Delhi having dismissed his appeal this petition for revision has been presented on his behalf. It has been found that he is the editor, printer and publisher of a periodical called the *Shuddhi Samachar*, which is printed in Delhi in the Hindi language and script, and that in the month of September 1928, he published in this periodical a signed article contributed by a correspondent and that the contents of the article are such that if read by the Mahomedans they are likely to promote feelings of enmity or hatred between the Hindus and the Mahomedans.

It is contended on behalf of the petitioner that the periodical in question is not sold to the public but is sent out to its subscribers who are invariably Hindus. It is, however, conceded that in the month of September 1928 one copy of the periodical was subscribed for by a Mahomedan who, however, was a resident of a Native State and not of British India. It is further admitted that the number of persons who subscribe to the periodical is ten thousand. It seems that some Mahomedans somehow got to know of the contents of the article in question with the result that at a meeting held in the Juma Mosque

of Delhi speeches were made protesting against the article and condemning what was contained therein.

The petitioner's counsel contends that if any feelings of enmity or hatred have been promoted as a result of the publication of the article the persons responsible therefor are those who published it in the meeting in the Juma Mosque and not the petitioner who did not intend that it should be read by the Mahomedans. Counsel strongly relies on the conclusion of the learned Sessions Judge that the appellant did not attempt to promote feelings of enmity amongst Mahomedans against Hindus as this was not his primary object and contends that after this finding it was not open to the learned Sessions Judge to convict Swami Chida Nand for actual promotion of such feelings because the intention of the accused is a necessary ingredient in the offence made punishable by S. 153-A.

Mr. Abdul Rashid, Additional Government Advocate, who appeared for the Crown; on the other hand contended that the learned Sessions Judge did not intend to hold that the petitioner did not intend to promote feelings of enmity amongst Mahomedans against Hindus as would appear from his remark that "he must be held to have intended that the article should have become known to Mahomedans." In this connexion, the petitioner's counsel relied inter alia on the judgment of Dalip Singh, J. in *A. I. R. 1927 Lah. 570* and contended that the Division Bench of this Court which decided the case reported as *A.I.R. 1927 Lah. 594* did not expressly differ from the view expressed in the former case. He also urged that even if it be held that the view taken in the later case by the Division Bench is correct, the judgment has no bearing on this case because in that case it was definitely found that apart from a poster issued by a Mahomedan leader inviting the attention of the Mahomedans to the objectionable article there had already existed excitement among the Mahomedans who had read the article independently. Such a circumstance does not exist in this case. To this the learned Additional Government Advocate replied that it was immaterial how the article came to the knowledge of the Mahomedans and the petitioner is

responsible for the result; and relied upon *Emperor v. Kalicharan* (1) and also the judgment of the Division Bench of this Court referred to above.

Finally, it was contended on behalf of the convict that a charge under S. 295-A could not under any circumstances be sustained. The learned Additional Government Advocate conceded that if a charge under S. 153-A could not be sustained for want of the requisite intention of the accused the charge under the other section must also fail for the same reason. He also conceded that the accused could not be convicted under both the sections but that he could be convicted only in the alternative. This, however, is immaterial because the sentences have been ordered to run concurrently.

It was also asserted on behalf of the petitioner that if the view of the learned Sessions Judge is sustained an honest criticism of another religion by a missionary in his own place of worship or congregation when addressed to his own followers exclusively would become punishable, which could not have been the intention of the legislature, and, finally, it was urged with regard to the sentence that the fact that the Government have selected persons of a particular persuasion for prosecution and have refrained from prosecuting the members of the other community for similar attacks on the religion of the accused should, *inter alia*, be considered a circumstance in support of a plea of provocation or extenuation and entitles the petitioner to leniency in the matter of sentence. No evidence, however, was cited in support of this assertion.

In my opinion the points of law involved in the case are important, especially in view of what I have stated above and in view of the somewhat contradictory findings of the Sessions Judge and a more authoritative decision thereof is desirable. I consequently refer this case to a Division Bench and direct that it be placed before the learned Chief Justice immediately with a view to its being heard very early.

Judgment on reference.

Fforde, J.—This is a petition in revision in which this Court is asked to hold that the decision of the Sessions Judge of Delhi, declaring a certain

article to have been published with the intention of promoting enmity between Hindus and Mahomedans, and also being deliberately and maliciously intended to outrage the religious feelings of Mahomedans, is a finding against law.

Having been taken through the judgment in question and having heard Mr. Kapur, who has advanced every argument which could reasonably be put forward, I am of opinion that the finding of the learned Sessions Judge that the article in question was intended to promote enmity between the two communities, and that it was published with the deliberate and malicious intention of outraging the feelings of one of the communities, has not been shown to be in violation of any principle of law. I am satisfied that upon the findings of the learned Sessions Judge on the evidence an offence has been established both under S. 153-A and under S. 295-A, I. P. C.

Mr. Kapoor has finally urged that the punishment imposed is too severe for the offence. The learned Sessions Judge has sentenced the petitioner to six months' rigorous imprisonment and a fine of Rs. 300 for the offence under S. 153-A and to rigorous imprisonment for six months under S. 295-A, I. P. C. Had these sentences been made to run consecutively the question might have arisen whether two separate sentences should be given for offences which arise out of one publication. As, however, the sentences of imprisonment have been made to run concurrently and, in effect, the punishment to be suffered will only be six months' rigorous imprisonment in addition to the fine, I see no reason to interfere with the sentence. This petition, in my opinion, must be rejected.

Addison, J.—I concur.

V.B./R.K.

Petition rejected.

(1) A.I.R. 1927 All. 649=49 All. 856 (S.B.).

1930 Cr. Cases 401

(Calcutta)

RANKIN, C. J. AND C. C. GHOSE, J.
Hamid Ali Haidar—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 842 of 1928, Decided on 20th February 1929, against order of Sess. Judge, Tipperah, D/- 27th September 1928.

(a) Criminal P. C., S. 304—Judge is not obliged to accept an absurd verdict—He can ask jury to reconsider matter over again.

In a criminal trial with the help of a jury a Judge is not obliged to accept an absurd verdict either as a verdict of guilty or as a verdict of not guilty. He is quite entitled to tell the jury to consider the matter over again.

[P 401 C 2]

(b) Criminal P. C., S. 298—It is not duty of Judge to accept and interpret unintelligible verdict.

It is no part of a Judge's duty to accept and interpret for himself a verdict of an unintelligible character when the members of the jury are there and can give a proper verdict.

[P 401 C 2]

(c) Criminal P. C., S. 297—Judge can re-charge jury after unintelligible verdict—Cross-examination of jury in such case is not proper.

When in case of an unintelligible verdict from a jury, a Judge thinks it better to re-charge the jury on specific points there is nothing in the Criminal P. C., to prevent him from doing so. In such a matter it is most unsatisfactory for a Judge to cross-examine the jury which as a matter of fact means cross-examination of the foreman of the jury.

[P 401 C 2]

A. K. Basu and *Satindranath Mukerji*—for Appellants.

Khundkar—for the Crown.

Rankin, C. J.—In this case when the trial had proceeded to the end of the learned Judge's charge to the jury, the jury considered their verdict. There were eleven accused and the foreman read out the names of those eleven people and said that the jury found them all guilty under S. 147, I. P. C. So far as the learned Judge is concerned, the foreman was then heard to read out the names of five of those accused and to say that the jury found them guilty under S. 364 and to go on to say that the others were not guilty under that section. Thereupon, the learned Judge recorded that as their verdict. He typed out a little judgment and sentence on that basis and he read it out in Court, when, to his astonishment, the foreman said :

"No that is not what we said. What we said was that these five people were guilty under

S. 364, but we gave them the benefit of the doubt."

Thereupon, the learned Judge has, I think, exercised a most admirable discretion. He recharged the jury, telling them particularly about the benefit of the doubt and what S. 364 meant and sent them back to consider and find out what their verdict really was. They came back. They delivered their verdict perfectly properly, finding the eleven accused guilty under S. 147 and finding certain accused guilty under S. 365. It is not said that there is anything wrong with the charge, and the verdict cannot be attacked upon that ground. It is said, first, that in this course there is something contrary to the Code and that the learned Judge had no right to re-charge the jury at all; secondly, that he should have taken this absurd verdict as a verdict of not guilty; and, thirdly, that at all events he was confined to asking certain questions of the jury.

I desire to say that I protest against all three of these suggestions. The learned Judge was not obliged to accept an absurd verdict, either as a verdict of guilty or as a verdict of not guilty. He was quite entitled to tell the jury to consider that matter over again. In the case in which the jury have not considered the matter over again, a verdict of that character would doubtless be construed afterwards as a verdict of not guilty; but that there is any duty upon the Judge to accept and interpret for himself a verdict of that character, when the jury are there and can give a proper verdict, is to my mind a proposition which has no foundation. Again, the learned Judge could, if he liked, have asked questions of the jury. He was not obliged to do so. If he thought it fairer and clearer and simpler to re-charge the jury on certain specific points and to tell them to go and get their heads clear on the subject and give a proper verdict, there is nothing in the Code against that. The Judge put the matter in a much better position than it would have been if he had endeavoured to cross-examine the jury, which, as matter of fact, means cross-examination of the foreman. That is generally a most unsatisfactory procedure.

Then it is said that, because the learned Judge has not treated as part of

the record the piece of paper on which he typed out the foreman's verdict of guilty as the Judge understood him, which the foreman afterwards disclaimed as not being the verdict at all, that is contrary to the Code and ought to vitiate this trial. In my judgment, the intention of the Code has in this case been most scrupulously fulfilled. You cannot put down in black and white a misunderstanding, and if the learned Judge had allowed that record to remain, it would have been obviously wrong unless he coupled it with something to say that there was a discrepancy between what he took the verdict to be and what the foreman afterwards said it was. The learned Judge, accordingly, recorded in the greatest detail everything connected with this incident; and, in my judgment, there is no ground whatsoever for interference with the result of this trial.

The appeal must be dismissed. The applicants must now surrender to their bail and serve out the remaining periods of the sentences imposed on them.

C. C. Ghose, J.—I agree.

R.M./R.K.

Appeal dismissed.

1930 Cr. Cases 402

(Rangoon)

BROWN, J.

Maung Ba Chit and another—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Revns. Nos. 341-B and 342-B of 1929, Decided on 15th October 1929, from order of Sess. Judge, Moulmein.

(a) Criminal P. C., S. 239 -- Persons charged with criminal conspiracy to steal timber for certain term and also with habitually receiving and dealing with it during that term in pursuance of conspiracy—There is no misjoinder—But trial will be bad if persons are charged with stolen timber outside the conspiracy.

There is no misjoinder where the accused persons are charged as being parties to a criminal conspiracy to steal Government timber for a term of years and also with habitually receiving and dealing with that timber knowing or believing it to be stolen property during the same period in pursuance of the conspiracy. But if the charge is for habitually receiving stolen timber outside the said conspiracy, the trial will be bad and must be set aside as void : 25 *Mad.* 61 (P.C.), *Dist.*

[P 405 C 1, 2]

(b) Criminal P. C., S. 342—Object of examination of accused is to enable him to explain anything appearing in evidence against

him—In complicated case general questions asking him what he has to say in explanation of evidence against him is insufficient.

The object of the examination of the accused is to enable him to explain anything appearing in evidence against him. It is impossible to lay down any hard and fast rule as to what question should be put in any particular case. The failure to put certain vital questions will not vitiate a trial if the accused is in no sense prejudiced by that failure. But in a complicated case it would be an entirely insufficient compliance with the provisions of the section to put a general question asking the accused what he has to say in explanation of the evidence against him. Thus where the prosecution is mainly based on the contents of the documents which are obscure and capable of more explanations than one it is of special importance that the accused should be asked specifically as to what his explanation of the doubtful passages is: *A. I. R. 1925 Cal.* 361 and *A. I. R. 1924 Rang.* 172, *Rel. on.*; *A. I. R. 1929 Rang.* 331 and *A. I. R. 1925 Rang.* 258, *Ref.*

[P 406 C 2]

(c) Penal Code, S. 378—Licensee cutting trees in Government forest not covered by license—Officer competent to give consent for their removal out of possession of Government giving it on understanding that timber to be removed was covered by license—Consent held not valid within S. 378 and theft of timber held to have been committed.

Where the licensee cuts down trees in the Government forest which are not covered by his license and where the person authorized to give consent to remove them out of the possession of Government gives it by issuing removal pass and the bill of title to timber on the understanding that timber to be removed was timber covered by the license and thus the consent is given under a misconception of fact there is no such consent as is meant by S. 378 and in such circumstances offence of theft of timber is committed : 1 *Bom.* 610, *Dist.*

[P 408 C 2; P 409 C 1]

(d) Criminal Trial—No specific instance of theft or receipt of stolen property proved—Court asked to infer from several obscure documents in possession of accused that there was conspiracy to commit theft—Accused not questioned about documents—Inference cannot be drawn—Criminal P. C., S. 342.

Where no specific instance of theft or of receipt of stolen property is proved and the Court is asked as a result of several obscure documents found in possession of accused to infer that there has been conspiracy to commit theft, it is a dangerous thing to draw such an inference as to any such conspiracy among the accused without questioning them about the documents : 37 *Cal.* 467, *Rel. on.*

[P 411 C 2; P 412 C 1]

De Glanville Grant and Darwood—for Appellants.

Gaunt—for the Crown.

Judgment.—The two petitioners, Ba Chit and Maing Naw, were sent up by the police before the First Additional Special Power Magistrate, Moulmein,

together with nine others, on various charges. After taking enough prosecution evidence to satisfy him that prima facie case had been made out, the Magistrate discharged four of the accused and framed charges against the other seven under S. 120-B, read with S. 379, and S. 413, I. P. C. The Magistrate found all the persons who were charged guilty. They all appealed to the Sessions Judge. The Sessions Judge set aside the convictions as regards five of the appellants but upheld the convictions and sentences in the case of the two petitioners. The two petitioners have both been found guilty under S. 120-B, and Ba Chit has also been found guilty under S. 413 and Maung Naw under S. 413 read with S. 109. They have each been sentenced by the Sessions Judge on the second charge only to two years' rigorous imprisonment. Both Ba Chit and Maung Naw have now come to this Court in revision against the orders of the Sessions Judge.

It generally happens that cases in which charges of conspiracy are brought are complicated cases. The present case is not exception to that rule. A large number of witnesses were examined at enormous length and the case took about nine months to try before the Magistrate, and, although the record of the oral evidence is so bulky, the convictions have been based mainly on certain documents which were found in the possession mostly of the two petitioners. Ba Chit was a timber trader in Moulmein, dealing in timber on a large scale. He had various licences and permits for the extraction of timber from the forests. He himself never went to the forests at all, the timber being extracted on his behalf by agents or contractors. Maung Naw was a servant of Ba Chit who used to visit the forests from time to time. The exact scope of his duties there, is disputed, but he had generally to look after the interests of Ba Chit.

A few months before the institution of this case, the Divisional Forest Officer as a result of personal inspection, found a large number of stumps of green Pyinkado, trees in an area where permits had been given only for the extraction of aule-natthat timber, that is to say, dead or fallen trees. Stated in broad terms, the prosecution is that for the last two years there has been a widespread con-

spiracy in which the petitioners took part to obtain timber by illicit means. That conspiracy involved several subordinate officials who were bribed from time to time by Ba Chit. At the time that the charges were framed against the seven accused, it appears that, though there was evidence to show that the four accused, who were not charged, had been conspiring separately to steal timber, the view of the Magistrate was that they were not parties to the same conspiracy as the petitioners.

Charges were framed against the petitioners under the provisions of S. 120-B and S. 413, I. P. C. The charge against Ba Chit under S. 120-B reads as follows:

"That you during the two years prior to 15th August 1928 (the date on which this case was reported), were a party to a criminal conspiracy to steal timber in the Ataran Forest Division with headquarters at Moulmein, and in agreement with the accused, Maung Naw, Maung Po Thein, Maung Tun Byu, Maung So Min, Maung Ye Gyan and Maung Khin in consequence whereof Government timber was stolen from Winyaw and Natchaung Ranges in the said Forest Division and thereby committed an offence punishable under S. 120-B read with S. 379, I. P. C."

The second charge against him was:

"That you during the two years prior to 15th August 1928 (the date on which this case was reported,) were a habitual receiver and dealer in Government timber which you know or had reason to believe to be stolen property and thereby committed an offence punishable under S. 413, I. P. C."

The charges against Maung Naw were couched in similar terms. Against the other accused charges of conspiracy only were framed. The first objection that has been raised on behalf of the petitioners in this case is that there has been a misjoinder of charges, and that, therefore, the whole trial is void. It is suggested that in any case the two charges against the same person could not be sustained; that a thief cannot also be a habitual receiver of stolen property; and that the receipt of stolen property in pursuance of a conspiracy of this nature cannot reasonably be called "habitual receiving" within the meaning of S. 413. The question whether the two charges can be sustained does not I think, properly arise in considering whether there has or has not been a misjoinder. It has been contended on behalf of the petitioners, and in my opinion the contention is perfectly correct, that in considering whether there has

been a misjoinder of charges or not, we have to consider not what orders were passed by the Court, but what was the subject of the charge.

The point for consideration at present therefore, is whether a joinder of the charges, as framed, is or is not justified by the provisions of the Criminal Procedure Code. Under the provisions of S. 239, Criminal P. C., persons accused of different offences committed in the course of the same transaction may be charged and tried together. It has, of course, not been suggested that all the accused could not properly be tried together under the first charge, that of conspiracy, but it is urged that the joinder of this charge with the second charge under S. 413 is not justified, as the offences charged in the two charges are not offences committed in the course of the same transaction.

It appears that in the case, as originally presented before the Magistrate, it was suggested that Ba Chit received stolen property, not only in pursuance of the conspiracy charge in this case, but also from other traders who were not themselves parties to this particular conspiracy. In the words of the Government Advocate when addressing the Court before the framing of the charge:

"The wider conspiracy for which the other accused have been joined with the above in this case is a conspiracy to make use of Ba Chit as a habitual dealer in stolen property.—120-B, 413."

If the accused in the present case has been charged with being a habitual dealer in stolen property which came from these other accused, then it is no doubt that there has been a misjoinder. Can it, however, be said that this is the meaning of the charge? The other four accused, from whom, it was suggested, Ba Chit used to receive stolen timber, were not charged in this trial at all. The trial proceeded only against the persons alleged to have taken part in the special conspiracy charged.

It must be admitted that the second charge in this case is not happily worded, and it might be read to include a charge of receiving stolen timber outside this particular conspiracy. But I think that, if the wording of the charge be taken in conjunction with the circumstances under which it was framed and the whole conduct of the trial of the case, it is clear that it was never

intended, and that it was never understood by any of the accused that it was intended that any habitual receiving should be considered except habitual receiving in the course of the present conspiracy.

The first charge sets forth that during the two years prior to 15th August 1928 the accused were parties to a criminal conspiracy to steal Government timber. The second charge sets forth that during the same two years the accused was a habitual receiver and dealer in Government timber, which he knew or believed to be stolen property. The charge should certainly have had added to it some such words as "in pursuance of the said conspiracy". But the wording of the two charges shows quite clearly that the periods covered by the two charges are the same, and at the time that the charges were framed the four other accused persons were struck off the list of accused in this case. This indicates very clearly that, although the charges were faultily framed, it was never the intention of the Magistrate in fact to consider timber received by the accused from these other four accused persons who were not subsequently charged; nor in the proceedings themselves have I been able to trace any sign of any attempt subsequent to the charge to prove such receipt, or anything to suggest that at any period after the charge the petitioners, or any of the other accused, really thought that this illegal receipt from persons not in the conspiracy was included in the charges. The position, therefore, seems to me to be this. The charges framed are unfortunately framed vaguely and read by themselves could undoubtedly be read to cover matters outside the transaction of conspiracy. But in actual fact they were never intended to cover such matters, and were never understood by any of the accused as covering such matters.

The question is whether in these circumstances there has been a misjoinder which vitiates the trial. The leading case on this point is the case of *Subrahmaniam Ayyar v. Emperor* (1). In that case an accused person had been tried in one trial charged with no less than forty-one acts extending over a period of two years. That was plainly

(1) [1931] 25 Mad. 61 = 29 I. A. 267 = 8 Sar. 160 (P.O.).

in contravention of the S. 234, Criminal P. C., which provided that a person might only be tried for three offences of the same kind if committed within a period of twelve months. It was held that such a procedure was absolutely fatal to the validity of the trial and could not be cured by the provisions of S. 537, Criminal P. C. In the course of their judgment their Lordships of the Privy Council observed at p. 97 :

"Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity. Such a phrase as irregularity is not appropriate to the illegality of trying an accused person for many different offences at the same time and those offences being spread over a longer period than by law could have been joined together in one indictment.

"The remedying of mere irregularities is familiar in most systems of jurisprudence but it would be an extraordinary extension of such a branch of administering the criminal law to say that when the Code positively enacts that such a trial as that which has taken place here shall not be permitted that this contravention of the Code comes within the description of error, omission, or irregularity."

It has been contended before me that on the face of this authority I am bound to hold that the trial in the present case is bad and that the defect cannot be cured irrespective of any question as to whether the accused have or have not been prejudiced. I have also been referred to various later rulings of the Indian High Courts in which this decision of the Privy Council has been followed. I do not think, however, that it is necessary to refer to any of these cases in detail, as none of them are really analogous to the present case. There can be no doubt whatever that had the accused in this case been in fact tried for habitually receiving stolen timber outside the conspiracy, I should have no option but to hold that the trial was bad and must be set aside as void. In such circumstances, in the words of their Lordships of the Privy Council, there is a positive enactment that such a trial should not be permitted. But in my view of the case, there was not in fact any such trial here. The charges were not drafted as carefully as they should have been, and, if read by themselves, might have been held to include charges that could not legally be joined with the

conspiracy charge. But the error here was one of form and not of substance. The joint trial of the charges of receiving from outside sources and being a conspirator was not a reality. There was in fact no such joint charge, only the appearance of one, and the circumstances are entirely different from those dealt with in *Subrahmania Ayyar's* case (1). In that case there can be no question that there actually had been a trial together of 41 acts, only three of which could have been legally joined together. The misjoinder was quite clearly one of substance as well as of form.

In the present case the trial which has actually taken place is the trial under charges of conspiracy and of receiving stolen property in pursuance of that conspiracy. There has not in fact been any trial which the Code has positively forbidden. There has merely been an error in the wording of the charge, which has in fact affected nobody.

In my opinion the circumstances of this case are entirely different from the circumstances of *Subrahmania Ayyar's* case (1), and the case is one where the error can be cured by the provisions of S. 225, Criminal P. C. There was, in my opinion, no joint trial of two offences which could not be tried together. There was merely an error of the particulars required to be stated in the second charge—an error which can be cured by S. 225. I do not understand it to be seriously suggested that the petitioners have in fact been prejudiced by this error. My finding on this point, therefore, is that there has been no such misjoinder of charges as necessitates by itself the setting aside of the proceeding of the trial Court.

The next point which has been raised on behalf of the petitioners is, to my mind, one of greater difficulty. After the examination of some of the prosecution witnesses, but before the framing of the charges, the accused were examined generally on the case and they were further examined later after other prosecution witnesses had been examined. They were questioned as to the oral evidence against them. Their convictions, however, are based chiefly not on the oral but on the documentary evidence.

There are a very large number of documents which have been relied on by the prosecution. They consist in part of letters of the alleged conspirators and in part of entries in diaries of the accused. The Courts below have held chiefly from general deductions drawn from these documents that the petitioners were parties to the criminal conspiracy; but so far as these documents were concerned, the only questions put to Maung Ba Chit were as to the documents having been seized in his possession and as to certain documents being in his handwriting and in the handwriting of his wife. His attention in his examination was not drawn to the contents of any of the documents which were held to be incriminatory; nor was he asked for any explanation in any single case. The same remarks generally apply to Maung Naw.

Section 342, Criminal P.C., lays down that for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court shall question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence. I held in the case of *Nga Hla U v. Emperor* (2), that a failure on the part of the Court further to examine an accused person after two of the prosecution witnesses had been recalled for further cross-examination, after the charge had been framed, did not necessarily vitiate the whole trial if the accused person was not in any way prejudiced thereby. I see no reason to change the view I took in that case, a view of which Carr, J., has expressed a general agreement in the case of *K. M. Subbaya Naidu v. Emperor* (3). But the question that arises in this case is a very different one, and the contention is that the petitioners have in fact been very seriously prejudiced by the failure on the part of the Magistrate.

Different views have been taken as to the exact meaning of this section. In the case of *Emperor v. Alimuddin Naskar* (4), it was held by Mukerji, J., that the section requires the Court to put to the accused the salient facts

and circumstances of the case in a succinct form, and to ask him if he has any explanation thereof to offer. Newbould, J., took a different view. He held that a formal question in general terms, which gives the accused an opportunity of making a statement of his defence with his own lips is a sufficient compliance with the mandatory provisions of S. 342, Criminal P. C., since it enables the accused to explain any circumstances appearing in the evidence against him.

In the case of *Maung Hman v. Emperor* (5), May Oung, J., took substantially the same view as Mukerji, J. He remarked as follows:

"The object of the section is to enable the accused to explain each and every circumstance appearing in evidence against him. A Judge or Magistrate should note every point which he thinks he will have to put into the scale against the accused and then question him on each point. Otherwise it is impossible for the accused to know what is in the Court's mind. Several points may be made by the prosecution; some of these the Court considers good others are regarded as practically worthless. But the accused is not afforded any reasonable opportunity of clearing up the case by such a question as: 'What have you to say?' The specific point or points which weigh against him must be mentioned; for if this is not done, he cannot reasonably be expected to be able to explain it or them."

With these remarks I generally agree. The object of the examination of the accused is clearly to enable him to explain anything appearing in evidence against him. It is impossible to lay down any hard and fast rule as to what questions should be put in any particular case nor would the failure to put certain vital questions vitiate a trial if the accused were in no sense prejudiced by that failure. But in a complicated case like the present I think it would be an entirely insufficient compliance with the provisions of the section to put a general question asking the accused what he had to say in explanation of the evidence against him.

A very large number of the passages in the documents on which the prosecution relies are in themselves obscure and capable of more than one explanation; and, where the prosecution is mainly based on the contents of such documents then, it seems to me of special importance that the accused should be asked specifically as to what their

(2) A.I.R. 1925 Rang. 258=3 Rang. 139.

(3) A.I.R. 1929 Rang. 331=7 Rang. 470.

(4) A. I. R. 1925 Cal. 361=52 Cal. 522.

(5) A. I. R. 1924 Rang. 172=1 Rang. 669.

explanation of the doubtful passages are. I do not suggest that they have to be questioned about every single one of the documents separately, or that no document could be used against them as to which a specific question had not been put. But in order to comply with the spirit of the provisions of this section, there should at least in my opinion have been some examination of the accused as to the contents of some of the more important documents.

The question for consideration, therefore, is whether the accused can be said to have been prejudiced by the failure to put these questions, and whether, in the absence of such questions, it is possible to uphold the convictions. I find it impossible to answer this question satisfactorily without considering in some detail the documents themselves and what they can be held to have proved. But before considering the contents of the documents, it seems to me necessary to have some clear idea of what the offences charged are and what it is necessary for the prosecution to prove to establish those charges.

The main charge against the petitioners is that they conspired together to commit theft of timber with a number of other persons. In the first place they are not charged with any isolated act of theft. They are charged with widespread conspiracy to commit theft extending over a period of two years ; and in the second place the conspiracy they are charged with is one of committing theft. A number of the documents produced on behalf of the prosecution indicate that the accused, Ba Chit, has been bribing various forest subordinates and clerks, some of whom were accused in the trial Court. But reprehensible though the wholesale bribery may be, bribery is not theft, and the evidence as to bribery is only relevant in this case so far as it supports other evidence to show the existence of the conspiracy to commit theft. The phrase "illicit felling" has been constantly used in connexion with this case. It is a somewhat unfortunate phrase to use in connexion with so artificial a charge as the charge of conspiracy to commit theft. •

As I understand the prosecution case it mainly is that Ba Chit, through his agents, has during the last two years

been deliberately cutting down green Pyinkado trees, which were not covered by the terms of the licences and permits held by him. The licences and permits he holds are of three kinds—namely, (i) Legwinthit, or permission to fell timber on revenue paying land ; (ii) Gaikthit, or permission to fell any standing Pyinkado within seventy-five feet of a kyaung ; and (iii) Aule-natthat or a license to cut in Government Forests what are known as "Aule-natthat" trees. There is no official definition of the word Aule-nat that, but it has been held to mean standing trees which have died and trees which have fallen naturally.

The suggestion for the prosecution is that under cover of this Aule-natthat licence, Ba Chit, through his agents, has in fact been cutting down growing Pyinkado trees on a large scale. There are various other Forest offences and fraudulent practices which Ba Chit is alleged to have committed or it is alleged the documents indicate, have been committed on his behalf and with his connivance. The lower Courts have held that the cutting of green Pyinkado trees not covered by a licence is necessarily theft. I agree that if the cutting on a large scale has been proved, then most of the necessary ingredients of theft are clearly present. There has been an intention to take property dishonestly out of the possession of Government and there has been a movement in order to such taking. The only point which raises difficulty in this respect is whether it can be held that the dishonest intention was to take the property without the consent of the person in possession. It would appear that if a green Pyinkado has been cut in most cases it has not been taken down the Moulmein before the licensee has paid the revenue due to Government thereon.

The procedure to be followed before timber extracted by private persons can be at the disposal of the person extracting it is described by Mr. Ricketts the Divisional Forest Officer. The trees when felled are dragged to a place previously agreed upon and fixed by the Forest Department Officers for measurement. The property hammer mark must be affixed to the stumps and the logs by the permit-holder or his agent

within 24 hours of the felling. The Forest Department measures the timber either at the stump or at the place fixed that is the bank of the nearest floating stream. The logs are then measured by the revenue marker who is either the Range Officer or some one specially deputed by the Divisional Forest Officer. The marker then records the measurement in the regulation book giving the serial number of the logs measured. A copy of the measurement is then sent to the head office at Moulmein. There it is checked and if royalty has not been prepaid a chalan is prepared and sent to the licensee. If the royalty has been prepaid the total amount is then entered in the register and debited against the permits. On the chalan royalty is paid in Moulmein and debited in the register likewise. After that a pass order is issued from the head office to the revenue marker and a copy of the pass order is supplied to the licensee. The revenue marker is instructed by the pass order to put the akauk or revenue paid mark on the timber and to issue bills and removal passes. The bill issued is on a printed form on which the revenue marker enters details of the logs under measurement and also the impression of his akauk. This bill is given to the representative of the owner in the forest and is apparently in the nature of a title deed to the timber. At the same time a removal pass is issued. Except on such a pass no timber can be removed. The result of all this procedure is that to all intents and purposes the timber remains in the possession of Government until the bill and the removal pass are issued. Pyinkado is then made up into rafts and floated downstream. Before reaching Moulmain it has to pass and be checked at the revenue station at either Ngante or Htake.

It has been urged on behalf of the petitioners that even though timber were originally cut and removed with a dishonest intention it remains in the possession of Government until the extractor obtains the removal pass and the bill connected with it, and that it cannot, therefore, be said to have been removed out of the possession of Government without Government's consent. I think it must be conceded that

in such circumstances the consent of Government or its representative, has been obtained to the removal of the timber.

In the case of *Reg v. Hanmanta* (6), the accused had cut down wood which had been removed to a Government Depot. It was subsequently taken away by the accused from the Government Depot with the consent of a Forest Inspector but without paying any Government dues. The Timber was held to have been in the possession of this Inspector on account of the Government. But it was held that the timber was not removed with the consent of Government as the Inspector was not authorized to give consent and that was clearly known to the accused person.

The circumstances of this case are very different. Here the consent was given by the person clearly authorized to give it after the payment of the full duty. I think, however, that presuming that there was a deliberate intention from the very first to obtain timber which the accused knew he had no right whatsoever to fell the offence would be theft on the ground that the consent given to the removal by Government was a consent based on a misconception of fact.

Section 90, I. P. C. lays down :

"A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person . . . under a misconception of fact and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such . . . misconception."

To what extent this section applies to the provisions of S. 378, I. P. C., I find it very difficult to decide. If it means that any misrepresentation of fact inducing a consent would result in that consent not being a consent within the meaning of S. 378, then it is difficult to see what distinction can be drawn between the offence of theft and claiming property dishonestly by means of cheating.

I have been unable to find any authority on this point. It seems to me, however, that in the circumstances just described it must be held that the consent has been given under a misconception of fact. Had the responsible officer who agreed to accept the revenue and to the issue of the removal pass and

the bill of title been aware that the timber in question was timber which the licensee had no right whatsoever to fell, there can be no doubt that the consent to the removal would never have been given. Consent was given on the understanding that the timber to be removed was timber covered by a license. If in fact it was timber not covered by a license at all there was a misconception as to the property for which consent was given. I think, therefore, that in such a case it must be held that there was no such consent as is meant by S. 378, I. P. C., and that in such circumstances the offence of theft was completed.

There are other respects in which some of the documents suggest that offences may have been committed. According to Mr. Ricketts one way in which Government might be defrauded would be by passing down timber on which the akauk mark had never been placed and on which revenue had never been paid, and escaping the attention of the revenue depot at Ngante either by concealing the timber or by bribing those in charge of the revenue stations. I think it is clear that timber taken in this way would be obtained by theft. It is quite clear that the person who took the timber out must have known that any forest subordinate who gave a consent thereto had no authority to give such consent.

Another method in which it has been suggested that Government may be defrauded is by influencing the officer deputed to measure the log and having short measurement returns sent to headquarters, the result being a defrauding of Government revenue. I do not think this method of fraud necessarily involves theft. If the timber was timber covered by the licenses it cannot be held that there was any dishonest intention when the timber was cut and moved to the river bank. After that, the timber remained in the possession of Government until it was handed over to the licensee or his agent with the bill of title. Possession was then made over to the licensee or his agent and it was after possession and title had been made over to him that any moving which could be called dishonest took place. The offence probably amounted to an offence of cheating,

but that is not the offence the accused are charged with conspiring to commit nor is property obtained by means of cheating stolen property within the meaning of S. 413.

Various other offences punishable under the Forest Act such as the failure to put a property mark on the stump after felling a tree clearly would not amount to theft. The two petitioner may have conspired together and with others to bribe forest officers and to defraud Government in various ways but their convictions in this case cannot be upheld unless it has been shown that they entered into a general conspiracy to commit theft and were habitual receivers of stolen property, or abetted the habitual receiving of stolen property. And in reading the documents we have to consider to what extent they implicate the accused in these particular offences. The Magistrate at p. 12 and the following pages of his judgment has detailed in chronological order what he considers the principal documents for the prosecution case. The first ten extracts dealt with by him it is not necessary here to discuss. They merely indicate that bribes were being paid on a large scale to dishonest clerks and subordinates, but do not indicate for what purpose they were being paid. We have then Ba Chit's diary (Ex. 3-B) of date 7th February 1927. This diary contains the entry :

"What arrangement has been made to give tips to the rangers at Chaung Nakwa to tell them not to have any fear if the logs are under size."

This entry does suggest collaboration with the rangers, but its exact meaning is obscure. It is possibly a suggestion that under-measurement should be shown. If so, according to the view I have taken it would not involve theft. Before using an obscure reference of this sort, it is clear that Ba Chit's explanation should have been obtained.

The next document is a letter (Ex. R.) dated 3rd March 1927. This is a letter from Si Khaing to Ba Chit and appears to suggest that the rangers are being persuaded to under-measure timber. On 8th of April, Maung Naw wrote to Ba Chit Ex. 2. (v) This refers to the cutting down of Kyungut of teak poles and suggests that Ba Chit should use his influence with Ye Gyan. The prosecution do

not allege that they have proved theft with regard to Kyungut or teak poles and this document does seem to me to be of much value.

In the diary of Maung Naw on 15th April (Ex. 5 F) there is a joking reference to the cutting of 300 standing green teak trees. The next day Maung Naw wrote the letter (Ex. 3 B) to Ba Chit, in which he said that Maung Kin had taxed him with getting his workmen to fell 300 Kyunguts and had jokingly said that he would prosecute. The allusion is too obscure for any satisfactory deduction to be made from it, especially when Maung Naw has not been asked to explain it.

On 27th April there is an entry in Maung Naw's pocket diary (Ex. 5 F C). In that Maung Naw says that he was accused by Tun Byu of cutting green teak trees. He denied it, but when they accompanied the forester to inspect the stumps, he found the information was not without foundation, and had to persuade the forester to overlook the matter. I do not think it is a fair reading of this entry that Maung Naw had been privy to the felling of the green teak trees. All that it suggests is that that he did his best afterwards to hush the matter up and save Ba Chit's property mark.

Two days later, on 29th April, Maung Naw wrote to Ba Chit the letter (Ex. 3 A). The prosecution has placed special reliance upon the letter. In this letter, Maung Naw states

"U Si Khaing has in his possession over 400 aule natthat standing trees or logs. They are not genuine aule natthat but converted ones."

He then goes on to state that Tun Byu had made an inspection of stumps accompanied by Maung Naw and Si Khaing. Maung Naw suggests that Ba Chit shall call Tun Byu and give him about 100. He adds that U Si Khaing said that he might be responsible for the money given to Tun Byu and that Sit Khaing intended to work the said timber during the rains. This certainly suggests that Maung Naw and Ba Chit are attempting to save Si Khaing from the consequences of his felling Pyinkadoes outside the terms and limits of the licenses and permits. The last part of the extract however might suggest that Sit Khaing himself is shouldering the responsibility and undertaking to work

the timber. It does not seem to me necessarily by itself to show that Ba Chit and Maung Naw were taking over the timber themselves and the Court certainly would not be justified in giving it that interpretation without first hearing what Maung Naw or Ba Chit had to say in explanation. (His Lordship then referred to other letters dated 1st of May, 9th May, 17th June, 6th, 13th, 20th and 30th of September, 3rd and 15th of the November and proceeded.) On 28th April Maung Naw wrote a letter (Ex. C) to U Ba Chit and some strens has been laid on this letter. He speaks about the inspection by the Divisional Forest Officer. He says that the Divisional Forest Officers has not yet discovered a single log of theirs as they have cut them down elsewhere. He says that he has suspended dragging of logs. The letter does suggest a guilty conscience, but Maung Naw should certainly have been asked to explain it before any inference could be drawn against him. Prior to this, on 18th March Po Thein had written a letter (Ex N) to Ba Chit. In it he says that his duty is to use his brain to get timber in addition to that extracted under the permit. It is of course possible to obtain timber other than that covered by Ba Chit's permit in other ways than by theft.

On 28th April Maung Naw wrote Ex. B to Ba Chit. In this letter he says that they have cut their rafts down to cause the raft to sink in the middle of the Chaung apparently because they can get no one to prepare the rafts. He also says that he has sunk 40 logs of Po Thein, and nearly 100 of his own. The next letter written by Maung Naw to Ba Chit is dated 12th May (Ex 3). He talks of Sit Khaing's difficulties, but does not say anything very specially relevant to this case. The next letter (Ex. F) dated 13th May is more important. Maung Naw refers to the Divisional Forest Officer's inspection and to the Divisional Forest Officer's diving for logs. He says that witnesses have been arranged to make Sit Khaing responsible for the logs discovered. He also refers to villagers being bribed, apparently not to help the Divisional Forest Officer. This seems to be a letter which Maung Naw should have been asked to explain. It may suggest a guilty conscience and it may suggest the adoption of various

dishonest means, but it does not necessarily suggest theft.

I have referred I think now to most of the documents on which the prosecution principally rely as proving the conspiracy to commit theft. There is oral evidence as well and my attention has been specially drawn to some of it by the learned Government Advocate. Mr. Rickett's evidence shows that green Pyinkado was cut down on a large scale, but admittedly there were a large number of different traders working in the forests concerned and this by itself does not prove anything against Maung Naw or Ba Chit. As regards Ba Chit, Mr. Rickett gives no definite evidence. In fact he says as far as the payment of royalty demanded is concerned, there had been no default and Ba Chit has a clean sheet. Sit Khaing says definitely that he was encouraged to cut green Pyinkado by Ba Chit. On his own showing, Sit Khaing is an accomplice and he is an accomplice giving evidence without having been made an approver and therefore liable to prosecution at any time. His evidence has rightly been accepted with caution by the lower Courts and his statement that he was encouraged to cut green Pyinkado by Ba Chit is obviously by itself of little value. On this point he has no corroboration on whatsoever. Ba Chit's son Tun Sein and his coolies Maung Pein and Po Chein say that Maung Naw pointed out what trees were to be felled. This evidence would be of value against Maung Naw if it could be believed, but in fact all these witnesses would seem to be more or less accomplices and the lower Courts have not relied on their evidence. Sein Ban speaks of forming rafts in which out of 1,100 logs some 600 were green and says Maung Naw was present. But under his Gaikthit and Legwinthit permits, Ba Chit was entitled to extract green timber. Pan U says that he felled green timber under Sit Khaing's orders, but does not implicate Ba Chit or Maung Naw. The Sessions Judge has treated, and in my opinion rightly treated, the evidence of Sit Khaing, Tun Sein, Maung Pein and Po Chein as untrustworthy. The oral evidence by itself obviously is of little value for the purpose of establishing the guilt of the accused. That being so, it seems to me to be of the

highest importance that before using the documents against the two petitioners in the way they have been used, some explanation should have been obtained from them as to their contents. On this point of the failure to examine the accused about the document, the learned Sessions Judge has remarked:

"It is contended that there ought to have been a distinct and separate question in respect of each document, some what in the following form."

You see the Ex. 10Z. According to this, Maung Naw says that he sent you 130 stolen logs. Is there anything that you wish to explain in connexion with this? If it was only in connexion with such documents that there had been failure to put questions, there would be a great deal to be said for the view that the failure to put such questions was not of much importance. But none of the important documents in this case contained any definite statement that stolen logs had been sent. The allusions in the letters are nothing like so definite as this. They are most of them obscurely worded and can only be interpreted as referring to stolen timber if read with other evidence in the case. I have specially indicated some of the documents in which I think questions ought to have been put. It is quite true that the numerous entries about payments of illegal gratification do suggest that bribery has been going on on a very large scale and there are indications that as a result of this bribery Ba Chit has had considerable influence with forest subordinates. There are, however, an enormous number of ways in which such influence could be used without any question of theft being involved. Admittedly it has not been proved that any particular timber has been taken by Ba Chit without payment of revenue and it is clear that the prosecution are not able to prove any specific instance of theft or of receipt of stolen property. Had they been able to do so there would certainly have been a charge of that particular offence. The Courts have been asked as a result chiefly of a mass of documentary evidence to infer that there has been a conspiracy between Ba Chit and others to commit theft. The evidence is in fact largely circumstantial and depends on the meaning of certain documents. The case

seems to me to be one in which the remarks of Jenkins, C. J., in the case of *Barindra Kumar Ghose v. Emperor* (7) are particularly apposite. At p. 508 the learned Chief Justice remarks:

"There is always the danger in a case like the present that conjecture or suspicion may take the place of legal proof, and, therefore it is right to recall the warning addressed by Mr. Baron Alderson to the jury in *Reg v. Hoyle* (8)."

Where he said:

"The mind was apt to take pleasure in adapting circumstances to one another, and even in straining them a little, if need be to force them to form parts of one connected whole, and the more ingenious the mind of the individual, the more likely was it considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete."

I think it can be said that not one of the documents relied on by the prosecution in itself clearly convicts either Maung Naw or Ba Chit of an intention of committing theft. The contention would be that the accumulated effect of all these documents read together leads to a fair presumption that they had entered into a definite conspiracy for this purpose. Before reaching such a conclusion, it seems to me specially necessary to bear in mind Mr. Baron Alderson's observations and that it would be an exceedingly dangerous thing to draw an inference as to any such conspiracy without having asked either of the two petitioners to explain the contents of any single one of the documents that have been used. In an ordinary case dependent chiefly on oral evidence, an accused person would from the very nature of things have a very clear idea of what evidence was likely to be considered of importance against him by the Court. In such a case a failure to examine him properly might not be of very great importance. In a case such as the present, it seems to me impossible for the accused to know by the light of nature exactly what particular passages from the mass of documents produced are considered by the prosecution or by the Court as requiring an explanation.

It was, therefore, of far more importance that they should have been asked what their explanation of the docu-

(1) [1910] 37 Cal. 467=7 I. O. 359=14 O. W. N. 1114.

(8) [1888] 2 Lew. 227.

ments was than in any ordinary case where the evidence was mainly oral. Without their having been so questioned, I find it impossible to hold that they have had a really fair trial or that a finding can justly be come to that they were guilty of a conspiracy to commit theft or of habitually receiving stolen property. It might be possible to send the case back to the trial Court for the two petitioners to be examined further now, but that course would obviously be unsatisfactory. An examination now would be a poor substitute for an examination which should have taken place nine or ten months ago and would involve in all probability the taking of a large amount of fresh evidence. The proceedings are already sufficiently complicated and if made more so would become well nigh unintelligible. It is possible also to order a new trial, but that to my mind is in the circumstances unjustified. I have indicated that I am not at present satisfied as to the exact meaning of the principal document relied on by the prosecution. The petitioners have already undergone a trial of enormous length and have served a term of over two and a half months' imprisonment. The case is by no means such a clear one that it can besaid with any confidence that a conviction after a new trial on the charges framed would be likely. I am of opinion that the interests of justice would not be served by the ordering of a new trial. I set aside the convictions of the two petitioners, and direct that they be acquitted and released so far as this case is concerned.

P.N./R.K. *Convictions set aside.*

1930 Cr. Cases 412

(Rangoon)

MYA BU AND BROWN, JJ.

Government Advocate of Burma—Applicant.

v.

Saya Sein—Respondent.

Criminal Misc. Appln. No. 54 of 1929,
Decided on 25th October 1929.

(a) Contempt—Article in newspaper commenting on pending proceedings is contempt—But such contempt to be punishable must interfere with due administration of justice.

It is contempt to publish an article in a newspaper commenting on the proceedings of a pending criminal prosecution or civil action. But the summary jurisdiction possessed by a High Court to punish for contempt ought only to be exercised when it is probable that the

publication will substantially interfere with the due administration of justice: 41 Cal. 173; *McLeod v. St. Aubyn*, (1899) A. C. 549; *Plating Co. v. Farquharson*, (1881) 17 Ch. D. 49, *Rel. on*. [P 414 C 1]

(b) Contempt—Article in newspaper suggesting that on account of youth of Judge he is unlikely to differ from decision of lower Court — It is attack on his competency as Judge and amounts to contempt.

Any act done or writing published calculated to bring a Court or a Judge of the Court into contempt or to lower his authority is a contempt of Court. But if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, that cannot be regarded as contempt.

Where an article does not confine itself to the justice of the decision but also suggests that the Judge on account of his youth is unlikely to differ from the decision of a lower Court, it is an attack on the competency of the Judge and amounts to contempt: *In the matter of a Special Reference from the Bahama Islands*, (1893) A. C. 138, *Dist.* [P 415 C 1]

Government Advocate—for Applicant.

Ba Han—for Respondent.

Judgment.—On the motion of the Government Advocate, the respondent Saya Sein, has been called on to show cause why he should not be punished for contempt of Court. The respondent is the printer and publisher of a paper known as "The Kesara" newspaper at Moulmein. A case had been tried in the Court of the Special Power Magistrate, Moulmein, against one U Ba Chit and a number of others. In the trial Court all the accused who had been charged were convicted. They all appealed to the Sessions Court and that Court whilst setting aside the convictions of the other appellants, confirmed the convictions of Ba Chit and Maung Naw.* The complaint is with reference to an article published in "the kesara" newspaper on 6th August 1929, after the Sessions Judge had passed orders. At the time of the writing of the article, an application in revision had been filed in this Court and the hearing of that application was then pending. It is claimed that the respondent is guilty of contempt for two reasons: firstly that in the article in question he had commented on a matter which was sub-judice and secondly that the article in itself was one that was likely to bring the Judge and the Court into contempt.

The article sets forth briefly the orders passed by the Sessions Judge and then goes on to say:

*[This matter came up before the High Court and appears on p. 402 of this issue—Ed.]

"In view of the fact that the said case implicated a big timber merchant of the non-Burmese community, it has not only exercised the public mind much and aroused special interest and discussion but the Court room was also crowded by spectators, who came to watch the proceedings during the hearing of the case, both before the lower Court and the Sessions Court. However an appeal having been preferred in the Sessions Court, directly the lower Court had passed its judgment and sentence, we had thought that justice would prevail and have waited quietly without writing anything regarding the lower Court's judgment. Now upon a consideration of the Sessions Judge's judgment as we do not feel that justice has been done, we shall, in duty bound have to write and express our comment and criticism."

The article then proceeds to comment on the case. It suggests that if the facts are proved the conviction should have been under the Forest Act and not under the Indian Penal Code. It then goes on to say:

"Here in U Ba Chit's case he has been convicted not under the Forest Act which is applicable but under S. 413, I. P. C., and awarded a sentence of imprisonment for the very first offence and therefore we are very sorry. Pondering over this state of affairs, in the light of the saying of the ancients (lit), "living not for life's sake but for honour" every thoughtful person will be able to gauge the extent of grief and shame to which U Ba Chit a respectable resident who has won the trust and confidence of the people and who has acted as one of their Municipal Commissioners, Pagoda trustees, and executive members of the local religious and social associations has been subjected. Mr. Wright, the Sessions Judge who heard U Ba Chit's appeal is yet a youth of little experience, and it must be said that his decision is not different from that of the lower Court in the same way as the water of a well so to speak is not different from that of a pond. In connexion with youthful Sessions Judges, Williams, J., of the Calcutta High Court has recently made a definite statement in his judgment in a case heard by him thus:—"Owing to the practice peculiarly in vogue throughout India of investing young judges of little legal experience in the Districts with full powers to pass sentences of death a great responsibility had devolved upon the High Court." In accordance with the dictum thus expressed as on account of the decision of a youthful Sessions Judge, U Ba Chit has been subjected to a great shame as much as to feel like almost dying of it, and as such he deserves a very great sympathy and so we have to write this by way of explanation."

The respondent does not deny publication of this article. He expresses his willingness to tender an apology if we should think that the article did amount to contempt. But it is contended that, in fact there has been no contempt of Court which would justify this Court in taking action. In Halsbury's *Laws of England* Vol. 7, para. 614, it is laid

down that it is contempt to publish an article in a newspaper commenting on the proceedings of a pending criminal prosecution or civil action.

When the comments were published in the present case, there were proceedings pending in this Court. We understand the respondent to claim that he was unaware of that fact when he wrote the article. But he must have known that in such cases revision proceedings were bound to follow and we do not consider that on this ground alone he can be held not to have been guilty of contempt. But it has been constantly laid down that the summary jurisdiction possessed by a High Court to punish for contempt on the ground that an article was published during the pendency of criminal proceedings ought only to be exercised when it is probable that the publication will substantially interfere with the due administration of justice.

In the case of the *Legal Remembrancer v. Motilal Ghose* (1), the learned Sir Lawrence Jenkins, C. J., observes at p. 221 :

"It is not enough that there should be a technical contempt of Court; it must be shown that it was probable that the publication would subsequently interfere with the due administration of justice Thus we find Lord Morris in delivering the judgment of the Privy Council in *McLeod v. St Aubyn* (2) describing committal for contempt of Court as a weapon to be used sparingly and always with reference to the interests of the administration of justice. This is an authority that must command our respect. But it does not stand alone. In *Plating Co. v. Farquharson* (3) Jessel M. R. after saying that the practice of making their motions against innocent people ought to be discouraged as far as possible, added, 'they lead to a great waste of time and to considerable amount of costs, and unless the Court is satisfied that the publication is a contempt which interferes with the course of justice, of course, the Court ought not to interfere. while James, L. J. said of the motion made against the proprietors of the newspaper who inserted an advertisement in the ordinary course of business and that it seemed to him to be idle and extravagant and a thing to be strongly discouraged and later he says "I think these motions are contempt of Court in themselves, because they tend to waste the public time."

We do not think it necessary to labour this point as we do not understand the correctness of the principle to be con-

tested. Can it then reasonably be said that the publication of the present article was at all likely to interfere with the due administration of justice because it was published during the pendency of the revision proceedings in this Court? We cannot see how it is possible to hold that there was any such probability. We do not think it would be contended that this Court is likely to be influenced by a suggestion that because a certain act may amount to an offence under the Forest Act, therefore it should not also be punished under the Indian Penal Code. There is no question of any witnesses, jurors or assessors being influenced. Revisional matters are dealt with by a Judge alone, and for the most part are concerned with questions of law.

The article does not in itself suggest that the writer had any thought of proceedings that must follow in revision. He definitely states that he reserved his comment until the trial in the Sessions Court was over, and we see no reason to suppose that he published the article with any idea that anything he said would be likely to have any effect on the revisional proceedings. That of course would not save him, if, in fact, the article was likely to have such an effect. But in our opinion, there is no probability whatsoever that the publication would substantially interfere with the due consideration of the case in revision before this Court. We do not wish to be understood as approving of the making of comments on pending judicial proceedings, such comments are clearly always severally to be depreciated. But even if the comments in this case amounted to a technical contempt on the ground that they were made whilst the case was sub judice, we think that the authorities are clear that the case is not one in which on this ground the Court would be justified in exercising its summary powers.

There remains, however, for consideration the other point which has been raised. It is contended that the attack in the report made on the Judge itself amounts to contempt of Court. It has been laid down that any act done or writing published which is calculated to bring a Court or a Judge into contempt, or, to lower his authority, or to interfere with the due course of justice, or

(1) [1914] 41 Cal. 173=18 C. L. J. 452=20 I. O. 81=17 C. W. N. 1253.

(2) [1899] A. C. 549=68 L. J. P. C. 187=48 W. R. 173=15 T. L. R. 487=81 L. T. 158.

(3) [1881] 17 Ch. D. 49=50 L. J. Ch. 406=29 W. R. 510=44 L. T. 399.

the lawful process of the Court is a contempt of Court. This principle was definitely enunciated in the case of *The Queen v. Gray* (4). At p. 40 of the report Lord Russell, C. J., states :

"Any act done or writing published calculated to bring a Court or Judge of the Court into contempt or to lower his authority is a contempt of Court. That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to construe adversely what under such circumstances and with such an object is published ; but it is to be remembered that in this matter the liability of the press is no greater and no less than the liability of every subject of the queen."

If the article complained of had confined itself to fair criticism of the justice of the decision of the Sessions Court, then no question of contempt on this ground would arise. But the article goes farther than this. It does not confine itself to the justice of the decision, but definitely attacks also the competency of the Judge who tried the case. It suggests that the Judge on account of his youth, was unlikely to differ from the decision of the lower Court and finally states:

"On account of the decision of a youthful Sessions Judge U Ba Chit has been subjected to a great shame as much as to feel like almost dying of it, and as such he deserves a very great sympathy."

There is, it is true no suggestion whatsoever against the honesty or character of the Judge. But it seems to us inevitable that the publication of such remarks in a public newspaper must tend to bring the Court and the Judge who heard the appeal into contempt.

We have been referred on behalf of the respondent to the case of *In the matter of a Special Reference from the Bahama Islands* (5). In that case the Chief Justice of the Bahama Islands was attacked in a letter published in a newspaper. It was held that the letter in question though it might have been made the subject of proceedings for libel, was not in the circumstances calculated to obstruct or interfere with the course of justice or the due admini-

nistration of the law. and, therefore, did not constitute a contempt of Court. It seems to us, however, that that case can be clearly distinguished from the present case. There was in that case no criticism of the Judge's action in the trial of any case. It was rather a personal attack on the Chief Justice than a direct attack on his administration of justice. In the present case there is quite clearly an attack on the Judge not in his personal and private capacity but in his capacity as a Judge in the conduct of a particular case. The comments are to the effect that there has been a failure of justice owing to the incompetence of the Court, and we cannot but look upon such comments as being likely to bring the Court into contempt, and if unchecked, ultimately to interfere with the course of justice or the due administration of the law. We are, therefore, of opinion that the publication of the article in question did amount to a contempt of Court, and we are bound to protect Subordinate Courts from such attacks.

The respondent did not at once, when called upon to show cause, tender an unconditional apology, but in the complaint as filed before us, what was chiefly insisted on was that the publication of the article amounted to a contempt, because it took place during the pendency of the revision proceedings in this Court. On this ground we have held that no case has been made out for us to take action, and we must, therefore, hold that on the main ground taken in the application the respondent was justified in raising the objection he did.

We understand that he is ready now to tender an apology to the Court. Bearing in mind the fact that there is no suggestion made against the integrity or personal character of the Judge in the article complained of, and that cases of this kind are fortunately rare in this province, we allow the respondent an opportunity of tendering an apology before passing sentence upon him.

On the judgment having been read over the respondent states that he regrets that the remarks appearing in the article complained of were derogatory and in contempt of the Court of Sessions and the Judge of that Court, and that he tenders an unconditional apo-

(4) [1900] 2 Q. R. D. 26=64 J. P. 484=82
L. T. 581=48 W. R. 474=16 T. L. R. 305.

(5) [1893] A. C. 138.

logy, and he undertakes to be careful not to offend in a similar manner again. In all the circumstances of the case, we consider that the apology may properly be accepted. We accept the apology and discharge the respondent. Considering that the main ground on which the petition was made has failed, we make no order for costs of this application. Dr. Ba Han for the respondent, undertakes that the fact of an unqualified apology having been made will be published in the respondent's newspaper.

- P.N./R.K.

Order accordingly

1930 Cr. Cases 416

(Rangoon)

CARR, J.

M. S. Ponnuswami and another—
Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 566-B of 1929,
Decided on 3rd February 1930, from
order of Dist. Magistrate, Myingyan,
in Criminal Revn. No. 530 of 1929.

Penal Code, Ss. 206 and 207—Civil suit
must be actually pending.

The words "intending thereby to prevent that property from being taken into execution of a decree or order which has been made or which he knows likely to be made by a Court of justice in a civil suit" refer to a civil suit which is actually pending before a Court.

[P 416 C 2]

Bose, Venkatram and De—for Applicant.

Guha and Ganguli—for the Crown.

Judgment.—In this case one Hesa Ismail filed a complaint charging one Ayakaranam with an offence under S. 206, I. P. C. and the petitioners with an offence under S. 207. It was alleged that the first named had made and the petitioners had accepted a fraudulent transfer of the goods of the first named in order to prevent their seizure under a decree which was likely to be passed in a civil suit in favour of the petitioner. No civil suit had in fact been filed, and it appears that none has been filed even yet. Indeed on the day before he filed the complaint the complainant had filed an application for the adjudication of Ayakaranam as insolvent. It has been urged that in view of this last fact the prosecution could not be launched by virtue of S. 195, Criminal P. C. I am inclined to think that this is correct, but will not

go further into the point, because the Magistrate held that the pendency of a civil suit was a condition precedent to the commission of the offence alleged to have been committed. On that ground he discharged the petitioners and their co-accused.

On an application in revision the District Magistrate took a different view and ordered a further inquiry into the case. This is an application for revision of the District Magistrate's order. Neither Magistrate has given any authority for the view taken by him; no authority on either side has been cited before me, and I have not been able to find any similar reported case. The sections provide for the punishment of fraudulent transferors and transferees who have made or accepted the transfer :

"intending thereby to prevent that property from being taken into execution of a decree or order which has been made, or which he knows to be likely to be made, by a Court of justice in a civil suit."

In my opinion those words refer to a civil suit which is actually pending before a Court. It is, of course, possible to argue that if the complainant had a good actionable claim against the transferor and had threatened to file a suit, the transferor must have known that if the complainant did file a suit he would be likely to obtain a decree, and that the wording of the section is wide enough to cover this. But reading the section as a whole I think that this is too wide a meaning to attribute to its words and that they can be held to refer only to a suit actually in existence. I therefore set aside the order of the District Magistrate directing a further inquiry and restore the order of the Second Additional Magistrate of Myingyan discharging the accused in his Criminal Regular Trial No. 35 of 1929. This order applies to the accused Ayakaranam as well as to the petitioners.

P.N./R.K.

Accused discharged.

1930 Cr. Cases 417

(Patna)

FAZL ALI AND DHAVLE, JJ.

Harakrishna Mahatab—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 21 of 1929, Decided on 2nd August 1929, from order of Sess. Judge, Cuttack, D/- 4th June 1929.

(a) Criminal P. C., S. 439 — Revision — Finding of facts can be interfered within revision if not based on positive evidence but on inferences.

Although a finding of fact is not usually interfered with in revision, where the finding is not based on any positive evidence but upon inferences drawn from certain circumstances arising from evidence and all materials on which the finding is based are set forth in the judgments of the Courts below, it is open to the accused to ask the High Court to consider whether the conclusions arrived at by the Courts below are warranted by those materials.

[P 419 C 2]

(b) Penal Code, S. 406—Evidence of dishonest intention — When and how much necessary — Principle enunciated.

It is neither necessary nor possible in every case of criminal breach of trust to prove in what precise manner the money was spent or appropriated by the accused, since by law even temporary retention provided it is dishonest is an offence. But where there is no direct evidence of misappropriation and one is left to surmise as to what use was made by the accused of money, one ought to require clearer evidence of dishonest intention than in a case where there is direct evidence to prove that the money was appropriated by the accused for a particular use which is inconsistent with his position as a trustee of the money.

[P 422 C 1]

(c) Penal Code, S. 406 — Failure to give account or giving false account is strong but not conclusive circumstance against accused.

In cases of criminal breach of trust failure to account for the money proved to have been received by the accused or giving a false account as to its use is generally considered to be a strong circumstance against the accused. But accused must not be convicted on it alone. It is only an indication or piece of evidence pointing to dishonest intention and must be considered along with other facts of the case; *A. I. R. 1927 Cal. 403, Diss. from.* [P 423 C 1, 2]

M. S. Das and *B. N. Das*—for Petitioner.

C. M. Acharya—for the Crown.

Fazl Ali, J.—This is an application on behalf of one *Harakrishna Mahatab*, who has been convicted under S. 406, I. P. C. and sentenced to three months' rigorous imprisonment and to a fine of Rs. 200.

The facts of this case have been set out in great detail in the judgments of the Courts below and I shall only

briefly refer to them. In the year 1927 when the petitioner was the Chairman of the District Board of Balasore a resolution was passed on 23rd March 1927, by the Education Sub-Committee of the District Board that the unspent balance of the previous year should be spent in sanctioning building grants to a number of Middle English Schools in the District including the Middle English School at Agarpura provided that certain conditions were accepted by the Managing Committees of those schools. The Sub-Committee proposed to allot a sum of Rs. 2,000 to Agarpura while sums allotted to other Middle English Schools were in some cases less, in some cases more and in several cases the same as that allotted to Agarpura. On 27th March 1927 the Managing Committee of the Agarpura School passed a resolution to the effect that the proposed grant be accepted by the school and an agreement be entered into on the lines suggested by the District Board. It may be mentioned here that sometime before the date the Agarpura School Committee had applied for a building grant to the District Board and estimated cost of the building to be about Rs. 7,500. The School Committee, therefore, while accepting the grant also resolved that they should arrange to contribute the balance of the estimated amount to the general school fund and that the grant made by the District Board be withdrawn before the 31st March which was the end of the financial year. On 28th March 1927 the committee executed an agreement in favour of the Chairman of the District Board, one of the clauses in which runs as follows;

"That we will contribute the balance of the estimated amount to the general school fund and the whole money will be deposited into Postal Saving Bank and the building will be done by the contractor appointed by the Board and paid from the fund according to the District Board Engineering Department rules and the site and the plan of the school will have to be approved by the District Board authorities and the District Inspector of Schools, Balasore."

I may mention here that the petitioner was at the time this arrangement was executed not only the Chairman of the District Board but he was also the President of the Committee of the Agarpura Middle English School

and he was one of the signatories to this agreement in this latter capacity along with the Secretary of the committee and the Headmaster of the school. On 29th March 1927, the petitioner as the Chairman of the District Board issued a cheque in favour of the Agarpara Middle English School and on the same day the cheque was cashed and money was made over to the petitioner as the President of the School Committee. On 30th April 1927 the Education Sub-Committee's resolution of 23rd March 1927, was confirmed by the District Board. Sometime in May 1927, there was fresh election of members for the District Board and in October 1927, Babu Gopal Prasad Das who is the present Chairman of the District Board was elected Chairman in place of the petitioner. The new Chairman belonged to a totally different school of thought and was by no means friendly with the petitioner and soon after he came into power it was decided by the District Board to ask for a refund of the amounts of money that had been granted to the various M. E. Schools including Agarpara when the petitioner was the Chairman. So on 29th December 1929, a letter was issued by the new Chairman to the Secretary of Agarpara M. E. School asking him to refund the amount of Rs. 2,000 to the District Board and pointing out that the grant had not been made according to the rules laid down in the Education Code. On 9th January 1928 the Headmaster of the Agarpara M. E. School sent a reply in which he said that the grant could not be refunded as a portion of it had already been spent in purchasing materials for the school building and the remainder had been advanced for the manufacture of bricks and purchase of other materials. The District Board asked again for a refund of the money on 31st January 1928, and, in February 1928, the School Committee recorded the following resolution in the minute book.

"In view of the fact that Chairman, District Board, Balasore, has asked the Secretary to refund the building grant of Rs. 2,000, and that the amount has already been spent in purchasing some materials and in giving advances for the purchase of some materials the committee regret that the amount of Rs. 2,000 cannot be refunded."

It appears that no further notice was

taken by the District Board of this matter until 18th September 1928 when another letter was addressed to the Secretary asking him to send the pass book kept by the school. On 19th September 1928, the Headmaster replied that the Secretary and the President being away the letter could not be complied with. On 26th September 1928, the District Board repeated its demand for the pass book and threatened "steps" against the Secretary. On 28th September 1928, the Headmaster wrote again saying that the Secretary and the President were still away. Meanwhile the matter seems to have been communicated to Mr. Beal, the then Magistrate who wrote a letter to the Superintendent of Police on 29th September 1928, asking him to institute a case under S. 406, I. P. C., against the petitioner. The letter was treated as "the first information" and a case under S. 406 was started against the petitioner.

In the course of the police investigation the petitioner informed the police that the money in question had been advanced to one Krishna Chandra Das and one Apariti Sahu for the purpose of collecting materials for the building and for the manufacture of bricks. These men supported the version of the petitioner, and the materials which were said to have been collected as well as the bricks said to have been manufactured were shown to the investigating officer. The District Engineer was also deputed to verify the information, and it has been conceded both by the Sub-Inspector and the District Engineer in evidence that the materials shown to them might very well be worth Rs. 2,000. It appears that the investigating officer was at first not inclined to send a charge sheet but submitted a report on 7th November 1928, in which having detailed the facts of the case, he expressed the opinion that it was doubtful if the case against the accused would stand in Court. Meanwhile Mr. Beal had left the station and a charge sheet was ultimately submitted by the police on 18th January 1929, there being nothing definite on the record as to what order was passed and by whom on the report of 7th November 1928. It may be mentioned here that the entire sum of

Rs. 2,000 had in the meantime been refunded by the Secretary, Agarpura School, and this was done sometime between 29th September 1928, when the first information was lodged and 1st October 1928, when the Secretary sent a letter to the District Board with a chalan showing the refund and explaining delay as being due to the fact that money was being raised by local subscriptions.

Now the receipt of the money not being denied by the petitioner, the vital question to be determined in the case was whether this was a case of anything more than a mere civil liability, or in other words, whether the prosecution had established the dishonest intention of the accused beyond reasonable doubt. The lower appellate Court as well as the trial Court have drawn strong inferences against the petitioner on two main grounds. It is pointed out in the first place that the terms of agreement of 28th March 1927, where entirely ignored by the petitioner, and it has also been held that the story put forward by the petitioner as to the manner and circumstances under which the money was advanced to Krishna Chandra Das and Apariti Sahu is wholly false. As to the former ground the learned Sessions Judge has himself conceded that if the materials for the building were really purchased as alleged by the defence, however irregular the action of the appellant might be and however contrary it might be to the agreement entered into with the District Board, there would be no offence under S. 406, I. P. C. In fact the prosecution evidence itself discloses that several other schools also have not acted in strict accordance with similar agreements executed by them. It is admitted that in several cases the money was not deposited in the Co-operative Bank. It is also admitted that in many cases the type plan provided by the District Board was entirely ignored, and the District Engineer frankly concedes that the rule about constructing buildings according to the District Board type plan is honoured more in breach than in observances. Besides, it is to be remembered that the District Board had made a grant of only of Rs. 2,000 to the school and the balance of the amount

required for the building was to be supplied by the School Committee. In these circumstances it is by no means improbable that the members of the School Committee with the petitioner at its head, would try to arrange to have the building constructed as economically as possible even though it may technically involve the breach of the agreement entered into with the District Board. It should also not be overlooked that the petitioner being the Chairman of the District Board and being in that capacity the person in whose favour the agreement had been entered into, may have quite honestly felt that the rules might very well be relaxed by the District Board in favour of the Agarpura M. E. School and that the School Committee need not for the time being at any rate stick to the letter of the agreement. The terms of the agreement also do not suggest that any infringement of the conditions laid down there would involve criminal liability. About the only question which has to be seriously considered is whether the defence put forward in this case that certain advance had been made to Krishna Chandra Das and Apariti Sahu for the purchase of materials as well as for the manufacture of bricks, can be definitely held to be false on the materials before the Court. Now it is true that the Courts below have come to a finding that the defence story is entirely false, and a finding of fact is not usually interfered with in revision; but as in this case the finding is not based on any positive evidence, but upon inference drawn from certain circumstances arising from the evidence, and all the materials on which the finding is based are set forth in the judgments of the Courts below, it is open to the accused to ask us to consider if the conclusions arrived at by the Courts below are warranted by these materials.

Before considering, however, the reasons given by the Courts below for rejecting the defence version, I wish to point out that there is a small gap in the prosecution evidence which does not seem to have been noticed by either of the two Courts in their judgments. I find from the judgment of the learned Sessions Judge that the entire correspondence about the refund of money

was addressed by the district Board to the Secretary of Agarpara School and almost all the letters that were received in reply were written by the Headmaster or by the Secretary. Thus there is no evidence to show that at any time before the institution of the criminal case any demand for the money was made directly from the accused, and whatever the actual facts or the probabilities may be, there is no evidence even to show how far the accused was aware of this correspondence before the first information report was drawn up. In fact the last two letters of the Headmaster definitely refer to the fact that both the Secretary and the accused were away for the time being and, therefore, the demand made by the District Board could not be complied with. Assuming then that the accused had actually set up a false defence in the case, it is to be considered whether that would in the circumstances of the case necessarily lead to an inference of dishonesty.

It must be remembered that nowhere in the whole correspondence which passed before the institution of the criminal case was there any suggestion that the petitioner was individually liable for the money, and once the School Committee had committed themselves to the statement that the money demanded by the District Board had been spent, as is evident from the letter of the Headmaster dated 9th January 1928, and the resolution of the School Committee dated 24th February 1928, there is nothing to be surprised at, if the accused prepared to adhere to that story, even though he found that he alone was being proceeded against. Remembering, then, that the accused may well have been somewhat handicapped by the previous statement made on behalf of the committee to which on the actual evidence, he may or may not have been a party, and remembering also that what the prosecution has to prove is the state of the mind of the accused at the point of time when the alleged offence is said to have been committed and after the case against him had been started it is a question requiring some consideration whether the mere setting up of a false defence in this case would necessarily raise an inference as to the dishonest intention of the

accused at the critical point of time referred to above.

Passing on to the merits of the defence version, it appears to me on an examination of the materials found in the judgments of the Courts below that although there are certain suspicious features in the evidence put forward on behalf of the defence yet it does not seem easy to say definitely that the story of the accused that certain advances had been made to court-witnesses 1 and 2 has been conclusively proved by the prosecution to be false. Both these persons are members of the School Committee and are interested in the school. It is admitted that bricks can be manufactured more cheaply at Mahantipara than at Agarpara. The mere facts that the court-witness 1 is an old person and is a Vaisnab and has devoted himself to a temple do not seem to me quite sufficient to warrant the inference that he was incapable of assisting the school in procuring or supplying the building materials. The Courts below appear to have been greatly influenced by the fact that the building materials shown to the investigating officer were found at some distance from the present site of the school. It is, however, to be remembered that it is nobody's case that the new building was to be constructed on the present site. On the other hand there is evidence that another site has been proposed for the building and one of the points raised by the prosecution itself is that even that site has not yet been definitely approved by the District Board. It has also been argued by the prosecution that a portion of the temple of which Court-witness 1 was in charge was built some years ago and that the materials found near about the temple were meant for the use of the temple. It may be that the theory evolved by the prosecution is correct, but after all the suggestion is based entirely on speculation and there is no reason entirely to exclude the supposition that the materials found near the temple might have been left after the temple had been built and the court-witness 1 might have been willing to make them over to the school at a cheaper rate than at which they would be available in the market so the money was advanced to him. Apart from these speculations, however, the facts which

in my opinion cannot be ignored are that the defence of the accused is supported by the sworn testimony of these two Court-witnesses and a large quantity of building materials was shown to the police as well as to the District Engineer in the course of the police investigation, the finding of the trial Court being that these officers had been duped in believing that the materials were for the construction of the school building. As against this there is no direct evidence to negative the case of the accused, and whatever inference have been drawn by the Courts below are based more or less upon certain surmises which are described as probabilities. These surmises may possibly be good surmises but when we have to adjudge the guilt of the accused and the adjudging of the guilt depends upon the rejecting of the direct evidence in favour of the accused merely on the strength of a few surmises, all that can be safely said is that the version of the accused may in certain respects be open to suspicion, but it cannot be definitely held to be false.

On the other hand, the version that the amount advanced by the District Board had been spent in purchasing the materials is not a belated story but was given out by the Secretary of the School as soon as the committee was asked to refund the money. The School Committee consists of a number of members and nothing has been shown as to why all those persons should collude with the petitioner in the misappropriation of the money. The Headmaster of the M. E. School according to prosecution evidence, is an honest and respectable person, and it was he who was for some time in correspondence with the District Board. The correspondence which passed between the School Committee and the District Board before the grant was made is enough to show that the School Committee was keen about a new building and had offered to contribute the bulk of the amount which the building was estimated to cost. It is thus a question to be considered whether all the members of the School Committee would suddenly become indifferent and disloyal to the interests of the school as to allow the petitioner to misappropriate the amount granted by the District Board. The learned Ses-

sions Judge says at one place that the School Committee was not aware of the money having been received until it was called upon to refund the money, but there is nothing in the record to warrant this inference. It is also a circumstance to be taken into consideration that not one member of the School Committee or any other person of the locality is charging the petitioner with dishonesty. The petitioner, it is conceded, is considered to be a "big man" in the locality and is a zamindar paying Government revenue of about Rs. 10,000. He was formerly a member of the Legislative Council and it has been admitted in evidence that he has provided a site for the local dispensary free of cost. It also appears from the judgment of the trial Magistrate that the accused provided a site for the new school building at Agarpara. This will be clear from the following passage in the judgment of the trial Magistrate:

"It cannot be said by any stretch of reasoning that the approval of the site by the accused even if it be taken to be in his capacity as Chairman of the Board which certainly was not as he himself offered the site was sufficient observance of the terms of the agreement as laid down towards the concluding portion of para. 1."

Now it cannot of course be said that merely because the accused is a man of substance or because he is shown to have acted in a public spirited manner in some instances, he is incapable of committing criminal misappropriation, but I certainly require the prosecution evidence to be more clear and conclusive than it is in this case before I hold, that the accused has actually misappropriated the money criminally or that he intended to convert the money to his own use dishonestly. To hold this would be to hold what is neither definitely suggested nor proved that the accused intended to rob the M. E. School at Agarpara of the amount which through his own efforts had been secured for that institution. It is to be remembered that the new school was to be built within the zamindari of the petitioner and it is highly improbable that the petitioner would risk his reputation in his own village by misappropriating the money which was intended for the school. Again the prosecution has not given any direct evidence to prove that the money had been actually misappro-

propriated by the petitioner or converted to his own use. The theory of the Magistrate was that the money had not been spent at all and was all along with the accused. The learned Sessions Judge, however, finds fault with this view of the Magistrate in the following passages:

“I do not think, however, that learned Magistrate is right in his finding that the money was lying intact with the appellant all the time between the receipt of it from the District Board and its refund into treasury. No man in his sense is likely to keep such a large sum of money belonging to public institution in his house unnecessarily for such a long time. The failure of the appellant to refund the money at once in spite of the two demands for refund conveyed by the District Board proves conclusively that the money cannot then have been lying intact in the hands of the appellant.”

Now I do not mean to suggest that it is either necessary or possible in every case of criminal breach of trust to prove in what precise manner the money was spent or appropriated by the accused: because under the law, even temporary retention is an offence, provided that it is dishonest, but all that I wish to emphasize is that where there is no direct evidence of misappropriation and one is left to surmise as to what use was made by the accused of the money, one ought to require clearer evidence of dishonest intention than in a case where there is direct evidence to prove that the money was appropriated by the accused for a particular use which is inconsistent with his position as a trustee of the money. In fact there is more than one view which is possible on the evidence before us. There is the somewhat extreme view taken by the Court below that the version of the accused as to his having spent the money in purchasing the materials from court-witnesses 1 and 2 is wholly false. There is also another view—a view which is not entirely excluded by the circumstances of the case—that although the accused has made his case worse by a number of lies and by producing one or two suspicious documents, yet there may be residuum of truth in the defence story and that the bulk of money at least may have been actually spent or advanced for the purchase of the materials. There is also another theory possible, namely, that the accused, or the accused and the

other members of the committee did not like to refund the money to the District Board, especially as the demand for the refund proceeded from the new Chairman who was by no means friend of the accused and that the accused and other members of the committee may have actually shared the belief that the District Board having once parted with the money in favour of the school was not justified in demanding it back and that the demand was being made out of spite against the accused who had been instrumental in securing the grant. It is true that this position was not clearly taken up in the correspondence between the School Committee and the District Board, but this may be due to the fact that the welfare of the school depended largely upon the aid which it received from the District Board and the School Committee, therefore, merely tried to put off the District Board rather than Court an open rupture. It may be mentioned that the other schools also did not readily accede to the demand of the District Board for a refund of the building grants it had made as will appear from the following statement of P. W. 1.

“Before September 1928, none of the schools refunded the money advanced to them as grant. Most of the schools alleged their inability to refund the grant.”

I may say here that it is not my concern to decide whether the School Committee would or would not be legally justified in treating the money as their own money and whether strictly speaking the property in the money would be with the school or with the District Board after the grant had been made. But if once it is conceded that it was possible for the School Committee to take that view, it would be a consideration which cannot be lost sight of in deciding whether the accused was impelled by any dishonest motive or not; even assuming that the money was not spent by him in the way alleged but still was in his possession. It is to be remembered that although temporary retention of money may in certain cases be sufficient to constitute an offence; yet in a criminal case it is incumbent on the prosecution to prove that the retention was a dishonest one.

Now reading the judgments of the Courts below, I find that they have been

largely influenced by the fact that the accused has given a false account of the use of the money. The learned Sessions Judge has also referred to the case of *Harendra Kumar Ghosh v. Emperor* (1), where a Division Bench of Calcutta High Court, dealing with the special facts of that case, made the following observations :

"The Courts below have found that certain sums of money came into the hands of the petitioner and that he has failed to account for them, in other words he has failed to prove how that money was legitimately used. The burden was initially placed on the prosecution and when the prosecution succeeded in proving the receipt by the petitioner of the several amounts; it was for the petitioner to show that he had not converted them to his own uses. In the circumstances we do not think that the burden was wrongly placed upon the petitioner."

The learned Judge deduces from this the following legal proposition :

"I think that when the prosecution has succeeded in proving that the money which had been paid for a particular purpose has not been used for that purpose, the onus of proving that the money has been used or that use of the money was not dishonest is upon the accused since this is a matter within his special knowledge."

With all respect I must point out that the essential thing to be proved in case of criminal breach of trust is whether the accused was actuated by dishonest intention or not. As the question of intention is not a matter of direct proof, the Courts have from time to time laid down certain broad tests which would generally afford useful guidance in deciding whether in a particular case the accused had or had not mens rea for the crime. So in cases of criminal breach of trust the failure to account for the money proved to have been received by the accused or giving a false account as to its use is generally considered to be a strong circumstance against the accused. We should, however, not lose sight of the principle and make a universal formula of what is after all only an indication of or a piece of evidence pointing to dishonest intention. The failure to account may in some cases be due to among other things, mere stupidity, bad legal advice, a disinclination to retract a foolish lie once told or even a perverse attitude taken by the accused that he is not liable to account, while there may be other evidence in the case pointing to the accused having acted

quite honestly. In such a case the accused cannot be convicted even though he may have failed or omitted to account for the money received by him. As Mayne has pointed out in discussing the offence of breach of trust (Edn. 4, p. 661.)

"The mere failure to render accounts is not itself a criminal breach of trust, unless it appears on the whole facts that the money is dishonestly withheld or has been dishonestly converted to the prisoner's use."

And again at p. 659 :

"The usual evidence of breach of trust in regard to money received for the purpose of payment over is either non-payment or non-accounting or false accounting."

• The last passage is rather important because, Mayne rightly points out, non-accounting or false accounting is after all a mere piece of evidence to prove breach of trust. It is also to be noticed that the learned author has taken care in the above passage to refer to those cases only when money is received for the purpose of payment over. Now, the case of *Harendra Kumar Ghose v. Emperor* (1) to which I have referred is a case directly in point. There the accused was a tax daroga and cashier of Maymansingh municipality. It was obviously his duty to pay the money realized as tax to the municipality and not keep it himself. If, therefore, the accused in that case kept the money with himself and failed to account for it, the Courts were obviously justified in drawing an inference against him. I do not mean to suggest that if it is found in the present case that the accused has given a false account as to the use of money, that would not raise an inference or possibly even a strong inference against the accused. But I do not think that the present case is easily distinguishable from the case of the tax daroga, because in the present case the accused being the head of the institution in whose favour the grant has been made was the proper person to receive the money and may have also quite honestly felt that he had some discretion to decide as to what would be the proper and most economical way of applying the money for the school building, especially when the bulk of amount required for the new building was going to be supplied by the School Committee. It is further to be observed that the condition that the money gran-

ted by the District Board was to be kept in the Post Office Savings Bank did not involve any restriction on the depositor's power of withdrawal and applied as much to the money advanced by the District Board as to the money to be raised by the School Committee, and this being so, it cannot be seriously contended that this condition was meant as a precaution against misappropriation.

The conclusion which I have arrived at may be summed up as follows :

There is no doubt that the terms of the agreement entered into between the School Committee and the District Board were completely ignored by the former and it is also not easy to accept the version of the accused in all its fullness, yet in my opinion it has not been proved beyond reasonable doubt that the accused had either dishonestly misappropriated or even dishonestly retained the money which he admittedly received from the District Board. In order to debit the accused with a dishonest intention in this case it should have been shown clearly among other things that the accused did not intend to apply the money granted by the District Board to the Agarpura School either then or later on. On this point, however, there is neither any definite suggestion by the prosecution necessarily pointing to this conclusion. The Courts below have taken the view that the accused has given a false account as to how the money was used and this is sufficient to prove his dishonest intention. As I, however, have pointed out, one may not be prepared to go so far as the Courts below, but even assuming that the accused has given a false account as to the use of the money that may be a strong circumstance against the accused, but it is by no means conclusive in this case, because it has to be weighed along with other circumstances which are in favour of the accused and which have not been fully appreciated by the Courts below. Unfortunately also the trial Court did not, while examining the accused under S. 342, specifically draw his attention to the circumstances that weighed with the Court and which in the opinion of the trial Court were unfavourable to the accused. The Courts below have also drawn conclusions against court-witnesses 1 and 2 in certain matters without their

having been specifically questioned about these matters. To give one instance only the figure "7" in one of the vouchers having been found to be in a different ink the trial Court drew certain inferences against the defence, although it was conceded before us at the time of argument that the attestation of the Court witnesses or the accused was not drawn to the alleged interpolation and no attempt was made to get an explanation from them about it. In my opinion the evidence adduced in the case does not conclusively establish the dishonest intention of the accused or a case of criminal liability and the accused is entitled to the benefit of doubt.

I would, therefore, allow this application, set aside the conviction and sentence of the accused and set him at liberty. The bail bond executed by the accused will be cancelled, the fine if paid will be refunded.

I would like to add that Mr. Acharya, who appeared on behalf of the Crown argued the case with great earnestness and ability and there was hardly anything which could be said on behalf of the prosecution that was left unsaid by him in the course of his long elaborate argument.

Dhavlé, J.—I agree.

V.B./R.K. *Application allowed.*

1930 Cr. Cases 424

(Patna)

ADAMI AND FAZL ALI, JJ.

Emperor—Referee.

v.

Surendra Chandra Das—Accused.

Criminal Ref. No. 77 of 1929, Decided on 12th November 1929, made by Deputy Commr., Singhbhum, D/- 29th August 1929.

Criminal P. C., S. 562—Mere fact of accused's coming of respectable family is no justification for imposing lighter sentence.

The mere fact that the accused comes of a respectable family cannot be a justification for imposing a lighter sentence for the more respectable and better educated a man is the less temptation there should be to commit offences. [P 425 C 2]

B. N. Mitter and *G. N. Mukerji* — for Complainant.

A. C. Roy—²for Accused.

Adami, J.—This is a reference by the Deputy Commissioner of Singhbhum regarding the sentence passed upon the accused *Surendra Chandra Das*, who was convicted by the Deputy Magistrate

under S. 108, I. P. C. in respect of the embezzlement of Rs. 2,400 and was released by the Deputy Magistrate by an order under S. 562, Criminal P. C. directing him to enter into a bond of Rs. 2,500 with two sureties to appear and receive sentence when called upon during the period of two years, and in the meantime to be of good behaviour.

The accused was the Jamshedpur Agent of Messrs. Brooke Bond and Co., and was entrusted with the duty of selling their tea in that locality. It appears that on hearing from the Calcutta Manager of the firm that he intended to visit Jamshedpur to inspect the accounts, the accused went to Calcutta and informed the Manager that he was short of cash and stock to the extent of Rs. 2,400. Action was then taken by Messrs. Brooke Bond and Co. with the result that the accused was put upon his trial and convicted as I have stated above.

The learned Deputy Commissioner in referring the case to this Court recommends that the order passed on conviction of the accused was altogether inadequate. He recommends that the sentence be altered to one of rigorous imprisonment for six months with a fine of Rs. 1,000 or in default a further term of six months' rigorous imprisonment.

The accused was called upon to show cause why sentence should not be passed upon him as recommended. The points put forward on his behalf are that he is a young man of respectable family and that he had far too much work. The accused's story, however, was that on two occasions his pocket had been picked and thus he lost most of the sum with the embezzlement of which he is charged and that he contributed Rs. 300 towards the Strikers' Union on various occasions. He admits that his cash and stock were short to the extent charged.

The learned Deputy Magistrate in passing his order states that the accused is a young man of respectable family; that he was alone and was doing work which four clerks formerly used to do and for that reason he says:

"He must therefore be a busy man and so his story that he had a sunstroke and that he was once pickpocketed cannot therefore be said to be false."

It is quite obvious to any intelligent man that the story of two successive

occasions on which his pockets were picked cannot be believed: nor does it follow that because the accused is respectable and was doing the work of four persons, his story about his pockets being picked should be believed.

In our opinion the order of the Deputy Magistrate was not justified. Were the order to stand, it is clear that there would be an inducement to agents of the company and of other companies to commit malpractices since they would have the knowledge that they could commit the offence with impunity. The mere fact that the accused comes of a respectable family cannot be a justification for imposing a lighter sentence, for the more respectable and better educated a man is, the less temptation there should be to commit offences.

The order passed under S. 562, Criminal P. C. must be set aside. The sentence recommended by the learned Deputy Commissioner is not a very heavy one, and we will adopt the recommendation and sentence the accused to six months, rigorous imprisonment and a fine of Rs. 1,000 or in default a further term of six months' rigorous imprisonment. The accused will now surrender to undergo the sentence.

Fazl Ali, J.—I agree.

V.B./R.K. *Sentence enhanced.*

1930 Cr. Cases 425 (Patna)

ADAMI AND SCROOPE, JJ.

Emperor—Referee.

v.

(Baraik) *Narendra Nath Singh*—Opposite Party.

Criminal Ref. No. 91 of 1929, Decided on 13th January 1930, made by J. C., Chota Nagpur, on 18th November 1929.

Criminal P. C., S. 123 (2)—Sessions Court has no power to test sureties.

A Sessions Court before which proceedings are laid under S. 123 (2) has neither any duty cast upon it nor any power to test sureties offered by the person bound down. It is for the Magistrate to deal with the sureties under S. 122: 5 S. L. R. 87, *not. foll.* [P 427 C 2]

Assistant Govt. Advocate—for Referee.

Ali Imam and *I. B. Saran*—for Opposite Party.

Adami, J.—This is a reference under S. 438, Criminal P. C., made by the Judicial Commissioner of Chota Nagpur recommending that an order passed by the Assistant Sessions Judge with re-

gard to the testing and acceptance of certain sureties offered in pursuance of an order passed under S. 123 (3), Criminal P. C., should be set aside.

On 25th August 1928, Bhondu Singh, as a result of proceedings taken against him under S. 110, was ordered to execute a bond of Rs. 2,500, with four sureties of the like amount each, to be of good behaviour for a period of three years. The security not having been furnished, the Magistrate referred his order to the Judicial Commissioner as required by S. 123 (2). The Judicial Commissioner transferred the matter to the Assistant Sessions Judge under S. 123 (3-B) for disposal, who confirmed the order made by the Magistrate, but instead of requiring Bhondu Singh to execute a bond to be of good behaviour, directed that he should execute a bond to keep the peace. It is quite evident that this was a mere oversight on the part of the learned Assistant Sessions Judge, since a bond to keep the peace cannot be required in proceedings under S. 110. However, that is not the point in this reference.

After the order was passed by the Assistant Sessions Judge he proceeded to call on Bhondu Singh to provide sureties before him and directed that the sureties would be tested in his Court in the presence of the Public Prosecutor. On the date fixed Bhondu Singh offered his father, Sidhnath Singh, and three others as sureties. The Public Prosecutor put forward objections to the persons offered on the ground that Sidhnath Singh had a previous conviction, that one of the other three persons had encumbrances on his property, and that another was heavily involved in debt. The Assistant Sessions Judge overruled the objections as to Sidhnath and the person who had encumbered property, but allowed the objection as to the other. When a substitute for the latter was offered the Public Prosecutor argued that the testing of sureties was the duty of the Magistrate and that the Assistant Sessions Judge had no jurisdiction in this matter. The Assistant Sessions Judge overruled the objection, relying on a passage in Sir J. Woodroff's "Criminal Procedure Code," 1920 and a ruling of the Judicial Commissioners in Sind reported in *Impera-*

tor v. Allahdin (1) as also on the wording of S. 123 (4).

The point referred to this Court for decision is whether the Sessions Court before which proceedings are laid under S. 123 (2) has the duty or power to test sureties offered by the person who is bound down.

Sir Ali Imam who appears to oppose the reference relies mainly on the decision of the Judicial Commissioners of Sind referred to above and on S. 123 (3), which runs:

"(3) Such Court after examining such proceedings and requiring from the Magistrate any further information or evidence which it thinks necessary, may pass such order on the case as it thinks fit."

and on sub-S. (4) of the section which is to the effect that;

"(4) If the security is tendered to the officer in charge of the jail, he shall forthwith refer the matter to the Court or Magistrate who made the order, and shall await the orders of such Court or Magistrate."

He argues that, as stated in the above cited decision, the Magistrate has no power to require by his order security for a period exceeding one year, and therefore he can have no power to test sureties when the order is for security for a period of three years. It is not exact to say that the Magistrate has no such power to pass an order; he has full power to make the order, but if security is to be given for a period exceeding one year, the proceedings must be laid before the Sessions Judge for confirmation or such orders as may seem fit to the Judge. It is not clear that the orders referred to in sub-S. (3) include the testing of sureties, such testing being a separate proceeding which follows after an order has been passed requiring a bond to be executed and sureties to be furnished, and there is only one section in the Code prescribing the manner in which sureties are to be tested, namely, S. 122, and that refers to the Magistrate only as the testing authority. There is no provision in the Code referring to or regulating the testing of sureties by a Sessions Judge, unless it can be said that sub-S. (4), S. 123 contemplates such a proceeding, as argued by learned counsel and as was found by the Judicial Commissioners in Sind. That subsection certainly shows that when the Sessions

(1) [1910] 5 S. L. R. 87=11 I. C. 594=12 Cr. L. J. 410.

Court has passed an order under S. 123 (3) and a warrant* from the Court has reached the officer in charge of the jail, that officer, if a person comes to him and offers himself as surety, must refer the matter to the Sessions Court, but the subsection does not state that the Court must thereupon test the surety, the Court can, and as far as I know, always does, refer the duty of testing the surety to the Magistrate for whose procedure in the matter there is special provision in S. 122. If the warrant comes from the Court, the Court is naturally the only authority to whom the officer in charge of the jail can make a reference, and that seems to be the reason why S. 123 (4) is so worded.

That it was not intended by the legislature that the testing of sureties should be done by the Sessions Court is, I think, shown by the new S. 406-A, which was inserted in the Code of 1923, giving a right of appeal against an order under S. 122 refusing to accept or rejecting a surety. While orders made by a Presidency Magistrate, District Magistrate or other Magistrates are made appealable, there is no mention of any such order made by a Sessions Court. It seems that such an order by a Sessions Court was not contemplated. It can hardly be imagined that it is intended that a Sessions Judge should be altogether untrammelled in the procedure he follows in testing a surety, there being no provision similar to S. 122 to regulate his procedure, and that there should be no right of appeal against an order passed under such circumstances.

Section 122 requires a Magistrate in his order to specify the number, character and class of sureties that are to be given; the Sessions Judge passing an order under S. 123 (2) will not go beyond this. His Chief object when the case is laid before him under S. 123 will be to determine whether the security should be given for good behaviour for so long a period as three years.

Clearly the Magistrate will have better opportunities of satisfying himself as to the sufficiency of a surety offered than will the Sessions Judge, and so far as my experience goes the Sessions Judge has always left the matter of testing sureties to the Magistrate. If the Magistrate rejects any of the sureties offered there is a right of

appeal given by S. 406-A. That section was not enacted at the time when the Judicial Commissioners in Sind gave their decision, nor was S. 122.

I find that the Assistant Sessions Judge had not jurisdiction to test the sureties and therefore would set aside the orders passed by him and direct that the matter of accepting or rejecting the sureties offered in this case be dealt with by the Magistrate under S. 122. The necessary correction will be made in the order of the Assistant Sessions Judge, substituting the words "to be of good behaviour" for the words "to keep the peace."

Scroope, J.—I agree.

V.B./R.K.

Order accordingly.

1930 Cr. Cases 427

(Patna)

ROSS AND SCROOPE, JJ.

Sham Sunder Prusti—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 37 of 1929, Decided on 3rd December 1929, from order of Sess. Judge, Cuttack, D:- 11th August 1929.

Penal Code (as amended by Act 18 of 1924), S. 373—"Possession" need not be obtained from third person.

It is not requisite for the purpose of S. 373 that the possession of the minor should be obtained from a third person. It is enough if it is established that the accused in fact obtained possession of the minor with intent that the minor shall be used for purpose of prostitution: 5 M. H. C. R. 473; 35 M. L. J. 157; 21 Cal. 97 and 11 C. P. L. R. 6, Dist.; A.I.R. 1921 Bom. 323, *Foll.* [P 428 C 2]

M. S. Das and *A. S. Khan*—for Petitioner.

Government Pleader—for the Crown.

Scroope, J.—The petitioner has been convicted under S. 373, I. P. C., by Mr. Ahad, Cl. 1, Deputy Magistrate of Cuttack, and sentenced to one year's rigorous imprisonment and a fine of Rs. 50 and his appeal has been dismissed by the Sessions Judge of Cuttack. The finding of the Courts below is that the petitioner Shamsunder brought a girl Khalia Dei to the house in which he was living with his mistress and another woman under promise of getting her married and there employed her as a prostitute. These findings are not disputed now, but it is urged by the learned advocate for

the defence that they are not sufficient to constitute the offence contemplated by S. 373, I. P. C., and he relies as was done in the lower Court, on the judgment of Holloway, J. in *Dowlath Bee v. Shaik Ali* (1). He also cites other cases, notably the ruling of the Madras High Court in *Emperor v. Maddila Mutayalu* (2), *Queen Empress v. Saker Raur* (3) and a case in *Empress v. Mt. Ganga* (4).

Now a case is only authority for what it decides, and the judgment of Scotland, C. J. which deals with the judgment of Holloway relates to a case of a single instance of sexual intercourse, not as here, to a case of a minor being employed as a prostitute. On the strength of this judgment the learned advocate argues that it is essential for an offence under S. 373, I. P. C., that the obtaining of possession of the minor should be from a third person; but I entirely fail to see why one should read into the section a gratuitous limitation of this kind. And as a matter of fact this view of the law was expressly negatived by Scotland, C. J. in his judgment though he held, however, that to bring a case within this section:

"it is essential to show that possession of the minor has been obtained under a distinct arrangement come to between the parties that the minor's person should be for some time, completely in the keeping and under the control and direction of the party having the possession."

Now this judgment dealt, as I say, with a case of a single act of illicit intercourse and undoubtedly as the section stood before its recent amendment by Act 18 of 1924 it could hardly cover such a case. The section since its amendment runs as follows:

"With intent that such person shall at any age be employed or used for the purposes of prostitution or illicit intercourse with any person or for any unlawful or immoral purpose or knowing it to be likely that such person etc."

Before the amendment the section ran thus:

"With intent that such minor shall be employed or used for the purposes of prostitution or for any unlawful or immoral purpose or knowing it to be likely that such minor will be."

It is noticeable that the words "or illicit intercourse" are new and would

in my opinion, cover the act of the accused in the case in question which was decided in 1870, that is to say, before the amendment. It is obvious that what impressed the learned Judges there was the fact that the prisoner was being tried for a single instance of sexual intercourse with a minor girl on an isolated occasion. Here it has been found that the girl was in the keeping and under the control and direction of the petitioner and was visited by different men for immoral purposes. Obviously the facts come within the mischief of the section and I disagree therefore with the learned advocate for the petitioner that it was necessary for the prosecution to prove that the petitioner had secured possession of the girl through the intervention of some third party. There is no special virtue from the accused's point of view in the words "to obtain possession" that will justify supplying the words "from a third party." A man obviously can "obtain possession" of a thing without such intervention.

The other rulings cited by the learned advocate follow the judgment in *Emperor v. Dowlath Bee* (1), with the exception of *Emperor v. Maddila Mutayalu* (2). That was an entirely different kind of case. There the alleged sexual intercourse was in connexion with the nuptials of a minor girl. The girl continued to live with her parents and never passed into the possession of the accused. The learned Sessions Judge rightly relied on *Emperor v. Shamsunder Bai* (5) as containing the view of the law which is applicable to the facts of the present case. That case is on all fours with the present and Sh. J.'s view of the law is as follows:

"I am of opinion that it is not requisite for the purpose of S. 373, I. P. C., that the possession of the minor should be obtained from a third person. It is enough if it is established that the accused in fact obtained possession of the minor with intent that the minor shall be used for the purpose of prostitution."

To hold otherwise would be equivalent to saying that if a minor girl of her own accord resorts to a brothel and is employed as a prostitute by the owner knowing that she is a minor it will be no offence. Obviously this will defeat the whole purpose of the section which is to prevent the prostitution of minor girls.

(1) 5 M.H.C.R. 473=2 Weir 377.

(2) [1914] 35 M.L.J. 57=8 M.L.W. 253=47 I.C. 865=(1918) M.W.N. 431.

(3) [1894] 21 Cal. 97.

(4) [1908] 11 C.P.L.R. Cr. 6.

(5) A.I.R. 1921 Bom. 323=45 Bom. 523.

I think therefore that the view of the law taken by both the Courts below is quite correct and I decline to interfere.

Ross, J—I agree.

V.B./R.K. *Application disallowed.*

1930 Cr. Cases 429

(Patna)

ADAMI AND FAZL ALI, JJ.

Kapildeo Narain—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 130 of 1929, Decided on 18th December 1929, from decision of Sess. Judge, Muzaffarpur, D/- 22nd July 1929.

Penal Code, S. 409—Absence of intention to misappropriate money belonging to principal—Agent cannot be prosecuted for criminal breach of trust—Proper remedy lies in civil suit for accounts.

Where an agent produces his lists of accounts and admits the withdrawal of money, if he be recalcitrant, even if there is good ground for suspicion that he was not altogether honest, yet so long as there is no intention to misappropriate money belonging to his principal, the agent's prosecution under S. 409 for criminal breach of trust is not the proper remedy; the proper remedy lies in a suit for accounts in a civil Court. [P 432 C 1]

M. Yunus, S. P. Varma and Bhagwan Prasad—for Appellants.

G. P. Cammaled—for the Crown.

Adami, J.—The appellant *Kapildeo Narain* has been sentenced to four year's rigorous imprisonment and a fine of Rs. 3,000 under S. 409, I. P. C., on a charge of having, as law agent for the *Madhuban Chautarwa* concern, committed criminal breach of trust in respect of Rs. 7,476-2-11. He was also found guilty under S. 477-A, I. P. C., but no separate sentence was passed under that section.

Mr. W. W. Broucke, the proprietor of the factory, which is managed by his son Mr. J. W. Broucke, appointed the appellant as law agent for the factory in respect of the conduct of certificate cases filed in the Court of the Certificate Officer, Motihari. He executed a general power-of-attorney in favour of the appellant on 15th January 1927. Under that power the appellant was authorized to file petitions necessary in the conduct of certificate cases, to withdraw or deposit moneys in the Court necessary for the conduct of cases, and also to withdraw all moneys deposited by the certificate debtors to the credit of the proprietor of the *Madhuban Chautarwa*

concern "in accordance with written instructions from me on giving accounts." There were no written instructions given, but, according to the prosecution evidence, it was the rule that with respect to all charges in connexion with the conduct of the cases, the appellant was to frame an estimate and take advances from the factory. He was not to meet these charges from the moneys withdrawn from the treasury, but when the money collected from the certificate debtors had been deposited in the treasury, he was to withdraw the amounts and pay them direct to the factory. During a part of the year 1928, Mr. J. W. Broucke was away and Mr. Arman was in charge as Manager. During that year the appellant drew up lists of cases in which the judgment-debt had been deposited in the treasury and withdrawn by him, and paid in money to the *Madhuban* concern. He also drew up estimates of charges and got advances from the concern. The Ex. 1-B to 1-F show that the factory received from him from March 1928 to 27th January 1929, five sums namely, Rs. 184-4-0, Rs. 815, Rs. 1,900, Rs. 1,000 and Rs. 290. The Ex. 6 series show also that the appellant filed lists of cases in which he had withdrawn money from the treasury while the Ex. 8 series show that from March to August 1928, the sum of Rs. 3,143 was advanced on various dates to the appellant for the purpose of conducting the cases. In January 1929, a new form of submitting lists of withdrawals was instituted. This list was in the form of a counterfoil book. On the right-hand half of the page *Kapildeo* wrote in his own hand a list giving the case number, the tenant's name, the village, the principal sum, interest, costs and total amount withdrawn from the treasury: on the left-hand half of the page there were identical entries but at the heading of the page was:

"Received—being the decretal amount from *Babu Kapildeo Narain* of the following cases detailed below."

It was also written up by *Kapildeo* and dated. This counterfoil book was to be brought to the factory with the money collected and when that money was found to be right, and right-hand portion was signed as a receipt by the Manager and the counterfoil book would then be returned to the appellant to

form a receipt for what he had paid to the concern. On 19th January, Kapildeo brought or sent to the factory the counterfoil book with four pages filled in; the first page was for a total sum of Rs. 1,667-3-6, the second page was for Rs. 2,626-3-3, the third was for Rs. 386-6-3 and the fourth Rs. 18-2-9. Whether Kapildeo Narain brought any money with him on that occasion is uncertain. From the factory cash book it appears that Rs. 290 was paid in by him on 27th January, but from the same cash book it is shown that on 22nd December 1928, Rs. 1,900 had been received from Kapildeo and on 16th January Rs. 1100. The Manager Mr. J. W. Broucke signed a receipt on the first page that the total sum of Rs. 1,667-3-6 had been received; on second page, however, he gave a receipt for Rs. 2,276-12-6 only.

The explanation of this, according to the prosecution seems to be that out of the total of Rs. 4293-3-9, Rs. 3,290 was met by the payments of Rs. 1,900, 1,100 and Rs. 290 while the appellant's explanation that he had spent Rs. 654 out of the money withdrawn for the purpose of the conduct of the cases was accepted, and therefore credit was given for Rs. 3944 only out of the total of Rs. 4293 : so that the amount was Rs. 349 short, and therefore on second page a receipt for Rs. 2,276-12-6 only was given. These receipts on pp. 1 and 2 were signed on 28th January 1929. It has to be remembered that the Rs. 290 is accounted for in the cash book only on 27th January 1929. The right-hand half of the counterfoils of those two first pages was torn off and according to the prosecution, were handed to the appellant. It is obvious that the proper procedure would have been that the factory should have kept the right-hand half and handed back the counterfoil book to the appellant as a receipt. The moneys in respect of pp. 3 and 4 having been paid, no receipt was signed. On 28th the appellant filed two further lists, one for Rs. 227-12-0 and the other for Rs. 53-13-9. As there was no payment made in respect of these two sums no receipt was signed and the counterfoil book was retained by the Manager. According to Mr. J. W. Broucke, he asked the appellant to bring the money and furnish an account; as the appel-

lant did not come back with any money he wrote to the Certificate Officer at Motihari, asking him to let him know how much money the appellant had withdrawn from the treasury within the year. The reply of the certificate officer was to the effect that between 7th November 1927 and 24th January 1929, the total withdrawal had been Rs. 13,759-1-11. Mr. Broucke continued to ask for accounts. It seems that the appellant stated that he had spent part of the money withdrawn from the treasury in meeting the charges for the conduct of the certificate cases. Mr. Broucke then asked a Mokhtear, Babu Balbhadar Prasad, to make inquiries as to the amount actually spent by the appellant on the conduct of cases. Babu Balbhadar Prasad replied on 27th March 1929 that he had found that Rs. 1,999-8-0 had been spent by the appellant but he had not completed the full inquiry and there were 72 cases still to be inquired into. Letters were passing between the Manager and the appellant with regard to accounts but the appellant, though asked to come to the factory to see the accounts books as he desired, refused to come and then Mr. Broucke laid a complaint on 11th April. In that complaint he accused the appellant of having misappropriated Rs. 12,222-11-11 between 3rd February 1928 and 24th January 1929. The Committing Magistrate drew up a charge with respect to the sum of Rs. 12,317-9-11, but the learned Sessions Judge amended it, reducing the sum to Rs. 7,476-2-11. According to the prosecution, between 3rd February 1928 and 24th January 1929, Rs. 13,109-7-5 were withdrawn from the treasury by the appellant and during the year from 3rd February 1928 the appellant paid in to the factory altogether Rs. 5,079-4-6. Adding to this the sum of Rs. 654 which the appellant was authorized to spend out of the money withdrawn on the conduct of cases, the total money received by him came to Rs. 5,733-4-6, and, therefore, the amount defalcated was Rs. 7,376-2-11. The charge as pointed out by the learned Sessions Judge is wrong in mentioning the amount of Rs. 7,476-2-11.

The case of the appellant was to the effect that he could account for the money and that he had full freedom to pay the law charges out of the moneys

withdrawn, there being no written instructions to prevent him doing so. It is his case that he had in fact paid to the factory the whole of Rs. 4,976-9-9 as shown in the list Ex. 5 and that the rest of the amount forming the subject of the charge was covered by the law charges.

The case has been a very difficult one to decide by reason of the fact that the evidence is not full and there are certain account books which were kept in the factory which have not been produced and which are necessary for ascertaining several points. It is not possible to determine whether the appellant came to the factory with his lists on 19th January, or whether he sent them. The receipts were given on 28th and we are not told definitely whether the appellant came to the factory that day. But Mr. Broucke says that he asked him to give an account. We have had to depend on explanations from learned counsel in order to understand the case, and I must say that, even with those explanations, it is somewhat difficult to determine whether the accused had in fact expended the money on law charges or any part of it, and to come to any definite decision as to the amount which he failed to pay the factory. It appears from the evidence that, during the year 1928, the appellant was submitting lists and was paying amounts into the factory. It is clear that he was not required to submit accounts at regular intervals. It is not quite clear to whom he paid the money; we are not told whether on 27th January the Rs. 290 was paid into the Manager's hand. From the evidence of Mr. Broucke it would appear that Rs. 3,290 out of the sums covered by the first two lists were paid by the accused that day but we know that that amount had been made up of sums paid on 22nd December 1928 and on 16th and 27th January 1929. The prosecution in reckoning the amount of advances made to the appellant for law charges includes Rs. 1,543 which was advanced in 1927 before the period covered by the case. There is no certainty when the alleged intention to misappropriate the money first arose. The charge relates to a period ending on 24th January 1929.

On 19th January the appellant had

filed in the factory, lists, acknowledging that he had withdrawn sums from the Treasury and held them in his hands and on 27th January he actually paid in Rs. 290. In my opinion the case is one which should in the first place have been brought in the civil Court. The factory wanted accounts and there had been no adjustment between the parties. The proper procedure would have been to institute a suit for accounts in the civil Court.

The head-clerk of the factory kept a register of certificate cases, all the entries being filled in by him except Col. 2 in which the appellant was to enter the number of the case in red with his own hand; the tenant's name, the serial number of the entry, the amount demanded, and the result were entered in this register by the head-clerk. The cases covered by the lists are entered in that register and in the remarks column against each entry there is the initial of Mr. Broucke. Mr. Broucke says that he signed his initials when the cash had been received by the concern. On the face of it the presence of the initial of Mr. Broucke according to his evidence, would show that the appellant had in fact paid the money to the factory. It is explained that Mr. Broucke initialled the entries in order to show the patwaris that they should take no further steps against the tenant to whom the entry related but there is no evidence to this effect. I cannot see that it was necessary to have Mr. Broucke's initial in the remarks column to give this information to the patwaris and I doubt whether the patwaris would be able to read the entries in the register.

The appellant's case is that he had paid sums to the head-clerk or the cashier. The cashier admits that he keeps his private book of receipts and disbursements and the head-clerk deposes that the cashier keeps notes. The Cashier's note book has not been produced, and we have before us no account book which was kept up from day to day. The entries in the cash book would show that they were made from time to time and must have been based on some daily ledger.

On the materials before us, meagre as they are, I should hesitate to say that the appellant was proved to have

had the intention of misappropriating the money.

The case is of a nature more suitable for its determination in a civil Court. It is really a case for a suit for accounts. The appellant produced his lists and admitted the withdrawal of the money. Mr. Broucke wanted accounts but the appellant delayed or refused to give them. A suit in a civil Court for accounts was far more appropriate than a criminal prosecution. It may well be that the appellant had been spending the money with drawn by him in meeting the charges. There is no doubt that he was recalcitrant and there is good ground for suspicion that he was not altogether honest. With regard to the charge under S. 477-A, it is alleged that in several instances he entered in Col. 2 of Register 12 the number of a certificate case in order to give the impression that he had filed it, though as a matter of fact he had not filed it, his object being either to hide his negligence or to draw more pay, as he was entitled to draw Re. 1/8 for each case. Admittedly it is uncertain whether the numbers he wrote in that column were the numbers of the case or the numbers given by the factory to the requisition. It is difficult to understand how he could profit by entering a case as filed which had not been filed, seeing that he would eventually have to show that he had withdrawn the money and must pay it to the factory. He has been found to have made entries in the papers to the effect that in certain certificate cases the decretal amount was still in Court whereas, as a matter of fact, the money had been withdrawn from the treasury by him. He explains these entries by saying that he may have made a mistake owing to lack of memory or the fact that he was away from Motihari when he made the entries.

As I have said the conduct of the appellant has not been about suspicion, but I do not think that we have sufficient material before us to come to a definite conclusion that he misappropriated the money or what the exact sum of money misappropriated was.

Under the circumstances I think that this appeal should be allowed and that the complainant in the case should be left to bring a suit in the civil Court for accounts. I would allow the appeal

and set aside the convictions and sentence.

Fazl Ali, J.—I agree.

V.S./R.K.

Appeal allowed.

1930 Cr. Cases 432

(Allahabad)

DALAL, J.

Chakrapan—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 68 of 1929, Decided on 3rd July 1929, made by Sess. Judge, Farrukhabad, D/- 19th January 1929.

Criminal P. C., S. 145 (4)—Meaning.

The direction to receive evidence implies a duty on the Court to summon such witnesses as may be mentioned to the Court by either party: 32 Cal. 1033, Dist. [P 482 C 1]

Kedar Nath Sinha and Jai Narain Verma—for Applicant.

M. Waliullah—for the Crown.

Ambika Prasad—for Opposite Party.

Judgment.—I am of opinion that the trial Court was wrong in not giving an opportunity to Chakrapan to produce his evidence. Reference was made by the opposite party to a ruling in the case of *Tarapana Biswas v. Nurul Haq* (1), that it was not obligatory on a Magistrate to assist parties to a proceeding under S. 145, Criminal P. C., in producing their witnesses. That ruling however, was passed long prior to 1923, when Cl. (4), S. 145 was amended by Act 18 of 1923 and the Magistrate was directed to receive all such evidence as may be produced by the parties. The direction to receive evidence implies in my opinion, duty on the Court to summon such witnesses as may be mentioned to the Court by either party. It may be noticed that the information given to the parties under S. 145 (1) is not that they should bring their witnesses along with them. The parties filed written statements, so it may be said that the Court was not put to the necessity of hearing the parties themselves. There can be no doubt that the Magistrate did not give Chakrapan an opportunity of producing his evidence.

I therefore set aside the order of the Magistrate, dated 10th November 1928, and direct an enquiry as to possession over again, as laid down by the provisions of S. 145 (4), Criminal P. C.

V.B./R.K.

Order accordingly.

(1) [1905] 32 Cal. 1033=2 C.L.J. 280.

**** 1930 Cr. Cases 433**

(Allahabad)

Full Bench.**BOYS, YOUNG AND SEN, JJ.****Emperor****v.****Himanchal Singh—Respondent.**

Criminal Appeal No. 539 of 1929, Decided on 16th January 1930, from an order of Special Magistrate Second Class Shahjahanpur, D/- 8th October 1928.

(a) Interpretation of Statutes—Doubt as to correct interpretation—Interpretation favourable to person to be penalized should be adopted.

Where there is reasonable ground for doubt as to the correct interpretation of an enactment that interpretation should be adopted which is most in favour of the person to be penalised, especially in fiscal and penal statutes.

[P 485 C 1]

(b) Interpretation of Statutes—Matter doubtful—Interpretation preventing abuse of process of law should be put.

Where the matter is in doubt as to the interpretation of a statute, that interpretation should be given to the statute which will prevent or will not permit an abuse of the process of the law.

[P 435 C 1, 2]

**** (c) Penal Code S. 174—Per Boys and Young, JJ.—Citation under U. P. Land Revenue Act S. 147 is not summons—Failure to attend does not make person guilty under S. 175—U. P. Land Revenue Act S. 147 (Sen, J., contra).**

(Per Boys and Young, JJ.) A citation issued to a person who is in arrear of Government revenue under S. 147, Land Revenue Act is not a summons within the meaning of S. 174, Penal Code and the person so served is not bound to appear in obedience to it and by his failure to attend he is not guilty under S. 174, Penal Code : (Sen, J. Contra) (Cases considered).

[P 433 C 2 ; P 436 C 2]

U. S. Bajpai—for the Crown.

K. N. Malaviya—for Respondent.

Boys and Young, JJ.—This is an appeal by the Local Government from an order passed by a Magistrate acquitting Himanchal Singh upon a charge of an offence under S. 174, I. P. C. The Magistrate acquitted the accused following, as he was bound to do, the decision of two Judges of this Court in *Emperor v. Bhirgu Singh* (1). The Local Government being dissatisfied with the decision in that case that a citation to appear issued under S. 147, Land Revenue Act (U. P.), 3 of 1901, was not a summons, notice or order which the recipient was legally bound to obey have appealed from the decision of the Magistrate. Without waiting to see whether the Bench of two Judges of this

Court before whom the appeal might come agreed with the decision of the two Judges of this Court above mentioned, the learned Government Advocate, presumably under instructions from the Local Government, secured an immediate reference by the Chief Justice of the appeal to a Full Bench. We think that the Chief Justice would not have referred the matter to a Full Bench at all if the point we have mentioned had been brought to his attention. If the Bench of two Judges before whom the appeal would have come in the ordinary course agreed with the two Judges who had already decided the question, there would have been an end of the matter. If, on the other hand, they had disagreed, it would have been open to them to ask the Chief Justice, in accordance with the ordinary procedure to refer the matter to a Full Bench.

The question now before us is whether a citation to appear issued under S. 147, U. P. Land Revenue Act, 3 of 1901, is a summons, notice or order which the recipient is legally bound to obey.

The facts are simple. Himanchal Singh was in arrears in the payment of Government revenue for a sum of Rs. 108-6-0. Whether or no a writ of demand had or had not already issued to him under S. 147 we are not informed ; nor is it in fact material. The document which was served upon him is a citation to appear, purporting to be drafted in accordance with form 2 of the forms drawn up by the Local Government by virtue of its power under S. 234 Revenue Act. This document was treated in the argument before us by both sides as if it was a document of a composite character embodying a writ of demand and a citation to appear in the one document. But this is not so as a reference to the forms will show. The English form does not contain an unconditional intimation to appear. It requires the recipient to appear on a certain date and at a certain hour "if the entire arrears plus the talbana for this citation are not sooner paid." The vernacular of the document which was actually served calls upon him to appear if the amount "is not paid with the greatest promptitude" (jaldtar adana kardiya jawe.) The translation is not accurate but the inaccuracy is im-

(1) A. I. R. 1927 All. 122=49 All. 205.

material. The document further bears a foot-note intimating that failure to attend is punishable (in the criminal Courts) under S. 174 I. P. C. This foot-note manifestly legs the question and is immaterial, except so far as it may indicate a desire to give to the intimation a force which the Act itself certainly does not expressly give it. The Local Government has power to make rules and prepare forms under S. 234, but manifestly, as S. 234 itself declares, only rules "consistent with this Act."

It is common ground that the citation was served upon Himanchal Singh personally and that he did not attend, nor paid the arrears within the time specified in the citation. Himanchal Singh was put upon his trial under S. 174, I. P. C. He admitted that the citation was served upon him and that he did not attend or deposit the amount of the arrears. The Magistrate describes this as a plea of guilty. It clearly was not a plea of guilty of an offence under S. 174, I. P. C. But this ceased to be of importance again in view of the fact that the Magistrate acquitted him in obedience to the ruling to which we have referred. It has only been necessary to mention these immaterial matters because they did in fact form the subject of argument, and it is necessary to sweep them aside. Before giving briefly our reasons for holding that the citation to appear was not a summons, notice or order which the recipient was legally bound to obey by appearing within the meaning of S. 174, I. P. C. we will narrate as briefly as possible the history of the previous decisions on the point.

In 1909 the Sessions Judge of Benares, Mr. E. H. Ashworth, subsequently Ashworth, J., referred a conviction under S. 174 to this Court on the ground that in his view it was an illegal conviction in that the accused was not bound to appear. The matter came before Knox, J. and Tudball, J. and was registered as '*Sarju Singh Reference No. 320 of 1909.*' On 3rd August 1909, they recorded the following brief judgment :

"In our opinion a citation issued by a Tahsildar is an order to appear before the Tahsildar which the person cited is bound to obey. The intentional disobedience of it is therefore an offence under S. 174."

No reasons for this view were given.

The next case, *Emperor v. Sheopal Singh* we are unable to give the date but the case is quoted in the next case to which we shall refer) came before Mr. Piggott, A. J. C., Oudh, subsequently Piggott, J., of this Court. The full judgment not being available to us we are only able to note that he held that the accused was not bound to obey the citation, basing his judgment on the report of the Select Committee during the passage of the bill.

In 1909 Mr. Chamier, Judicial Commissioner, and Mr. Evans, A. J. C., Oudh, held that the accused was bound to appear in obedience to the citation. They rejected the decision of Mr. Piggott because he had relied upon the report of the Select Committee. They quoted the form of the citation and then rejected the argument (the only one apparently urged) that a citation was merely an alternative to a writ of demand, because if a citation merely took the place of a writ of demand, the citation itself would be useless as it did not make any demand. No other consideration was apparently drawn to the attention of the learned Judges and they gave no further reason for holding that the recipient was bound to appear in accordance with the citation. This case is *Rambali v. Emperor* (2).

The next case is that to which we have already referred, *Emperor v. Bhirgu Singh* (1) decided by Dalal, J., and one of the members of the present Full Bench, Boys, J. It was held that the recipient was not legally bound to obey the citation. This appears to have been the first case in which the matter was at all fully argued and reasons are given at length for the decision to which reference may be made.

In the following year the matter came up before a single Judge of this Court, Sulaiman, J., in *Emperor v. Banwari* (3). The learned Judge said :

"If the matter were entirely *res integra* I would have been inclined to hold "that the citation was at any rate a notice, if not a summons or order, and that, therefore, its disobedience was covered by S. 174, I. P. C."

He held himself, however, bound by the last decision to which we have referred. It will be noticed that the learned Judge did not consider whether, even though

(2) [1910] 13 O. C. 55=5 I. C. 805.

(3) A. I. R. 1927 All. 49=43 All. 215.

the citation might be regarded as a notice, it was a notice that the recipient was legally bound to obey. He proceeded to set out in detail the reasoning in *Emperor v. Bhirgu* (1) and then added "the view taken by the Bench certainly prevents the abuse of the power to issue a citation to appear and then to arrest the defaulter, which may be an intolerable hardship It may be doubtful whether such a procedure was contemplated by the legislature when the Act was passed."

Lastly, the question came up in 1927 before Stuart C. J., and Pullan, J., in the Chief Court at Lucknow in *Chandrika Singh v. Emperor* (4). The learned Judges delivered separate judgments to which reference may be made. It is only necessary to point out that Stuart, C. J., referred to the complete difference of opinion in regard to the effect of the citation between the decisions in *Rambali v. Emperor* (2) and *Emperor v. Bhirgu* (1), and further stated "why the word citation was used in this portion of Local Act, 3 of 1901, I am in no position to decide,"

though he added that the word "citation" was possibly used in Chap. 8 and the word "summons" in Chap. 9, because Chap. 8 is concerned with the purely fiscal act in collecting land revenue, while Chap. 9 is concerned with the procedure of revenue Courts and Revenue Officers exercising judicial or quasi judicial functions. It may be noted further that Pullan, J., relied to some extent at least on the threat in the foot-note to the citation form to which we have referred.

These are all the cases to which we have been referred. It would seem that a mere recital of these cases is sufficient to show this much at least, that there is room for doubt as to the force to be given to the term "citation to appear." That being so, there comes into force immediately the principle of interpretation of a statute that where there is reasonable ground for doubt as to the correct interpretation of an enactment, that interpretation should be adopted which is most in favour of the person to be penalised. This principle is of general application to fiscal and penal statutes. Here we have both a fiscal and a penal statute.

Next, there is the principle of interpretation that where the matter is in doubt, that interpretation should be

given to the statute which will prevent or will not permit of an abuse of the process of the law. The learned Government Advocate, putting as best he could the case for the appellant Local Government, was unable to suggest to us why the Local Government should be so anxious to secure the strict interpretation, for which he pleaded, of the word "citation." If the defaulter fails to appear in response to the citation, and even without the issue of a citation, the Revenue Officer has power to issue a warrant of arrest. The only motive underlying the desire of the Local Government to put a strict interpretation on the word "citation" which anybody could suggest was that it would save the Revenue Officer the trouble of issuing a warrant of arrest and of bringing the defaulter before him under arrest. He could, if the defaulter was bound to appear in answer to a citation, issue the citation, and then having the defaulter before him say to him:

"Now come to terms such as I can accept, or I will forthwith arrest you."

Can anybody doubt but that this would be an abuse of the process of the law. No other motive is suggested to us. We should therefore give effect so far to the principle that where there is doubt, that interpretation should be put on the enactment which will prevent an abuse of the legal process.

Having stated these two principles we next turn to the question, what explanation is there of this special use of the word "citation" in S. 147 when it is used nowhere else in the whole Act. When the N. W. P. Land Revenue Act, 19 of 1873, and the Land Revenue Act of Oudh, 17 of 1876, were consolidated into the present U. P. Act 3 of 1901, the draftsman had to consider whether he should or should not use the word "a summons to appear" which appeared in the Oudh Act, and he substituted, and can only be held to have deliberately substituted, the word "citation." It is not the case that the word was used carelessly or with some vague idea that it did not really matter whether one used the word "summons," "citation," "notice," "call upon," etc. The draftsman had the word "summons" before his eyes. He had not the word "citation." He deliberately substituted "citation" for "summons." What was

the reason for this? No one has been even able to suggest that there was any reason except possibly, and that is in favour of giving the less strict interpretation to the word, that in Chap. 9 where the word "summons" is used the legislature was dealing with the procedure of the Courts, and in Chap. 8 he was dealing only with the proceedings of officers for the collection of the amounts due to Government. There would be a natural inclination to substitute the milder word in the latter case for the stricter word used in the former. This is the only possible explanation that occurs to us or that has been offered by anybody of the deliberate substitution of the term.

Much argument has been directed to suggest that a citation is in fact equivalent to a summons carrying with it the consequence enacted in S. 174, I. P. C. It may be that it is so in some cases. It does not follow that it is so in all. But in fact even if it could be held to be merely a variant of the word "summons," and that the two words are interchangeable, even that will not help the appellant, for it is manifest that the word "summons" is sometimes used in cases where the recipient is not bound to obey the summons. It is in itself a striking fact that nobody has ever yet heard of a man being prosecuted under S. 174, I. P. C., for failing to obey a summons to attend a Court as a witness. The invariable procedure followed, if the attendance of the witness is essential, is to issue a warrant for his arrest; and indeed in the Civil Procedure Code express provision for this is made in S. 32, in which there is no reference to S. 174, I. P. C. But more than this, we find the word "summons" actually used in the very Act which we are considering in S. 201 where it is laid down in the proviso that no order shall be altered without previously summoning the party, in whose favour that order was passed, to appear. Manifestly here no liability under S. 174, I. P. C., can arise. Again, where it is intended that failure to appear even in answer to a summons should carry the consequences laid down in S. 174, I. P. C., we find it expressly stated, which declares that "all persons so summoned shall be bound to attend." As to citations, to refer to another Act, we find that where it is

intended that failure to obey a citation should be penalised, that intention is made the subject of express enactment, e. g., Act 21 of 1866, Ss. 10 and 11, where it is declared that the respondent, in other words, the defendant in the suit, shall be served with a citation to appear, and that in default of his or her appearance, liability to punishment under S. 174, I. P. C., follows. Lastly, we may note that to give the less strict meaning to the term "citation," if indeed the more severe interpretation be permissible at all, is in accordance with a reasonable interpretation of the scheme of the Act. The Tahsildar has under S. 145 to certify a statement of account showing the existence of the arrear, of its amount and of the person who is the defaulter. It is declared that this statement of account shall be conclusive evidence of the facts stated in it. It is manifest, however, that this cannot possibly be held to prevent the Tahsildar from amending the certified statement of account if he desires to do so. If he has issued a writ of demand in accordance with that statement of account, and either in consequence of information received from the alleged defaulter, or from any other source, he has reason to doubt the correctness of the statement or the desirability of proceeding to extreme measures without further light on the matter, it is reasonable to suppose that he should be empowered to give the alleged defaulter an opportunity of appearing before him and explaining either that he is not the person liable, or that he is not liable for the whole amount claimed, or of offering to make an arrangement which will not necessitate proceeding to extreme measures. It is not necessary to elaborate this. We have already noted above that no other proper motive can be suggested as underlying the use of the word "citation."

For the reasons we have given we hold that the citation was not a summons, notice or order which Himanchal Singh was legally bound to obey, and we dismiss the appeal.

Sen, J.—This is an appeal by the Local Government from an order, passed by a Magistrate, acquitting Himanchal Singh of an offence under S. 174, I. P. C.

Himanchal Singh was in arrear of Government revenue for a sum of Rs. 108-6-0 on account of Rabi 1332 Fasli.

A writ was issued to him under S. 147, United Provinces Land Revenue Act (Act 3 of 1901) on 11th July 1928. This document was of a composite character being a writ of demand and a citation for appearance, if the demand for revenue is not complied with. The document is in a printed form which is headed as "summons for attendance." The wording of this document is substantially in accord with the prescribed form to be found in the Land Revenue Manual for the United Provinces, which is a Government publication. The document is addressed to Himanchal Singh, who is directed to attend the Court of the Tahsildar of Tahsil Shahjahanpur, on 26th July 1928, at noon, if the amount of arrears together with the costs of the process fee is not paid with the greatest promptitude (*Jaldtar ada na kar diya jave*). The order was served upon Himanchal Singh personally, on 17th July 1928. The document bears the following endorsement by Himanchal Singh :

"I am informed of your order and received a copy of the summons through the peon."

This document contained a warning note :

"A failure to attend will be punishable in the criminal Courts under S. 174, I. P. C."

Himanchal Singh did not pay the amount of arrears together with the costs of the process fee nor did he attend the Court of the Tahsildar, on 26th July 1928, as he was directed to do. Proceedings were initiated against him under S. 174, I. P. C., and he was eventually put upon his trial before Khan Bahadur Maulvi Muhammad Mansub Hasan Khan, Special Magistrate of Second Class. The statement of the accused was recorded, on 5th October 1928, under S. 364, Criminal P. C., and the accused admitted that the summons was issued to him and that he neither deposited the revenue nor attended the Court. The Magistrate acquitted him, on 8th October 1928. The Magistrate held that, though the accused pleaded guilty, no offence was committed by him under S. 174, I. P. C., for non-attendance in the Court of the Tahsildar and reliance was placed upon a Division Bench ruling of this Court in *re, Emperor v. Bhirgu Singh* (1) in support of this view.

The Magistrate is not quite accurate

in stating that the accused pleaded guilty before him. The accused was not asked whether he had committed an offence under S. 174, I. P. C., and he did not plead guilty in express terms. The Magistrate was, however, bound to follow the ruling of this Court, which undoubtedly supported his view.

The Local Government challenges the correctness of the decision in *re, Emperor v. Bhirgu Singh* (1). The point to be considered in this appeal is of far reaching effect as involving a question of principle, and is a matter of general importance, affecting the authority of the Revenue Officers acting under the Land Revenue Act, as also the liberty of the subjects of the Crown to whom citations are addressed under S. 147 of the Act.

In approaching the question before this Court, no importance can be attached to the fact that the citation is headed as "Notice of attendance" nor to the further fact that the foot-note contains a pointed warning. Nor can the fact of the citation being issued from "the Court of the Tahsildar" and Himanchal Singh being directed to appear "in the Court of Tahasildar" be permitted to be strained too far. The Tahasildar was acting in his administrative capacity as a Revenue Collector. He was not, strictly speaking, a "Court" and was exercising, at the most a quasi judicial function. In S. 189, a Tahsildar is authorized to hold his Court within his tahsil, but his powers under S. 147 are more administrative than judicial.

Section 174, I. P. C., provides :

"Whoever, being legally bound to attend in person at a certain place and time in obedience to a summons, notice, order or proclamation proceeding from any public servant legally competent, as such public servant to issue the same, intentionally omits to attend at that place or time shall be punished with imprisonment or with fine"

The ingredients of the offence under this section are, therefore, (1) that a summons for attendance must be issued by a public servant who was legally competent to issue the same, (2) that the person summoned must be legally bound to attend at a certain place and time in answer to the summons and (3) that the person summoned must intentionally have omitted to attend at

that place and time. S. 147, Land Revenue Act provides that when an arrear of revenue becomes due, a writ of demand calling on the defaulter to pay the amount within the time therein stated or a citation to appear may issue.

Circular 3-III of the rules framed by the Board of Revenue contained, amongst others the following provisions relating to S. 147, Land Revenue Act :

"Processes under S. 147, shall be issued by the Tahashildar of the tahsil in which the arrear fell due, or by order of the Collector or Assistant Collector in charge of the Sub-Division." "Writs, warrants and proclamations shall be in the forms appended. They shall bear the date of issue and shall be signed by the issuing officer and sealed with his official seal."

"Process under S. 147 is not required by law to precede processes under S. 150 but ordinarily writ or citation to appear should issue before any other process is resorted to." "The fee charged for the issue of a writ or citation to appear shall be 12 aunas. The fee shall be included in the amounts specified in the writ or citation as that for the recovery of which the writ is issued."

"No more than one writ shall be issued in respect of the same arrear to any defaulter, except under the orders of the Collector. If the arrears be not paid within 15 days from the date of the service, severer measures should promptly be taken."

It is not controverted that the Tahsildar of Tahsil Shahjahanpur was a public servant, legally competent as such public servant to issue a citation to Himanchal Singh to appear before him under S. 147, Land Revenue Act, or that Himanchal Singh as a defaulter was duly served with the citation calling upon him to appear on 26th July 1928. But it has been argued that a citation to appear under S. 147, Land Revenue Act is not a 'summons' within the purview of S. 174, I. P. C., and that Himanchal Singh was not legally bound to appear.

Statutes of a fiscal or penal character must be strictly construed so as to prevent undue encroachment upon the liberty of the subject. Where the words of a statute are ambiguous, or of a doubtful import, the words should be construed generously. Where, however, the words of the statute are unequivocal and unambiguous, they must be construed in their plain, natural and grammatical senses.

The question which emerges for decision in this appeal is whether the words "a citation to appear" in S. 147, Land Revenue Act connote anything different

from a summons to appear. The word "citation" has not been defined in the Land Revenue Act nor has the word "summons" been defined in the said Act. It is presumable that the words citation and summons have not been used in the Act in a special or technical sense. If recourse be had to standard books of reference, it would appear that citation and summons are interchangeable words. For instance, in Webster's New International Dictionary, "citation" means amongst other things, an official summons or notice given to a person to appear before a tribunal of justice; hence any summons. In Murray's Dictionary "citation" is a citing or summoning to a Court of justice. Bouvier gives the following note on "citation":

"A writ issued out of a Court of competent jurisdiction, commanding a person therein named to appear on a day named and do something therein mentioned, or show cause why he should not."

"The act of which a person is so summoned or cited."

"In the ecclesiastical law, the citation is the beginning and foundation of the whole cause, and is said to have six requisites, namely, the insertion of the name of the Judge, of the promover, of the impugnant of the cause of suits, of the place, and of the time of appearance; to which may be added the affixing the seal of the Court, and the name of the Registrar or his Deputy."

"Process issued in Courts of Probate and Admiralty Courts. It is usually the original process in any proceeding where used and is in that respect analogous to, the writ of *capias* or summons at law, and the subpoena in Chancery."

According to Wharton (Law Lexicon, Edn. 4, p. 187) "citation" is a summons to appear, applied particularly to a process in the spiritual probate and matrimonial Courts.

In its common significance, therefore, "citation to appear" is clearly "a summons to appear" and cannot be held to mean anything short of this. If this meaning is applied to the text of S. 147, it fits in with the context. It is not necessary either to strain the language or to have recourse to a process of reasoning to find out the meaning of the text. Indeed, if regard be paid to the context and the scheme of the Act, it is not possible to construe the word "citation" otherwise than as a summons.

Section 146, Land Revenue Act prescribes the processes by which an arrear of revenue may be recovered. These

processes are eight in number, and have been enumerated *in Cls. (a) to (h). Each of these processes is and is intended to be coercive. Every process enumerated in the section is severer or more drastic than the one immediately preceding it. There may be variance in the degree of the effectiveness of the several processes as also in the degree of their coerciveness, but all of them share one common character in so far that all of them are coercive.

The Local Government may issue a warrant of arrest in the very first instance but the legislature provided for a less drastic remedy by the issue of a citation. It cannot be assumed that the object of the citation is simply to facilitate the execution of the warrant of arrest. The two processes are different. If the man appears in obedience to the citation, he may be allowed to go without any warrant being executed against him. That the process of citation to appear may be abused is no argument against the process itself being from its very inception an instrument of an imperative or compelling character.

A writ of demand or a citation to appear is one of the statutory processes for recovering an arrear of revenue. A citation to appear could not have been intended to be a mere invitation from the Tahsildar to appear in his Court to parley with him about the amount of the arrear or to negotiate with him the time as to its payment. It is not till the revenue has fallen into arrears that steps can be taken for its recovery. S. 145, Land Revenue Act enacts that a statement of account certified by the Tahsildar shall for purposes of Chap. 8 be conclusive evidence of the existence of the arrear, of its amount and of the person who is the defaulter. Ex hypothesi, the amount due has been determined and has been duly certified. The certificate being conclusive, the issue of a citation could not be treated as a mere occasion given to the co-sharer concerned to come and discuss with the Tahsildar because *of any dispute or uncertainty about the amount of revenue. The certificate having already settled the matter, the chapter regarding dispute or uncertainty is closed anon and for ever. It is extremely difficult to conceive that the

legislature could have intended "citation to appear" to have been one of the modes or processes for recovering the arrear of revenue without looking forward to the obedience of that process by the person against whom it is directed.

It has been argued that the processes from (b) to (h) are coercive but "a writ of demand" or "a citation to appear" is not a coercive process. According to Wharton, a writ is :
"a judicial process by which any one is summoned as an offender and is also a legal instrument to enforce obedience to the orders and sentences of the Courts." "A writ of demand is a peremptory order to pay."

"A citation to appear" cannot be otherwise than a peremptory order to appear, if the arrear of revenue is not paid. It is coercive because he has to leave his business and has to undergo the worry, trouble and expense of a journey to the Tahsil. The appearance before the Tahsildar as a defaulter is humiliation enough. He is exposed to the risk of being arrested by the Tahsildar if the latter chooses to do so. Besides this, he has to pay the expenses of the process issued to him. It is the extent of the privation, wherein lies the compulsion.

The word "citation" does not appear to have been used in Ss. 146 and 147, Land Revenue Act in a technical sense. "Citation" may have a limited or a technical meaning in a particular statute relating to ecclesiastical law or to law relating to probate and administration. But it is not permissible to construe words in one Act by a reference to the use of the same words in another Act which is not in *pari materia* with the former. It was held in the case of *Muddoo Soodan Dey v. Bama-Churan Mookerji* (5) that the meaning of an Act is to be gathered solely by a reference to the Act itself. In *Walji Karimji v. Jagannath Premji* (6) it was held that :

"enactments in *pari materia* should be read together as if they were one law and interpreted as consistently and harmoniously as their language will fairly admit but an enquiry into the vicissitudes which a measure experienced in the course of its passage as a bill through the legislature is not a legitimate mode of ascertaining the intention of the legislature."

It is, therefore, submitted with respect that it is not legitimate to con-

(5) 1 Hydge 100.

(6) [1877] 2 Bom. 84.

strue the words "citation to appear" in Ss. 146 and 147, Land Revenue Act by a reference to S. 69, Act 5 of 1881 or Ss. 199 and 250, Succession Act (Act 10 of 1865). S. 69, Act 5 of 1881 is a replica of S. 250, Succession Act of 1865 and provides that it shall be lawful for the District Judge . . . , to issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administrations. The citation here is a general citation and is not addressed to a particular individual by name. The citation is not addressed to persons who do not put forward any claim in the estate of the deceased. It is not a process for enforcement of a pre-existing liability as in the case of a defaulting landholder. If a person having a claim to the estate of the deceased holds himself back, he exposes himself to the risk of an ex parte order against him or to his prejudice. But no liability has been incurred till this order has been passed. S. 199 is clear that no appearance on the part of the next-of-kin is contemplated and he has the option to accept or refuse the letters of administration.

It is worthy of note that a mode of publication of the citation was prescribed by the Probate and Administration Act and the Succession Act. In the Land Revenue Act, no mode for the service of the citation under S. 147 has been specifically provided for. But the mode of service of summons under the Act has been expressly provided. This could not be treated as a case of omission from inadvertence. It is rather suggestive of the fact that the framers of the Act considered the two terms to be synonymous.

In S. 151, N. W. P. Land Revenue Act (Act 19 of 1873) there was a provision for the "writ of demand" but there was no provision of the issue of a citation or summons to the defaulting zamindar. In S. 114, Land Revenue Act of Oudh (Act 17 of 1876), there was a provision for both, that is, there was a provision for "a writ of demand" and, alternatively, for "a summons to appear." Under Act 3 of 1901, the two aforesaid Acts were repealed and they were consolidated into one. In the new Act, a provision has been made for both, with this difference that the word "citation"

has been substituted for "summons." This would suggest that the legislature considered the word "summons" and "citation" as convertible terms. As has already been observed, the context, where the words "citation" has been used, is also indicative of the same conclusion. The word "citation" has to be read with reference to the context and not divorced from it, and the interpretation as to the nature and character of the citation may be mild in one case and more severe in another if the mildness or severity is to be assigned to the legal effect of the process. But it would depend in each case upon the text of the statute with special reference to the character of the proceedings, it relates to. Having regard therefore (1) to the natural and grammatical meaning of the word "citation," (2) to the general scheme of the Land Revenue Act and (3) to the use of the word "citation" with reference to the context, it is clear that "citation to appear" cannot but have one meaning, namely, "summons to appear." There is no ambiguity in the word "citation to appear" and the words cannot be construed to mean citation to appear or not to appear at the option of the person served with the citation. There can be no warrant for introducing words into the text of S. 147 as an addition or an alternative. It will be trenching upon the province of the legislature to add an inconsistent alternative into the text.

There are certain sections of the Land Revenue Act, where the word "summons, has been used; for example, Ss. 123, 194, 195 and 201. In S. 193, "all persons" summoned "are bound to appear." If after due service they do not attend, they are, it is submitted liable to be prosecuted under S. 174, I. P. C. It was not necessary to add a provision to S. 147 like the one in S. 193, because the legislature has already declared its mind in S. 146 that citation to appear is a process for enforcing payment of arrears of revenue and it follows that it has to be obeyed.

It cannot be argued from this that the framers of the Act in using the word "citation" Ss. 146 and 147 deliberately intended to use a word of different connotation from "summons." A comparison of those sections with Ss. 146 and 147, Land Revenue Act, satisfies me

that no distinction or differentiation was intended to be made. Ss. 146 and 147 are to be found in Chap. 8 which relates to collection of revenue. The matters dealt with therein are purely fiscal and administrative. Ss. 193, 194, 195 and 201 are to be found in Chap. 9, which relates to procedure of revenue Courts and Revenue Officers. It is not unlikely that "summons" and "citation" were used as mere variants of the same idea and two words were used to mark off the nature and character of the proceedings before the Revenue Officers concerned, but the nature and obligatory character of the "summons" or "citations" are different according to the nature of the proceedings.

The learned Government Advocate has invited the attention of this Court to the following decisions in support of his appeal. In the matter of *Surju*, decided by Knox, A. C. J., and Tudball, J. *Ram Bali v. Emperor* (2), decided by Messrs. Chamier and Evans, JJ., which overruled an unreported decision of Mr. Piggot founded upon the report of the Select Committee: *Chandrika Singh v. Emperor* (4), decided by Stuart, C. J. and Pullan, J. The last mentioned case expressly dissents from the Division Bench ruling of this Court in *Emperor v. Bhirgu Singh* (1). I am in general agreement with the reasonings of the learned Judges in this case. In *Banwari Lal v. Emperor* (3), Sulaiman, J., is reported to have observed as follows:

"The question is whether 'the citation to appear' does not come, within the expression 'summons, notice, order of proclamation.'"

If the matter were entirely *res integra* I would have been inclined to hold that the citation was, at any rate, a notice, if not, a summons or order, and that, therefore, its disobedience was covered by S. 174, I. P. C. I might have sought support from the case of *Ram Bali v. Emperor* (2), if the matter were not concluded by a recent pronouncement of a Division Bench in *Emperor v. Bhirgu Singh* (1), which is binding on me as a single Judge.

A point is sought to be made of the fact that no penalty for non-attendance has been provided for in the Land Revenue Act as appears to have been done in S. 2 of Act 21 of 1866. This cannot be

treated as an example of a *casus omis-sus* nor can an inference be drawn from this omission. S. 174, I. P. C., was already on the statute book to meet the situation and it was not necessary to make a special provision for a case like this in the body of the Land Revenue Act.

There can be no charm in the word— "citation" or "summons." Citation or summons may be issued to a party or to a witness or to a party who is sought to be examined in the case as a witness. The object may be to give notice to a party of some suit, application or other proceeding. In such a case the party is not bound to appear in Court although his non-appearance may entail the consequence of an *ex parte* order against him (see for instance O. 9, Civil P. C.). Again the object may be to compel his appearance in Court to give evidence. In such a case, he is legally bound to appear in Court and he cannot be allowed to contumaciously withhold his appearance. A summons to a witness is a process of a mandatory character. In a civil suit, the Court has summary powers to proceed against him and pass orders under O. 16, R. 12, Civil P. C. The rule aforesaid, however, does not take away the powers of the Court to prosecute him under S. 174, I. P. C. Cases of deliberate disobedience of summons are rare. Even where they occur, the civil Courts may deal with the offender under O. 16, R. 12, and not file a complaint against him in the criminal Court under S. 174, I. P. C. I am by no means certain that witnesses are never prosecuted by the civil Court for disobedience of summons, although I must say that there are no reported cases where this has taken place. The powers of the civil Court in this respect are foreign to the enquiry in hand. Whether a party or a witness was bound to appear in a proceeding of a civil nature has to be determined by a reference to the nature of the proceeding and the provision of the particular statute under which he is served with the notice. Any answer for or against cannot be made in the abstract and the answer cannot be helpful in the solution of the question which is now before us, which has to be determined by a reference to the relevant portions of the Land Revenue Act and nothing beyond,

Section 201, Land Revenue Act provides that no ex parte order or order by default shall be set aside without a notice of the application to the opposite party. This section is analogous to O. 9, R. 14, Civil P. C. Here the notice served to a party is not for personal appearance. It is a matter of his option to appear or not to appear but non-appearance exposes him to certain legal consequences. It may be conceded at once that the party served with notice in these cases is not legally bound to appear.

I hold, therefore, that where a citation has been issued to a person who is in arrear of Government revenue under S. 147, Land Revenue Act, the said citation is a summons within the meaning of S. 174, I. P. C., that the accused was legally bound to appear in the Court of the Tahsildar in obedience to it and that by his failure to attend, he was guilty under S. 174, I. P. C.

I would, therefore, allow the Government appeal and convict the accused.

By the Court.—The result is that the appeal by the Local Government fails and is hereby dismissed, and the acquittal of Himanchal Singh accused of an offence under S. 174, I. P. C. is hereby confirmed.

R.K.

Appeal dismissed.

1930 Cr. Cases 442

(Allahabad)

BOYS AND YOUNG, JJ.

Chandan and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 512 of 1929, Decided on 3rd December 1929, against order of Sess. Judge, Budaun, D/- 14th Judge, 1929.

(a) Criminal P. C., S. 112 — Ordinarily mentioning that clause of S. 110 applicable to case is sufficient but where clause refers to two or more offences, offence appropriate should be mentioned.

Ordinarily it is sufficient under S. 112 if that portion of the clause of S. 110 which is applicable to the particular case is specified in the notice that is given. But where the particular clause refers to two or more offences, the particular offence or offences which is appropriate to the particular case should also be mentioned in the notice. This applies more particularly to Cl. (d) : A. I. R. 1927 Oudh 306, *Appr.*

[P 442 C 2]

(b) Criminal P. C., Ss. 241 to 259—Before accused appears he is not entitled to information about detailed evidence of prosecution.

In the trial of an ordinary summons or war-

rant case before a Magistrate an accused person is not entitled, before he appears in Court, to any information as to what detailed evidence the prosecution is going to lead. [P 443 C 1]

(c) Criminal P. C., Ss. 256 and 110—S. 256 applies to cases under S. 110.

Section 256 is applicable to inquiry into cases under S. 110, so far as practicable : A. I. R. 1927 All. 660, *Foll.* [P 443 C 1]

(d) Criminal P. C., S. 110—Mere fact of allegation of substantive offence does not preclude proceeding under S. 110 : A. I. R. 1929 All. 818 and A. I. R. 1925 All. 250, *Overruled.*

The mere fact that there is an allegation of a substantive offence is no obstacle to the using of the evidence such as it is in regard to the commission of that offence in proceedings under S. 110 : A. I. R. 1929 All. 813 and A. I. R. 1925 All. 250, *Overruled* ; A. I. R. 1925 All. 694, *Ref.* [P 443 C 2]

L. M. Roy—for Applicants.

M. Waliullah—for the Crown.

Boys, J.—This is an application of three men on the revisional side of the Court asking that an order under S. 110, Criminal P. C., for filing security be set aside. There are no less than 11 grounds in the application for revision, of which some five have been argued before this Court.

It has already been held by the single Judge who referred this case to the present Bench that there is no force in ground 1 that the applicants had no notice under S. 112 before they were arrested. We agree that the terms of S. 113 were fully complied with and that no notice before arrest is necessary.

Next, it is urged that the applicants were not given the substance of the information against them in accordance with the terms of S. 112. We have no hesitation in agreeing with the decision in *Emperor v. Ramghulam* (1), in which it was held that ordinarily it is sufficient under S. 112 if that portion of the clause of S. 110 which is applicable to the particular case is specified in the notice that is given. To this we would further add that where the particular clause refers to two or more offences, the particular offence or offences which is appropriate to the particular case should also be mentioned in the notice. This applies more particularly to Cl. (d). It is unnecessary to repeat the arguments in the case to which we have referred. But we would note, if the principle which we have approved be not accepted, the utter impossibility of drawing the line at any place or of offering the Magistrates any guiding

(1) A. I. R. 1927 Oudh 306=2 Luck. 157.

principle which would assist them in determining how much information is to be given. We may state a specific example. The evidence in this type of case generally consists of something like the evidence of 20 witnesses, who are expected to speak each of them possibly to a separate incident, sometimes one witness being supported by the evidence of another. Is the information to give the substance of the evidence that one witness is likely to give, or two witnesses or three witnesses, or where is the detailing of the information to stop? It is manifest that it would not be of any value for the purposes of giving notice of the evidence of witness 20 to give even in full the evidence that the earlier 19 witnesses were going to give. This practical difficulty only supports the view that it is sufficient if the particular clause of the charge, or where there are more than one offences named in charge, the particular offence or offences is given in the notice. In the trial of an ordinary summons or warrant case before a Magistrate an accused person is not entitled, before he appears in Court to any information as to what detailed evidence the prosecution is going to lead. What we have said on this point refers of course only to S. 110 and has not necessarily any bearing on Ss. 107 and 109.

The next point taken was that S. 256, Chap. 21, Criminal P. C. is applicable to inquiry into cases under S. 110. One of the members of this present Bench in *Tirlok v. Emperor* (2) has already held that the terms of S. 256 are applicable so far as practicable. This is in accordance with S. 117 (2), Criminal P. C., and we see no reason to hold otherwise. It is contended for the applicants that the accused were not asked to state whether they wished to cross-examine or not. Counsel was not prepared to suggest that there was the smallest possibility of there having been any prejudice to the accused from their not having been so asked, and this is manifest when counsel was asked whether they were represented or not, and he had to reply in the affirmative. There is no force in this contention and it need never have been raised.

Next, it is contended that proceedings under S. 110 cannot be instituted or at

least are inappropriate where there is an allegation on behalf of the prosecution that the accused have committed a substantive offence under the Penal Code. This again is wholly untenable, and is based on an entire misappreciation of the principles properly applicable. There is not the slightest reason whatever why the police should not institute proceedings under S. 110 despite the fact that there may be some reason to suppose that the accused have committed some substantive offence under the Penal Code. It is only necessary again to give a concrete case. It may be that the accused is suspected in six cases of house-breaking. The police may have adequate grounds for believing that the accused is really guilty of those six cases of house-breaking, but in regard to any individual case it may be that the evidence would be almost certain to prove inadequate for a conviction. It does not follow, of course, that such evidence, that there is, is not trustworthy. There is manifestly here nothing whatever to prevent the police saying "if we institute a case of house-breaking it will only involve a useless expenditure of time and money. The evidence such as we have is trustworthy, but it would be inadequate for a conviction for the substantive offence."

There is no reason for holding that proceedings under S. 110 would be improper in such a case. It would be possible to multiply the reasons for holding that the mere fact that there is an allegation of a substantive offence is no obstacle to the using of the evidence such as it is in regard to the commission of that offence in proceedings under S. 110.

It is, however, desirable to consider the earlier decisions of this Court relevant to this ground. In 1924 the case of *Ram Prasad v. Emperor* (3) came before a single Judge of this Court. In that case the notice to the applicants was to the effect that they were "habitual dacoits and belonged to the dangerous gang of Dhani and Ram Kishan dacoits." The learned Judge of this Court said :

"On a reference to S. 110, Criminal P. C. it will be found that it does not provide for any person being called upon to furnish security on the ground that he was by habit a dacoit and belonged to the gang of a dacoit."

It is not for the Courts to find out the motive for the commission, but if it were necessary one could easily be found. Being a member of a gang of dacoits is a definite offence defined and punishable under the Penal Code and it was for that reason that under the preventive sections, action could not be taken for having committed a specific offence."

We are unable to agree with the learned Judge in the suggestion that he makes for the reason of the omission. In our view, being a member of a gang of persons associated for the purpose of habitually committing dacoity does come within the purview of S. 110, and is not excluded merely because there is an allegation of facts pointing to an offence under S. 400, I. P. C. Similarly, we are of opinion that where the facts alleged are that the person belongs to a gang of persons associated for the purpose of habitually committing theft or robbery, and not being a gang of thugs or dacoits, those facts are susceptible to proceedings under S. 110. Let us suppose the case of a person *A* being accused of being by habit a thief. Similarly *B*, *C*, *D* and *E* are each accused of being by habit thieves. It is manifest that the accusation against each one of these persons could be the subject of a separate proceeding directed against him individually under S. 110, Cl. (a). Now, if we turn to S. 117, Cl. (5) it says :

"Where two or more persons have been associated together in the matter under inquiry they may be dealt with in the same or separate inquiries as the Magistrate shall think just."

From this it is clear that where two or three or four or five or more persons are accused of being associated together, or, in other words, forming a gang, for the purpose of habitually committing thefts, the legislature has contemplated that those facts may be the subject of a case under S. 110: otherwise there is no meaning in the two clauses read together. This is sufficient to show that the state of facts we have named does come both within S. 401, I. P. C. and S. 110, Criminal P. C. Nor is there any statutory provision forbidding the application of S. 110 to facts which happen to come also within S. 401, I. P. C.

Nor do we consider that as a matter of policy or convenience or justice it is even desirable to hold that where the facts come within either section, it

should follow that only the section of the Penal Code should be applied, and that there must be a regular trial for the substantive offence. Let us consider the distinction between the two sections. Where a charge in the full sense of the term is laid under a section specifying a substantive offence such as section 401, I. P. C., the evidence and the only evidence which can be led is that of persons who saw acts or heard words, etc. with their own eyes and ears. On the other hand, evidence which is admissible under S. 110, Criminal P. C. includes evidence of "general repute." Manifestly, therefore, evidence which might be insufficient for a conviction under S. 401, I. P. C. punishable directly with imprisonment, may, though the facts to be proved are identically the same with the facts to be proved upon a case under S. 110, Criminal P. C. be sufficient for a conviction under S. 110, Criminal P. C. involving merely in the first place furnishing of security, for further evidence to support the prosecution, e. g., that of "general repute" is admissible, where the lesser consequence follows, of a nature which is not admissible where the graver consequence follows. We are, therefore, of opinion that it is not illegal to institute proceedings under S. 110 merely because the facts alleged would, if proved, establish an offence under S. 401, I. P. C. Nor is it necessarily improper to institute such proceedings. A case under S. 401, I. P. C. which might necessarily fail for want of the essential evidence might well and properly result in a conviction under S. 110, Criminal P. C. The same reasoning will *mutatis mutandis* apply to S. 400, I. P. C., and S. 110, Criminal P. C. We do not think it necessary to enter into speculation as to the reason for mentioning theft and robbery in S. 110 and not mentioning dacoity. We have stated why we do not agree with the reason given by the learned Judge in the case to which we have referred.

We have also been referred to the decision of one of us sitting with another Judge reported in *Budhan v. Emperor* (4). That case was referred to a Bench of two Judges by a single Judge who did not, as we have said we do not, agree with the proposition laid down in the

case of *Ram Prasad v. Emperor* (3), which we have just discussed. In *Budhan v. Emperor* (4), however, the Bench held that the case of *Ram Prasad v. Emperor* (3) was distinguishable, and therefore cannot be interpreted as having overruled *Ram Prasad v. Emperor* (3) on the point which we are now considering. Finally there is the case of *Ramrup Bhar v. Emperor* (5). That case naturally followed the decision in *Ram Prasad v. Emperor* (3) which was correctly noted as not having been overruled in *Budhan v. Emperor* (4). As our present decision overrules *Ram Prasad v. Emperor* (3), it follows that it also overrules *Ramrup Bhar v. Emperor* (5).

The application is dismissed.

V.B./R.K. *Application dismissed.*

(5) A. I. R. 1929 All. 813.

• 1930 Cr. Cases 445 (Allahabad)

YOUNG AND SEN, JJ.

Emperor

v.

Bindeshwari Singh—Respondent.

Criminal Appeal No. 561 of 1929, Decided on 9th September 1929, from order of Sess. Judge, Azamgarh, D/- 18th April 1929.

Criminal Trial—False plea of enmity put forth by accused aggravates offence and affects question of sentence.

In a great majority of cases, the plea used in defence is the stereotyped plea of enmity. The plea is characterised by a wanton disregard of truth and in spite of liborious attempts, no malice is established between the accused and the Crown witnesses including the complainant. It ought to be generally known that a false defence of this character has a tendency to aggravate the offence and is a factor which may affect the question of sentence. [P 416 C 2]

U. S. Bajpai—for the Crown.

Nehal Chand—for Respondent.

Young, J.—Bindeshwari Singh was convicted by a Magistrate of the First Class under S. 381, I. P. C. for having extorted Rs. 10 from one Balle Halwai by holding out threats to him of physical injury and of the institution of legal proceedings charging him with the commission of a criminal offence. The learned Magistrate gave him the sentence of one year's rigorous imprisonment and a fine of Rs. 100.

The learned Sessions Judges reversed the decision of this trial Court and directed the acquittal of Bindeshwari Singh.

The Local Government has filed an appeal to this Court.

The complaint which gave rise to these proceedings was instituted by one Balle Halwai of Deogaon on 29th August 1928. The story of the Crown is shortly this:—Bindeshwari Singh purchased puris and sweets from the shop of Balle Halwai and owed him Rs. 10. A demand was made for the money. Bindeshwari Singh took offence at this and told Balle

"I shall set you right. I shall get a false case brought against you and shall cause you to be sent to jail."

On 30th March 1926, one Jamna Prasad filed a complaint against Balle, his wife Mt. Kishen Dei and Ganga Barnwar under S. 498, I. P. C. in the Court of a Special Magistrate of Deokali, in the District of Ghazipur. The allegation was that Mt. Kishen Dei was the wife of Jamna Prasad and that Balle and Ganga Barnwar had taken or enticed away the wife with intent that she may have illicit intercourse with them. Summonses were issued but could not be served. Warrants were applied for and were duly executed and 15th May 1926 was the date fixed for the hearing of the complaint. On that date the complainant did not appear in Court and the complaint was dismissed.

In the meantime, on some date between 8th May and 15th May 1926, Bindeshwari Singh came to the shop of Balle Halwai and told him that it was now time for him to realize the insecurity of his position, as a complaint under S. 498 had already been launched against him and the only thing which remained to be done was to press the complaint and send Balle Halwai to jail. Bindeshwari Singh told Balle that if he was anxious to enjoy his liberty, he ought to pay him Rs. 50. A settlement was arrived at for a sum of Rs. 10 and Balle paid Rs. 10 to Bindeshwari Singh. The above is proved from the evidence of Balle and is supported by the depositions of Miri Halwai, Bishnath Kalwar, Jattan and Kundar Kandau.

There is also very strong corroboration of this evidence in the fact that the complaint of Jamna Prasad came to nothing as the complainant allowed the complaint to go by default.

Balle Halwai is the complainant in this case and his statement ought to be carefully scrutinised. The complaint

had been instituted after a very long time. Balle may be presumed to have a natural partiality in favour of his own complaint. The unusual delay in the institution of the complaint had got to be explained.

Balle had been subjected to a lengthy cross-examination and has not broken down in the least. His statement is clear and consistent. The delay in the institution of the complaint, has been accounted for. Bindeshwari Singh is a bully and evidently the complainant was afraid of him. It was not till proceedings were initiated against Bindeshwari Singh under S. 110, Criminal P. C. that Balle could venture to come forward against such a formidable opponent.

The statement of Misri Halwai has been rejected by the Court below upon the ground that he was the brother of Mahabir, who filed the complaint in the connected case. That is not a sound reason for discrediting the statement, but it ought to have been a good ground for scrutiny. It does not appear that any portion of the statement of Misri is intrinsically improbable, nor does his statement conflict with the statement of Balle or those of other witnesses for the prosecution. We are of opinion that the learned Sessions Judge has discredited the statement of Misri upon grounds flimsy and insufficient.

No reason whatsoever has been assigned for not accepting the statements of Bishnath, Jattan and Kunder who appear to be thoroughly independent witnesses. We are not surprised bearing in mind the character of Bindeshwari Singh that the demand was made at a public place in broad day light and in the presence of many witnesses. Bindeshwari Singh believed that he was the master of the situation and was running no risks.

We consider that on the evidence for the prosecution the case against Bindeshwari Singh has been clearly established. The defence in this case is exactly the same as was put up in the connected case of *Mahabir*. There is no evidence to support this defence. It has not been made out that Rai Sahib Dindayal Sahu had engineered this case to satisfy his malice against Bindeshwari Singh. The case set by the defence is that there was a widespread conspiracy and that the police and the district authorities had

made common cause with Rai Sahib Dindayal. This defence was absolutely false and baseless.

In a great majority of cases, the plea urged in defence is the stereotyped plea of enmity. The plea is characterised by a wanton disregard of truth and in spite of laborious attempts, no malice is established between the accused and the Crown witnesses including the complainant. It ought to be generally known that a false defence of this character has a tendency to aggravate the offence and is factor which may effect the question of sentence.

Three witnesses were examined for the defence; of those Munshi Ramanad Lal and Babi Swami Nath Singh had appeared as witnesses for Bindeshwari Singh in the connected case. They say no more than this that there was a contest between Raghuraj Bali Sahu, nephew of Sahu Dindayal and certain other persons for a seat in the District Board of Azamgarh. They do not state that there is an enmity between Bindeshwari Singh and Sahu Dindayal. The third witness Babu Sham Narain Singh is a mukhtar and member of District Board. He states that four five months ago when he was sitting in Bar Library at about 11 a. m. he was called by Bindeshwari Singh who told him that the police daroga was getting a complaint written against him by Balle Halwai. He did not go near them but he saw Balle and daroga together when the complaint was being written. We do not believe a word of this and we are of opinion that this witness is not only false but radiates falsehoods.

The judgment under appeal appears to us to be extremely unsatisfactory. We are sorry to note that the findings of the learned Judge in this and the connected case, *Criminal Appeal No. 560 of 1929*, are against the weight of evidence and no serious attempt has been made to meet the excellent reasons given by the primary Court.

In the result, we allow the appeal, set aside the order of the Sessions Judge dated 18th April 1929, and convict Bindeshwari Singh under S. 384, I.P. C. We maintain the sentence of fine passed by the trial Court and sentence him to two years' rigorous imprisonment. The sentences in the two cases are to run consecutively. Bindeshwari Singh must sur-

render to his bail. The complainant ought to be paid Rs. 50 out of the fine if realized. If the fine is not recovered from Bindeshwari Singh, he must undergo three months' rigorous imprisonment in addition.

V.S./R.K.

Sentence enhanced.

1930 Cr. Cases 417 (Allahabad)

YOUNG AND SEN, JJ.
Emperor

v.

Maiku—Accused.

Criminal Ref. No. 429 of 1929, Decided on 4th September 1929, made by Dist. Magistrate, Agra, on 4th June 1929.

Criminal Trial—Sentence—Sentence should be proportionate to nature and gravity of crime in each case—Giving certain sentence given in hundred other cases does not make it obligatory upon the Court to award the same sentence.

It is an elementary proposition in criminal jurisprudence that sentence in each case should be proportionate to the nature and gravity of the crime, and a Magistrate cannot claim a right to inflict a particular sentence in a particular case because he had done so in hundred other cases—some of which were more serious—without any regard to nature of facts, upon which each and every case has to be decided.

[P 447 C 2]

Mr. Waliullah—for the Crown.

Young, J.—Maiku Khar has been convicted by Mr. S. M. Ahmed, Excise Magistrate of Agra under S. 60, Excise Act and has been sentenced to a fine of Rs. 50. The District Magistrate of Agra has through the Sessions Judge referred the case to this Court "for examination and enhancement of sentence if thought proper."

Mr. Sheodan Lal, an Excise Inspector, raided the house of Maiku Khar which is situated in Sadar Bazaar of the city of Agra. Maiku was caught in the act of distilling liquor. A large quantity of illicit liquor and a complete paraphernalia of instruments for manufacture of illicit liquor was discovered in his house. Maiku was put on his trial and he made no pretence of innocence. He pleaded guilty. The Excise Magistrate considered that he had properly discharged his function as a Magistrate by sentencing Maiku to a fine of Rs. 50.

Excise cases are not easy to detect and are difficult to prove. The distiller, not unoften, prepares liquor for purposes of traffic. The game is a profitable one.

Illicit distillation of liquor does not only mean a loss of revenue to the Government but is a serious menace to the health and the moral well being of the community. The Local Government, by its letter No. 579-13-55 dated 21st December 1928, had accentuated the fact that the crime was widely prevalent and that the actual distiller or trafficker should be sentenced to a substantial term of imprisonment. Under the Act, the maximum punishment, in the case of first offenders, is one year's rigorous imprisonment and a fine of Rs. 1000.

The explanation given by the Excise Magistrate is ridiculous. He says:

"I had been Excise Magistrate of Allahabad for over a year and I had to do no other work than excise, as the work is so heavy there. The present Excise Commissioner had been Excise Inspector under me there and he knows well that in all such cases Rs. 50 was considered proper punishment. I decided at least some hundred such and more serious cases with fine but the excise department there never considered the punishment inadequate."

It is difficult to understand the above statement together with its implications. Are we to take it that this Magistrate has ignored and pigeon-holed the Government notification which we have alluded to above? Does the Magistrate claim a right to inflict a sentence of fine in all cases because he has done so in hundred other cases—some of which were more serious—without any regard to the nature of facts, upon which each and every case had to be decided? The Magistrate would have been well advised not to bring in the aid of prescription in his favour. It is an elementary proposition in criminal jurisprudence that sentence in each case should be proportionate to the nature and gravity of the crime.

The learned Magistrate submits that a fine of Rs. 50 for a man of no means and status is "quite adequate punishment." It is worthy of note that there was not a scrap of evidence before the trial Court concerning the means of Maiku. Granting that the financial position of Maiku was not sound why was not the sentence of imprisonment passed?

There is an insinuation that the Excise Inspector was shielding the principle culprit and that Maiku was playing the second fiddle. A Magistrate with any sense of responsibility ought to have hesitated and paused before

making any insinuation against the Excise Inspector which was not justified by the evidence on the record. In the present case the attack upon the Excise Inspector was wholly unwarranted.

The Magistrate's grievance is that the Excise Inspector has moved in this matter and submitted his report for enhancement with a view to "minimise the blame brought against the Excise Inspector in the Peoples' Herald." Any publication in the Peoples' Herald is outside the judicial record. Here we have another insinuation and nothing to support it. We hold that the Excise Inspector in bringing the sentence to the notice of the District authorities had done the right and proper thing. The sentence is ridiculous. We sentence Maiku to six months' rigorous imprisonment and maintain the fine of Rs. 50.

V.B./R.K. *Sente ice enhanced.*

1930 Cr. Cases 418

(Allahabad)

PULLAN, J.

Balkishen—Applicant.

v.

Emperor—Opposite Party.

Criminal Ref. No. 357 of 1929, Decided on 29th May 1929, made by Sess. Judge, Aligarh, D/- 27th April 1929.

(a) Criminal P. C., S. 250—Case *prima facie* triable by Magistrate but if facts were proved constituting offence exclusively triable by Sessions Court—Award of compensation by Magistrate is not illegal.

Where a Magistrate tries an accused for an offence *prima facie* triable by him, when really if the facts had been proved the offences would have been one triable exclusively by the Sessions Court, an award of compensation made by the Magistrate under S. 250 is not illegal: *A. I. R. 1922 Mad. 223, Ref. A. I. R. 1926 All. 159, Dist.* [P 448 C 2]

(b) Criminal Trial—Court's duty—Magistrate is not bound to find whether case exclusively triable by Sessions would arise if facts before him were proved.

It is not incumbent upon a Magistrate to go out of his way to find that a case exclusively triable by a Court of Sessions might arise from facts before him, if they were proved. [P 448 C 2]

Judgment.—This is a reference by the learned Sessions Judge of Aligarh requesting this Court to set aside an order passed by a Magistrate under S. 250, Criminal P. C., directing a certain complainant to pay compensation to the accused. It is not suggested that the

order was otherwise improper, but merely that it was without jurisdiction. The case before the Magistrate was under Ss. 463 and 323, I. P. C. both being within the Magistrate's jurisdiction and *prima facie* he was entitled to pass the order in question. The learned Sessions Judge bases his reference on the assumption that if there was any offence it was one under S. 467, I. P. C. and exclusively triable by the Court of Sessions. But it has been found by both Courts that there was no offence, and the Judgment appears to me to have gone too far when he assumes that if the offence had been committed it would have been one under S. 467, I. P. C. We have to consider whether the Magistrate was trying the case or merely holding an enquiry with a view to commitment. He says that he was trying the case, and I have no doubt that he is correct in so saying. The case must be distinguished from that reported in *Harihar Datt v. Maksud Ali* (1) which refers to a case where one at least of the offences charged is exclusively triable by the Court of Sessions. The case which is parallel to the present is noted in the judgment in *Harihar Datt v. Maksud Ali* (1). It is *M. Venkatrayar v. K. Venkatrayar* (2). It was not in my opinion incumbent on the Magistrate to go out of his way to find that a case exclusively triable by a Court of Sessions might arise from the facts before him, if they were proved. He was trying a case apparently within his jurisdiction. He found that there was no case and that it had been brought frivolously and vexatiously. He was therefore entitled to act under S. 250, Criminal P. C.

I decline to interfere. The reference will be returned.

V.B./R.K.

Reference returned.

(1) A. I. R. 1926 All. 156=18 All. 108.

(2) A. I. R. 1922 Mad. 221=15 Mad. 29.

THE CRIMINAL CASES

JOURNAL SECTION

1930

[MAY

INDIAN LEGISLATION 1930

ACT 13 of 1930

*(Received G. G.'s assent on 24th
March 1930)*

Amends the Inland Steam Vessels Act, 1917.

New Ss. 54-A and 54-B have been inserted giving G. G.-in-Council power to fix maximum and minimum rates for passenger fares and freight for goods and Local Government power to make rules for appointing Advisory Committee.

ACT 14 of 1930

*(Received G. G.'s assent on 26th
March 1930)*

Amends the Indian Railways Act, 1890.

A new Chap. 6-A has been inserted consisting of 8 sections viz., 71-A to 71-H. The amendments are mainly for the purpose of limiting the hours of work and of granting periodical rest to railway servants.

ACT 18 of 1930

*(Received G. G.'s assent on 4th
April 1930)*

Provides for the imposition and collection of an excise duty on silver.

This Act has been introduced to impose duty on silver extracted from ores in British India. S. 2 gives definition of "silver works." S. 3 (i) imposes duty of four annas on each ounce of silver issued from the 'silver work.' Cls. (2) and (3) give the mode in which the duty is to be imposed. S. 4 imposes a fine to the extent of Rs. 1,000 or double the amount of the duty avoided on persons contravening the rules under S. 6. S. 5 relates to the application of Sea Customs Act while S. 6 is for giving rule-making power to Governor General in Council.

"Browbeating the witnesses."

Courts and juries appreciate delicacy of feeling upon the part of advocates, and where in cross-examination it becomes important to inquire into the past history of a witness, or to speak about the death of a near relative or dear friend, or to touch some chord of sorrow, it is wise to use introductory expressions deploring the necessity of asking such questions, and representing it as one of the unpleasant but imperative duties of counsel. Jurors are apt to sympathise with a witness who is unjustly attacked by counsel upon cross-examination, and in making up their verdict are often unconsciously influenced by such improper conduct upon the part of the advocate. It is in vain that we deplore the fact that jurors are often influenced by passion or prejudice, and that they do not always follow the strict letter of the law, but, generally

speaking, they mean to do what is right, and if they sometimes lean a little too far to the side of mercy, who can blame them? In this respect the observations of Archbishop Whately, on the unfair treatment of witnesses by counsel, are worthy of consideration. He says:

"I think that the kind of skill by which the cross-examiner succeeds in alarming, misleading or bewildering an honest witness may be characterized as the most, or one of the most, base and depraved of all possible employments of intellectual power. I have seen the experiment tried of subjecting a witness to such a kind of cross-examination by a practical lawyer as would have been, I am convinced, the most likely to alarm and perplex many an honest witness, without any effect in shaking the testimony and afterwards by a totally opposite mode of examination, such as would not at all have perplexed one who was honestly telling the truth, that same witness was drawn on, step by step, to acknowledge the utter falsity of the whole. Generally speaking a quiet, gentle, and straightforward, though full and careful, examination will be the most adapted to elicit

truth; the manoeuvres and the browbeating which are the best adapted to confuse an honest simple minded witness are just what the dishonest one is the best prepared for. The more

the storm blusters, the more carefully he wraps round him the cloak which a warm sunshine will induce him to throw off."

(*Advocacy series.*)

THE PLEA OF INSANITY IN CRIMINAL CASES

By

AMOLAK RAM KAPUR., B.A. (HONS.), LL.B. *Vakil, High Court, Lahore*

* The plea of insanity is sometimes urged to a charge for a criminal offence more often in indictments for murder, treason and such other offences of a more or less serious character. Our knowledge of the working of the human mind is so inadequate that the decision of the question whether a person accused of an offence has succeeded in proving that he comes within the exception or not offers the greatest difficulty to the Judge and the jury. Lawyers and medical men have striven hard for many years to come to a definite conclusion, but constantly differing amongst themselves have not yet been able to lay down any satisfactory test for judging the difficult question of the sufficiency or insufficiency of a plea of insanity in criminal trials.

Sir Fitz James Stephen, in his treatment of the subject was constrained to remark as follows: "I have read a variety of medical works on madness, but I have found the greatest difficulty in discovering in any of them the information of which I stood in need; namely a definite account of the course and of the symptoms collectively constituting the disease. Most of the authors whose works I have read insist at a length which in the present day I should have supposed was unnecessary, on the proposition that insanity is a disease, but hardly any of them describe it as a disease is described. They all, or almost all, describe a number of states of mind which do not appear to have any necessary or obvious connexion with each other."

"These they classify in ways which are admitted to be more or less unsatisfactory. Total insanity, partial insanity, impulsive insanity, moral insanity, pyromania, kleptomania and many other such expressions occur; but in the absence of any general account of the whole subject showing what is the common cause of which all the symptoms are effects, and how they respec-

tively proceed from it, these expressions are like adjectives with an unintelligible substantive. To say that a strong and ceaseless desire to set a house on fire is pyromania, and that a state of continuous passionate excitement, in which all the ordinary connexion of ideas is broken up, and a man behaves as if he were drunk or transported with intense anger is mania as opposed to melancholia, is to substitute words for thoughts. It is like telling a man that a whale and a monkey are both mammals when you do not explain what mammal means." (1) The passage quoted above sets forth clearly the nature of the information that lawyers, in dealing with the subject, require at the hands of alienists, and the difficulty experienced in procuring the information. The knowledge of insanity is not even yet advanced to such a stage as to fulfil our requirements.

It is an old old story that precise definition of insanity is difficult and that professional opinions differ both as to the tests and the inferences from them in different cases. It was said by a distinguished man, the late Sir George Savage, that there is no standard of sanity fixed by Nature; but that "sanity" and "insanity," as recognized by the doctor, and in fact, by the general public, must be but terms of convenience. Sir Clifford Allbutt described health whether of body or mind as "an oscillation about an ideal axis" in which stability is marvellously maintained, and there is no difficulty in perceiving when this stability is upset.

MEDICAL AND LEGAL TESTS

Coming to the field of criminal jurisprudence, we find the lawyer and the doctor notoriously at variance, the former strongly upholding the view that the mere doctrine that insanity per se connotes irresponsibility is dangerous and that it would be not safe to incor-

(1) See *Mercier — Criminal Responsibility*, pp. 76—77.

porate the notion of uncontrollable impulse in the legal definition of insanity for criminal purposes. In this connexion His Honour Parry, J. observes as follows :

To allow a human being to escape punishment for crime by pleading loss of self-control opens the gates of the dock from a lawyer's point of view far too widely and allows many real criminals to escape from justice (1). As a great scientist wrote : "There is a border land between crime and insanity, near one boundary of which we meet with something of madness but more of sin, and near the other boundary of which something of sin but more of madness." (2)

Thus it will be noted that the medical and legal standards of sanity are not identical, and the test of insanity, as viewed from a legal point, does not coincide with the medical idea. From the medical point of view every man at the time when he commits a murder, is insane, that is, he is not in sound, healthy and normal condition ; but from the legal point of view a man must be held to be sane so long as he is able to distinguish between right and wrong, so long as he knows that the offence he is committing is a wrong thing to do, so long as he has a guilty mind. A person who is in a highly excited and unbalanced condition, but is nevertheless conscious that what he is doing is wrong and a crime cannot be said to be of unsound mind within the meaning of S. 84 (3), I. P. C.,

The principle underlying the doctrine exempting a man of unsound mind from criminal responsibility has been well elucidated by penologists. It has been rightly said that a *mad* man does not possess mere *rea* or free will, cannot distinguish right from wrong, is deprived of memory and understanding is a victim of his impulses and all his acts are involuntary and unintelligent; he is punished by his own madness; and society can neither correct him nor make an

example of him by inflicting punishment on him. Legally speaking such a man does harm to society and individuals by his violent acts; but he does no wrong (4); and Society, in order, to protect itself, provides for his detention in an asylum.

THE McNAGHTEN CASE.

The rules concerning the defence of insanity in criminal trials were laid down in the answers of the Judges to questions put to them by the House of Lords in 1843 in the McNaghten case. The circumstances of the case were recently given by Lord Birkenhead in the Times, London (24th May 1924). In 1843 one McNaghten shot at and mortally wounded Mr. Drummond. He did so in the belief that the person at whom he shot was Sir Robert Peel, and under the insane delusion that he was the object of prosecution by Sir Robert Peel. The defence was that the prisoner was insane, and that under the influence of the delusion he was not capable of exercising any control over acts which had connexion with his delusion. The jury found the prisoner not guilty on the ground of insanity.

The case caused much discussion and gave rise to a debate in the House of Lords, and it appeared to those in authority desirable to obtain some authoritative pronouncement as to the law applicable to such cases. It was therefore determined to ask the opinion of the Judges.

The House put to the Judges five questions, all of them necessarily hypothetical. Maule, J., delivered his opinion separately and Sir Nicholas Tindal, L. C. J. of Common Pleas, then, on behalf of all the other Judges there attending, delivered their answers. These answers constitute what are known as the rules in McNaghten's case. For questions and answers in detail see (5). In his reference to these questions and answers, Lord Birkenhead says : "They have no legal authority, but, having been delivered upon so important an occasion, and as representing the considered opinion of almost the whole of the Judges of the Common Law Courts they were regarded as having, and have ever since

(2) Parry, Edward Abbot, His Honour—The Drama of the Law, June 1924, Edition, p. 38.

(3) *Sher Singh v. Emperor*, A.I.R., 1923 Lah. 508. (Per Sir Shadi Lal, C. J., and Le Rossignol J.) *Chhajju Mal v. Emperor*, 94 P. L. R. 1903-06 M. L. T. 101 4 I. C. 985—11 Cr. L. J. 105—16 P. W. R. 1907 Cr.

(4) Marcicr—Criminal Responsibility, Chapter on wrong-doing, p. 60.

(5) Goar, Dr. H. S.—The Penal Law of India Paras 553-54-55, 1903 Edition, pp. 333-37.

had, great weight—indeed such great weight that they are described by Lord Atkin, J.'s Committee as formulating the present rules of law determining criminal responsibility (in relation, that is, to insanity)" (6). Sir James Stephen, writing on the subject in 1862 said that it had been the general practice ever since, for Judges charging juries in cases in which the question of sanity arose to use the words of the answers given by the Judges on that occasion. But Sir Henry Theobald in a recent book (7) on the lunacy laws says that more recent examination of charges given by the Judges in trials for murder shows that though the rules in *McNaghten's* case are still relied on, yet, being abstract and general in their terms, the Judges are careful to adopt and apply them to the circumstances of each case.

THE RULES SUMMARISED

Sir James Stephen summarised the rules as follows: No act is a crime if the person who does it is at the time when it is done prevented by any disease affecting his mind:

(a) from knowing the nature and quality of his act; or

(b) from knowing that the act is wrong.

And he added as a doubtful proposition (c) from controlling his own conduct unless the absence of the power of control has been produced by his own default.

He further added as being certain law the following:

But the act may be a crime although the mind of the person who does it is affected by a disease, if such a disease does not in fact produce upon his mind one or other of the effects above-mentioned in reference to that act.

The rules laid down in the *McNaghten's* case (8) have been followed in every subsequent case in England as well as this country, as the most authoritative expression of the law on the subject. S. 81, I. P. C., lays down the law similar to the rules in the *McNaghten* case, and there is no reason to believe that the framers of the Code intended to in-

troduce any rule involving a departure from the English Law on the subject (9).

Section 84, I. P. C., runs as follows:

"Nothing is an offence which is done by a person who at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law.

THE OBJECT OF THE CRIMINAL LAW.

The object of the criminal law is to make people control their insane as well as their sane impulses, (10), and to guard against mischievous propensities and homicidal impulses (11). It is not therefore every mental disease which exempts the sufferer from criminal responsibility.

Lord Birkenhead says (12) that sane persons from time to time suffer from impulses to do wrong. They as a rule resist their impulses. If they do not and if the wrong which they are thus led to do is one forbidden by the criminal law and they are detected in its commission they are rightly indicted and rightly convicted.

It is precisely the same with the insane. They, like sane persons, perhaps to a greater degree are the subjects of impulses to do wrong. Sometimes they resist these impulses. Sometimes they give way to them under the influence of delusion, or not knowing right from wrong, or not understanding the nature of the act which they are committing. They are amply protected under the express words of the *McNaghten* rules.

THE PRESUMPTION OF LAW.

It is the basic principle of criminal jurisprudence that the law presumes every person at the age of discretion to be sane and to possess a sufficient degree of reason to be responsible for his crimes unless the contrary is proved; and even if a lunatic has lucid intervals the law presumes the offence of such a person to have been committed in a lucid interval,

(To be continued.)

(6) Times, London, 24th May 1924.

(7) Law Relating to Lunacy, 1924 Edition, P. 242.

(8) 1 Car. & K. 130=10 C. & F. 200.

(9) *Waris Ali v. Emperor*, 7 N.L.R. 180=13 I.C. 919=13 Cr. L.J. 167.

(10) *Chhajju Mal v. The Crown*, 94 P.L.R. 1909=6 M.L.T. 101=4 I.C. 985=11 Cr. L.J. 105=16 P.W.R. 1903 Cr.

(11) *Reg v. Humphreys*, 10 Clark & Fennelley 200, per Lord Justice Bramwell; See Taylor's Manual of Medical Jurisprudence, 10th Edition, P. 745.

(12) Times, London, 24th May 1924.

* 1930 Cr. Cases 449

(Allahabad)

SULAIMAN AND NIAMATULLAH, JJ.

B. Madan Mohan Singh—Plaintiff—Appellant.

v.

B. Ram Sunder Singh—Defendant—Respondent.

Second Appeal No. 80 of 1927, Decided on 9th January 1930, against decree of Sub-Judge, Ghazipur, D/- 10th July 1926.

* (a) Malicious Prosecution—Application under Criminal P. C., S. 436 for ordering enquiry is prosecution.

The word 'prosecution' has a very wide significance and does not merely mean an actual trial or an enquiry which may result in a conviction and the imposition of imprisonment or fine. Therefore, an application in revision under S. 436, Criminal P. C., for ordering an enquiry or a retrial is a prosecution: 17 C. W. N. 554; 19 C. W. N. 935; 41 All. 503; A. I. R. 1922 Cal. 145, *Rel. on.*

[P 450 C 1,2]

* (b) Limitation Act, Art. 23—Prosecution terminates by order of discharge by Magistrate—But if matter is taken up in revision by higher authority, prosecution terminates when proceedings in revision come to end.

As soon as the order of discharge is passed the prosecution in a Magistrate's Court terminates. If no further proceedings are taken the prosecution must be deemed to have terminated on that date. But if, as a matter of fact, the matter is taken up in revision to a higher authority which has power of interference and proceedings sanctioned by the Criminal Procedure Code are being pursued, e. g., under S. 436, Criminal P. C., the prosecution can no longer be said to have finally terminated. Its final termination would be only when the proceedings in revision have come to an end in favour of the discharged person. In such a case the prosecution for the purpose of Art. 23, Limitation Act, terminates only when the application for revision is dismissed. 23 *Mad. 24, Dist.*; A. I. R. 1922 Bom. 209, *Diss. from*: 30 All. 525; A. I. R. 1926 P. C. 46, *Ref.*

[P 451 C 1]

A. P. Pandey—for Appellant.*Janaki Prasad*—for Respondent.

Sulaiman, J.—This is a plaintiff's appeal arising out of a suit to recover damages for malicious prosecution. Both the Courts below have dismissed it on the ground that it is barred by limitation. The only question that arises for consideration in this appeal is one of limitation.

A complaint under S. 500, I. P. C., was filed by the defendant against the plaintiff in the Court of a Magistrate on 26th May 1924. By an order dated 8th August 1924, the accused was discharged. The defendant filed an application be-

fore the Sessions Judge for ordering further enquiry under S. 436, Criminal P. C. Notice was issued to the accused to appear and show cause why a retrial should not be ordered. On cause being shown the application was ultimately dismissed on 25th October 1924. The present suit was instituted on 24th October 1925, i. e., more than one year after the order of discharge but within one year of the dismissal of the application by the Sessions Judge.

Article 23, Lim. Act, admittedly applies to this case, and under it one year is to be calculated from the date "when the plaintiff is acquitted or the prosecution is otherwise terminated." This was not a case of acquittal at all. We have to see when the prosecution terminated. Obviously the article implies the final termination.

The word 'prosecution' has not been defined in any statutory enactment. It is undoubtedly a word of much wider scope than a trial or even an enquiry by a Magistrate. Murray's New English Dictionary explains the word 'prosecution' as meaning in strict technical language a proceeding either by way of indictment or information in the criminal Court in order to put an offender on his trial, the exhibition of a criminal charge against a person before a Court of justice, and in general language the institution and carrying on of legal proceedings against a person.

The question before us is whether an application for further enquiry and for ordering a retrial under S. 436, in the exercise of the revisional jurisdiction of the Sessions Judge can be deemed to be either a continuation of the prosecution or a fresh prosecution in itself. There are two cases in favour of the view taken by the Courts below and there is no direct authority against that view. In *Narayana v. Seshayya* (1), it was held that a suit brought within one year from the dismissal of a revision petition filed against an order of acquittal but more than one year after the acquittal was barred by limitation. The judgment is very brief and no detailed reasons are given. The case may also perhaps be distinguished on the ground that the District Magistrate to whom the application in revision had been made from the order of acquittal had himself no

(1) [1900] 23 *Mad. 24.*

jurisdiction to order any further enquiry or retrial or set aside the acquittal; at best he could report the case to the High Court. Moreover in a case where the prosecution ended in acquittal the language of Art. 23 leaves no room for argument, as it provides specifically that limitation is to run from the date of 'acquittal'. It is not, therefore, necessary to consider when the prosecution 'terminated.' It is only in cases which ended otherwise than in acquittal that it falls to be considered as to when the prosecution terminated. *Purushottam Vithal Das v. Raoji Hari* (2) is a direct authority in support of the view that limitation begins to run from the order of the discharge and the subsequent revision proceedings do not in any way affect the matter.

Now there is plenty of authority that the word 'prosecution' has a very wide significance and does not merely mean an actual trial or an enquiry which may result in a conviction and the imposition of imprisonment or fine. In the case of *C. H. Crowdy v. L. O. Reilly* (3) it was laid down that an action for damages would lie in the case of an application under S. 107 of the Code and that it was not essential that the original proceeding should have been of such a nature as to render the person against whom it was taken liable to be arrested, fined or imprisoned. The same view was followed by the Calcutta High Court in *Bishun Pershad Narain Singh v. Phulman Singh* (4). It was there remarked that the term 'prosecution' should not be interpreted in the restricted sense in which it is used in the Criminal Procedure Code and that if a person maliciously and without reasonable and probable cause sets the machinery of the criminal law in motion, he is responsible for the consequences. This view was accepted by our High Court in *Mohammad Nizullah Khan v. Jai Ram* (5) where an action was held to lie on account of an application for binding down to keep the peace under S. 107, Criminal P. C.

Indeed, there is one case which has

gone still further. *Narendra Nath De v. Jyotish Chandra Lal* (6), was a case where the defendant had applied to the Court of the Munsif under S. 195, the old Criminal P. C., for sanction to prosecute the plaintiff. Although the application for sanction was a preliminary or initial stage in a criminal prosecution and was actually filed in a civil Court, the learned Judges held that the claim for damages for malicious prosecution was maintainable. They held that as the proceedings for sanction had been instituted maliciously and without just reasonable or probable cause they gave rise to a sufficient cause of action. It seems to us that an application in revision for ordering an enquiry or a retrial is on a much stronger footing than a mere application for sanction to file a complaint. If the latter is deemed to be a prosecution, much more should be the former.

In the case of *Gaya Prasad v. Bhagat Singh* (7), persons whose names did not appear on the face of the proceedings as complainants but who were directly responsible for the charge and for the production of evidence and for the conduct of the case before the police and in the Court were held to be liable, for damages in action for malicious prosecution. Similarly their Lordships of the Privy Council in the case of *Balbhaddar Singh v. Badri Sah* (8), held that a man who had given information to the authorities which naturally led to the prosecution, even though he himself was not, in the most literal sense of the word, the prosecutor was liable in an action for malicious prosecution for damages on account of the information supplied by him which caused trouble.

When the application under S. 436 is preferred before a Sessions Judge and notice to show cause has been issued, the Judge has himself power to make further enquiry into the case of the accused person who has been discharged or direct any subordinate Magistrate to make such enquiry. While such a proceeding is pending before a Sessions Judge, the accused, in our opinion, is being prosecuted and in order to save himself

(2) A. I. R. 1922 Bom. 209=47 Bom. 28.

(3) [1918] 17 C. W. N. 554=18 I. C. 737=17 C. L. J. 105.

(4) [1915] 19 C. W. N. 935=27 I. C. 449=20 C. L. J. 518.

(5) [1919] 41 All. 503=50 I. C. 140=17 A. L. J. 776.

(6) A. I. R. 1922 Cal. 145=49 Cal. 1035.

(7) [1908] 30 All. 525=35 I. A. 189=11 O. C. 371 (P. C.).

(8) A. I. R. 1926 P. C. 46=1 Luck. 215=29 O. C. 163 (P. C.).

from a retrial he must satisfy the Judge that there is no case against him. Taking the word "prosecution" in its wider sense we fail to see why it should not include a criminal proceeding of this nature before a Sessions Judge or a High Court. If this view were not to be accepted the result would be that the discharged person would be compelled to institute his suit for damages even though the matter is still sub judice and is being considered by the Sessions Judge or by the High Court. It seems extraordinary that a plaintiff should be compelled to sue while it is yet a question whether his retrial is not going to be ordered. Of course as soon as the order of discharge was passed the prosecution in the Magistrate's Court terminated. If no further proceedings are taken the prosecution must be deemed to have terminated on that date. But if, as a matter of fact, the matter is taken up in reversion to a higher authority which has power of interference and proceedings sanctioned by the Criminal Procedure Code are being pursued, the prosecution can no longer be said to have finally terminated. Its final termination would be only when the proceedings in revision have come to an end in favour of the discharged person.

One may take the case of a Government appeal from an acquittal as an illustration. The order of acquittal terminates the prosecution for the time being. The filing of an appeal does not ipso facto vacate that order; and yet while the appeal is pending it can hardly be said that the prosecution has terminated. We think that in the same way while a revisional application is pending the prosecution must be deemed to be still continuing and not finally terminated.

It has been suggested that inasmuch as a further enquiry cannot be claimed in revision as of right and as there is no statutory period of limitation fixed for an application for revision, time should not be extended after the order of discharge. As a matter of practice revisions are not admitted when the application is very stale and irrespective of the question whether the Sessions Judge exercises his discretion ultimately or not, the complainant has no grievance if while his application for

further enquiry is pending it is considered that his prosecution of the accused is still continuing. It is only after the dismissal of such an application that the accused is freed from the worry of the criminal proceedings, and is in a position to think of a civil suit for damages.

As a matter of fact it is conceivable that the original complaint might have been filed on the basis of information received from certain witnesses or documents believed to be genuine and, therefore, might not be without reasonable and probable cause, in which case no suit for damages would lie on account of that. But in the course of the trial it may be disclosed that the oral evidence was false and perjured or that the documentary evidence was forged, resulting in the discharge of the accused. If the complainant persists in taking the matter up to the revisional Court without any reasonable and probable cause there seems no reason why he should not be liable for damages on account of the latter proceedings, though there was no such liability on account of the earlier one.

Differing from the views expressed by the learned Judges of the Bombay High Court we would hold that the prosecution finally terminated when the application in revision was dismissed and that the present plaintiff, if he can make out a case of malicious prosecution which was false and without reasonable and probable cause, is entitled to damages not only on account of the proceedings in the Magistrate's Court but also the revisional proceedings before the Sessions Judge. The latter has given him just as good a cause of action as the former. The appeal is allowed, the decree of the lower appellate Court is set aside and the suit is remanded under O. 41, R. 23 to that Court for disposal. The costs will abide the event and will be on the higher scale.

V.S./R.K.

Case remanded.

1930 Cr. Cases 452 (1)

(Lahore)

JAI LAL, J.

Tirath Ram—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1827 of 1929, Decided on 24th January 1930, from order of Sess. Judge, Jullundur, D/- 25th November 1929.

Criminal Trial—Sentence—Courts should avoid passing short sentences of imprisonment in case of first offenders of immature age.

To send a youth aged 17 years, who is a first offender and commits the offence of criminal breach of trust being prompted by another person, to jail is to put him in the way of becoming a hardened criminal in association in jail with other criminals. The subordinate Courts should, therefore, ordinarily avoid passing sentences of imprisonment for short terms specially on first offenders of immature age. [P 452 C 1]

Judgment.—The petitioner Tirath Ram, aged 17 years, was sent up for trial for having committed criminal breach of trust in respect of Rs. 4-12-0 while he was employed as an octroi clerk at Kartarpur. He pleaded guilty at the trial and was convicted and sentenced to one year's rigorous imprisonment and a fine of Rs. 100 under S. 408, I. P. C. He appealed to the Sessions Judge on the question of sentence which was reduced to three months' rigorous imprisonment. The Sessions Judge has found that

"the accused is a first offender and a raw inexperienced youth. He was a tool in the hands of Sri Gopal senior muharrir who appears to have prompted him to embezzle this small amount. The case does not therefore call for a deterrent punishment."

An application for revision has been presented in this Court and the only question on which it has been admitted is the question of sentence. It seems to me that to send a youth of the age of the petitioner to jail for an offence committed under the circumstances mentioned by the Sessions Judge is to put him in the way of becoming a hardened criminal by association in the jail with other criminals. It has often been pointed out by this Court that the Subordinate Courts should ordinarily avoid passing sentences of imprisonment for short terms, especially on first offenders of immature age.

I accept this petition and reduce the sentence of the petitioner to the

term of imprisonment already undergone by him. He will be discharged from his bail bond and the fine, if paid, shall be refunded to him.

R.M./R.K.

*Petition allowed.***1930 Cr. Cases 452 (2)**

(Allahabad)

DALAL, J.

V. S. Dandekar—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 903 of 1929, Decided on 11th December 1929, from order of Dist. Magistrate, Mainpuri, D/- 21st August 1929.

(a) Penal Code, S. 124-A—Speech bringing Government into hatred is not innocuous because contempt already existing has not been increased.

It cannot be said that the speech even if it brought the Government into hatred and contempt can be considered to be innocuous because such hatred and contempt cannot be increased from the standard that already exists in the minds of the people. [P 453 C 1, 2]

(b) Penal Code, S. 124-A—Intention is correlated with natural consequences—Person in his speech saying he is follower of non-violence but at the same time saying that he is nobody to blame people who in their anger at oppression of present Government use more violent methods—He further insinuating various disabilities of village life to be due to present Government—There is an intention to bring present Government into hatred and offence under S. 124 is committed.

It is true that the gist of the offence under S. 124-A lies in the intention of the speaker or writer. But intention is connected with consequences. To intend a thing is to act in such a way as to expect that certain consequences would follow. Intention, therefore, is correlated with the natural consequences which would follow from a particular act. Where a person says in his speech that he himself is the follower of the precept of non-violence but at the same time says that he is nobody to find fault with people who in their anger at oppression as is witnessed under the present Government use more violent methods and shoot at members of the Assembly and where throughout his speech he insinuates various disabilities of village life to be due to the present Government, there is an intention on his part to bring the Government into hatred and he commits the offence under S. 124-A. [P 453 C 1, 2]

K. D. Malaviya and Vishwa Mitra—for Appellant.

Sankar Saran—for the Crown.

Judgment.—Mr. Dandekar has been convicted of an offence under S. 124-A, I.P.C., in so far as that he made a speech bringing or attempting to bring into hatred or contempt, or excite or attempting to excite disaffection towards the

Government established by law in British India. From such a conviction an appeal is permitted direct to this Court. After reading the statement of the appellant in the Court of the District Magistrate I felt doubt as to his desire to appeal. He seems to glory in his condition and feel very happy in the position which he has created for himself. His learned counsel Mr. Malaviya assured me that though he had received instructions from the friends of the appellants, those friends had consulted the appellant who desired an appeal. That was the reason why I did not think it necessary to make direct enquiry from the appellant himself. Mr. Malaviya has read the entire speech to me. Such a speech should be considered to be seditious or otherwise, according to the impression which it would create on the mind of the audience. When I put this conclusion before Mr. Malaviya he quoted a ruling of the Calcutta High Court that the gist of the offence lies in the intention of the writer. Intention however, is connected with consequences.

To intend a thing is to act in such a way as to expect that certain consequences would follow. Intention therefore is correlated with the natural consequences which must follow from a particular act. His further argument was that there has been so much talk at present of independence of the country, that this talk must have reached the small town of Bewar in the backward district of Mainpuri, that Ahirs and Chamars—that is not what he said but that was the interpretation that I put on what he said—would be full of ideas of independence of the country, that therefore Mr. Dandekar's speech would have little effect in increasing the height to which such ideas had reached in the minds of the cultivators of Bewar. I do not think that Mr. Dandekar himself would relish that his efforts were treated with such little consideration. It is quite true that being in the judiciary I have had no opportunity of going round the country and discovering whether the tenantry in remote places like Mainpuri and Bewar had imbibed the ideas of independence. However, that may be, it cannot be said that the speech even if it brought the Government into hatred and contempt could be considered to be

innocuous because such hatred and contempt cannot be increased from the standard that now exists in the mind of the tenantry. I do not desire to quote from the speech and to give it a publicity which was not open to Mr. Dandekar himself. The principle that I adopt is to read the speech myself and to discover what my feeling would be if I accepted all the statements made therein to be true. Mr. Malaviya was quite correct in saying that I cannot place myself in the position of the tenantry who listened to the speech because of the difference in education and the want of capacity in the tenants to test the truth of what Mr. Dandekar stated. To that extent, a speech made to an audience such as was available in Bewar would be more harmful than a speech made to partially educated man like myself. There would be in an audience composed of men like me some desire to test the allegations made by a speaker. There would be absolutely none in the town of Bewar. The speech is a very clever one. It is very easy to see how, with every desire to incite, the speaker, believes that he is keeping within the law by attributing to himself personally peaceful motives and conduct. He is willing to harm and yet afraid to strike. What he has said in effect is that he himself is a follower of the Mahatma whose precept is that of non-violence, but at the same time who is he to find fault with people who in their anger at oppression such as is witnessed at present under the present Government use more violent methods and shoot at members of the Assembly. He exhorts his audience to reserve their judgment as regards such acts because such acts have led to the independence of other countries. The impression on my mind is that the speaker desired to tell the audience: "I am not violent but do not follow my example. I would not blame you if you are violent."

All through the speech he insinuates various disabilities of village life to be due to the present Government. Clearly then there is an intention on his part to bring the present Government into hatred. I am of opinion that Mr. Dandekar has been rightly convicted and dismiss his appeal.

P.N./R.K.

Appeal dismissed.

1930 Cr. Cases 454

(Allahabad)

SRN, J.

Ghasi and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Ref. No. 508 of 1929, Decided on 7th September 1929, made by Addl. Sess. Judge, Moradabad, D/- 2nd July 1929.

Penal Code, S. 424—Removal of property under attachment by third person claiming title to it—Question of title has to be determined before conviction.

The crucial question for determination under S. 424 is whether the alleged removal of property is dishonest or fraudulent and therefore if persons claiming title to a property under attachment in execution of a decree on another remove the same, the matter whether such property belonged to the accused or no has to be determined by criminal Court before deciding upon conviction : 22 *Mad.* 151, *Dist.*

[P 454 C 2]

M. Waliullah—for the Crown.

Judgment.—This is a reference by Mr. P. C. Agarwal, the learned Additional Sessions Judge of Moradabad, recommending that the conviction and sentence passed upon Ghasi, Dari and Gokul under S. 424, I. P. C., be set aside.

One Umar Daraz had a decree against Ganpat, Gangu and Dilsukh. In execution of the said decree, certain crops were attached and one Saadat was appointed shehna or bailiff to guard the crops. Ghasi, Dari and Gokul, in spite of resistance on the part of the shehna, cut and took away half the crops. The shehna lodged a complaint and the result was that Ghasi, Dari and Gokul were convicted under S. 424, I. P. C., and sentenced to a fine of Rs. 20 each. The plea put forward by the accused persons was that they had cultivated the crop and that there was nothing wrong, if they cut the crop and took the same away. The trial Court did not enter into the question whether the plea put forward by the accused was correct.

The learned Magistrate in answer to the referring order observes as follows :

"It is a general principle that a criminal Court cannot determine the title of a person to any property. Moreover the complainant had no opportunity to adduce any rebutting evidence as to the title, because he came to know of the defence only after he had completed his prosecution. In the prosecution, what he had to prove was only this that there was an attachment subsisting on the crops in question and that the accused removed it during the attachment."

Any determination of title by a criminal Court cannot have the force of a decree of a competent Court of civil jurisdiction. It may be necessary in certain cases to adjudicate upon an issue of title with a view to determine whether the offence charged had been brought home to the accused. S. 424, I. P. C., provides that whoever dishonestly or fraudulently. removes any property of himself or any other person. . . shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both. Ex hypothesi, the decree of Umar Daraz was not against Ghasi, Dari and Gokul. The latter admittedly removed some property alleging that the said property belonged to them. The crucial question for determination therefore was whether the removal of the crops by these three persons was dishonest or fraudulent. If they were the owners of the crop and removed the same, their conduct was neither dishonest nor fraudulent. The matter ought to have been determined by the criminal Court whether the property belonged to the accused, but this matter was not enquired into by the criminal Court.

The learned Sessions Judge upon an examination of the record came to the conclusion that the prosecution had utterly failed to establish that the crops belonged to the judgment-debtors of Umar Daraz. He further found upon the evidence that Ghasi was the owner of the crop. The conviction of Ghasi, Dari and Gokul under S. 424, I. P. C., could not therefore be maintained.

My attention has been drawn to a decision of the Madras High Court in *Queen Empress v. Obayya* (1). The facts of this case are toto coele different from the case now before me and the decision is not helpful to the prosecution.

I accept the reference and set aside the conviction and the sentence. The fine if paid must be refunded.

V.B./R.K.

Conviction set aside.

*** 1930 Cr. Cases 455**
(Patna)

MACPHERSON AND DHAVLE, JJ.
Charan Mahto—Petitioner.

v.

Emperor—Opposite Party.

Criminal Misc. Case No. 19 of 1929, Decided on 6th May 1929, from order of Offg. Addl. Sess. Judge, Manbhum-Sambalpur, D/- 30th January 1929.

*** (a), Criminal P. C., S. 118—Inquiry under Chap. 8 is not trial and person called upon to furnish security is not deemed to be convicted within Criminal P. C., S. 426.**

A proceeding under Chap. 8, is an "inquiry" which under the definition of the term excludes a trial. No doubt S. 117 applies to such inquiry the procedure prescribed for conducting trials, and the terms and expressions which occur in a trial come to be loosely applied in an inquiry also for the sake of convenience. But actually the person in respect of whom the inquiry is held is not an accused but a quasi-accused, and he is not "deemed" to be an accused, nor when an order under S. 118 is passed against him "deemed" to be convicted within the meaning of S. 426: *A. I. R. 1924 Cal. 392; A. I. R. 1926 All. 403, Foll. [P 456 C 1]*

(b) Criminal P. C., S. 426 (1)—Appeal by "convicted person" is condition precedent to granting bail.

Under S. 426 (1) the existence of an appeal by a convicted person is a condition precedent to jurisdiction to grant bail: *A. I. R. 1923 Cal. 723, Expl. and Dist. [P 456 C 1]*

(c) Criminal P. C., S. 118—Imprisonment for default of security is different from imprisonment on conviction.

Imprisonment for default of security under S. 118 stands on quite a different footing from a sentence of imprisonment passed on a conviction in respect of an offence: 1 *Pat. L. J. 212, Rel. on [P 458 C 1]*

S. K. Mitler—for Petitioner.

W. H. Akbari—for the Crown.

Macpherson, J.—This application in revision, is directed against the order of the Additional Sessions Judge of Manbhum-Sambalpur cancelling the order of bail in favour of the petitioners passed by the Deputy Commissioner, who is the District Magistrate of Manbhum.

On 5th July 1928, a First Class Magistrate directed the petitioners under S. 118, Criminal P. C. to furnish personal bonds in Rs. 200 and two sureties in Rs. 100 each to be of good behaviour for a period of one year and in default to undergo rigorous imprisonment for that period. Security was not furnished and the petitioners were committed to prison. Against the order they preferred an appeal under S. 406 of the Code to the District Magistrate of Manbhum who under the first proviso to

that section is the proper Court of appeal, and on 7th July the District Magistrate admitted the appeal and directed the release of the appellants on bail of Rs. 300 with two sureties each pending the hearing of the appeal. Bail was furnished and the appellants were released on 9th July. Eventually this Court on 6th November transferred the appeal to the file of the Sessions Judge of Manbhum-Sambalpur who on 15th January 1929, transferred it to the Additional Sessions Judge. The Crown moved the learned Additional Sessions Judge to cancel the bail bonds executed by the appellants and on 30th January the Additional Sessions Judge cancelled them holding that the order granting bail was illegal and without jurisdiction and that as the order could have been cancelled by the District Magistrate, he standing in the place of the District Magistrate, had jurisdiction to cancel it. The petitioners surrendered to their bail and on 5th March moved a Judge of this Court. The application in revision was admitted by a Division Bench before whom the learned Judge of this Court directed it to be placed because of its importance. The appeal has not yet been heard as the petitioners obtained an order of stay being for some reason more concerned to secure a decision on the question of the powers of the District Magistrate to grant bail than to secure prompt disposal of their appeal.

In support of the application it has been urged, first, that the District Magistrate had ample jurisdiction to release the petitioners on bail; and, secondly, that even if he had not, the Additional Sessions Judge had no jurisdiction to cancel his order.

Now the provision relating to appeals are found in Chap. 31, Criminal P. C. It opens with S. 404, which is a general section restricting appeals. There follow three Ss. 405, 406 and 406-A which relate to appeals from orders. Next come provisions in Ss. 407, 408, 410, and 411 relating to "an appeal by a person convicted on a trial" while Ss. 413 and 414 begin:

"Notwithstanding anything hereinbefore contained, there shall be no appeal by a convicted person"

in certain cases where the sentence is small and in cases tried summarily, where the sentence does not exceed a

fine of Rs. 200. Admittedly the only provision as to bail which could be applicable to the present case is S. 426 (1).

It enacts:

"Pending any appeal by a convicted person the appellate Court may order that he be released on bail or on his own bond."

In support of the first contention Mr. S. K. Mitra has argued that a person ordered to execute a bond with or without sureties under S. 118 must be "deemed" to be a "convicted person" within the meaning of S. 426. The plea is not sound. Part 4 of the Code which contains Chap. 8 deals with Prevention of Offences, and Chap. 8 deals with security for keeping the peace and for good behaviour. A proceeding under that chapter is an inquiry which under the definition of the term excludes a trial. Nodoubt S. 117 applies to such inquiry the procedure prescribed for conducting trials and the terms and expressions which occur in a trial come to be loosely applied in an inquiry also for the sake of convenience. But actually the person in respect of whom the inquiry is held is not an accused but a quasi-accused and he is not, as Mr. Mitra urges, "deemed" to be an accused, nor when an order is passed against him "deemed" to be convicted. Indeed the provision so far from rendering the inquiry a trial serves to bring into prominence the fact that it is not a trial. An inquiry is a criminal case but it results in an order, unlike a trial for an offence which results in a conviction or an acquittal. In *Binde Behari Nath v. Emperor* (1), it was held that a person who was called upon to give security under Chap. 8 is (1) not an accused and (2) not guilty of any offence as defined in S. 4 (o), I. P. C. In *Emperor v. Bhagwat Singh* (2) the Allahabad High Court has held that a person bound down under S. 107 is not a person convicted of an offence. Even if for certain purposes of procedure a person in respect of whom an inquiry is proceeding, is an accused, he cannot be convicted as he is not accused of an offence. A conviction is the judgment of a legal tribunal adjudging a person guilty of a criminal offence. Under S. 426 (1) the existence of an appeal by a convicted person is a condition precedent to jurisdiction to grant bail. The Code clearly contemplates that there cannot be a con-

viction unless there had been a trial for an offence and the expression "appeal by a convicted person" in S. 426 (1) means an appeal by a person convicted at such a trial. Whereas in the case of a person against whom an order is made under S. 118, there is no offence and no trial, he is not "a person convicted on a trial" nor is he "a convicted person." In short S. 426 under which the District Magistrate appears to have granted bail to the petitioners has no application to the circumstances. It is not contended that any other provision of the Code authorized him to do so nor that he had inherent jurisdiction to liberate any person on bail. In my opinion his order was without jurisdiction.

Some reference has been made to S. 498 of the Code and to the decision in *Ahmad Ali Sardar v. Emperor* (3) which is relied upon. It may indeed be that under that provision a Court of Sessions is empowered to admit to bail pending the hearing of the reference a person directed under S. 118 to give security for two years, whose case has been referred to it under S. 123 (2) of the Code. But the basis of the order would be that in a case under S. 123 (2) the final order is that of the Sessions Judge; and in the decision cited the learned Judges apparently contemplated that the Sessions Judge was authorized to revise an order passed by the Magistrate under S. 118 as affected by S. 120 (2) in respect of the dates between which the order for security and the imprisonment in default would operate. Whether that view is correct or not, [and it is perhaps open to question whether an order committing to prison a person who has failed to give security required under S. 118 is a sentence of imprisonment or the person so committed is sentenced to imprisonment within the meaning of S. 426 (3)] the present case is clearly distinguishable. Here the bond and security required are for one year and the order requires no confirmation of any superior Court or authority but subject to any appeal preferred under S. 406 is final. Now S. 120 provides that when a person has been ordered under S. 118 to furnish security, the period for which security is required shall commence on the date of such order unless the Magistrate for sufficient reason fixes a later

(1) A. I. R. 1924 Cal. 392=50 Cal. 965.

(2) A. I. R. 1926 All. 408=48 All. 501.

(3) A. I. R. 1928 Cal. 728=50 Cal. 969.

date. The Magistrate did not fix a later date in respect of the petitioners. S. 123 (1) enacts that if a person does not furnish such security on or before the date on which the period for which security is to be given commences, he shall be committed to prison until such period expires or until he gives security. The obvious inference is that the legislature did not contemplate that bail should be allowed in such a case or that the appellate Court should alter the dates, so that a person who has been released on bail for a portion of the "period" should be detained in jail beyond the expiry of the "period" for the number of days on which he was on bail. That is to say, the statute does not provide for suspension or abeyance of the period of detention in prison. And that is altogether reasonable: the detention is preventive merely, and on bail the detenu is not prevented from committing offences. In the present instance we have the curious result that bail with two sureties for Rs. 300 is readily secured whereas two sureties on Rs. 100 for good behaviour are not available. Again the effect of the order granting bail has been to set the petitioners at liberty without security for more than seven months of the period specified in S. 118, which, under the provisions of the Criminal Procedure Code, cannot be excluded in computing the period for which they are to be detained in prison for default in furnishing security. Such a state of affairs could not have been contemplated by the legislature. The first contention cannot prevail.

As to whether the Additional Sessions Judge had jurisdiction to cancel the bail order, there appears to be much to be said for his view that on the transfer of the appeal to him he was in the peculiar circumstances in the same position as the District Magistrate in respect of jurisdiction to cancel the bail bond on which the appellants had been released and that as the District Magistrate certainly could have cancelled the order for bail on, among other grounds, want of jurisdiction to make it, it was open to the Additional Sessions Judge to do the same. It is, however, not necessary to decide the point in view of the order which we propose to make.

The learned Sessions Judge has moved this Court to retransfer the appeal to the District Magistrate as the file of the Sessions Judge is in heavy arrears, there is no Additional Sessions Judge and no prospect of one for some months; there is a new Deputy Commissioner who had no previous concern with the proceedings against the petitioners, and the appeal should be heard without further delay. We accept the reference and transfer, in accordance with the wishes of all concerned, the appeal to the file of the Deputy Commissioner of Manbhum. In the circumstances the question of the legality of the transfer of an appeal governed by the proviso to S. 406 of the Sessions Court need not be considered.

In the circumstances the order of the Deputy Commissioner granting bail being illegal, we see no ground for interfering in revision with the order cancelling it. The rule is accordingly discharged. The appeal should be heard without further delay.

Dhavlè, J.—I agree. The Code of Criminal Procedure makes a definite distinction at point after point between persons called on to give security under Ss. 107 to 110 and persons accused of offences. As was pointed out in *Binode Behari Nath v. Emperor* (1) the former are (unlike the latter) nowhere referred to as "accused" persons, and the amendments of 1923 in such sections as S. 340 and S. 436 only emphasize the distinction. An accused person is "tried," and if he is found "guilty," "sentence" is passed upon him under S. 245 (2), S. 258 (2) or S. 306 (2) as the case may be (unless resort is had to the exceptional provisions of Ss. 349 and 562). It appears from Ss. 263 (h) and 306 (2), among other sections, that there is no distinction between "convicting" an accused person and finding him guilty. Against the sentence passed, a "person convicted on a trial" may appeal under Ss. 407, 408, 410, or 411. It will thus be seen how a person who begins as an accused person may come within S. 426 in respect of an "appeal by a convicted person." A person against whom security proceedings are taken (unless discharged under S. 119, only becomes, in S. 120, a "person in respect of whom an order requiring security under S. 118 is made,"

and in S. 123, "a person ordered to give security under S. 118." He cannot be said to have been "tried" or found "guilty" nor is any "sentence" passed upon him. It is true that in default of security he is to be "committed to prison," but such imprisonment stands on quite a different footing from a sentence of imprisonment passed on a conviction in respect of an offence: see *Markandar Genda v. Emperor* (4). The Code does not anywhere refer to persons dealt with under S. 118 as convicted persons; and S. 406 which provides an appeal against an order under S. 118 speaks of "any person who has been ordered under S. 118 to give security" This is in sharp contrast to Ss. 407, 408, 410 and 411 which give an appeal—an appeal from a sentence—to "any person convicted on a trial." S. 426 which is invoked on behalf of the petitioners provides for orders "pending any appeal by a convicted person." Having regard in particular to the fact that this section occurs in the same chapter as Ss. 406 to 411 with the distinction that they make between persons dealt with under S. 118 and persons convicted on trials, I cannot see on what principle it can be held that the legislature gave up the distinction between the two classes of persons for the purposes of S. 426. It is true that the section speaks of a "convicted person" instead of a "person convicted on a trial"; but there does not seem to be any real difference between these expressions, and I can see no reason to regard persons dealt with under S. 118 as included in the category of "convicted" persons.

V.B./R.K. *Rule discharged.*

(4) [1917] 1 Pat. L. J. 212=2 Pat. L. W. 809=26 I. C. 496=(1917) P. H. C. C. 32.

* 1930 Cr. Cases 458

(Patna)

ROSS AND SCROOPE, JJ.

Aparti Charan Ray—Accused—Petitioner.

v.

Emperor.

Criminal Revn. No. 41 of 1929, Decided on 3rd December 1929, from order of Sess. Judge, Cuttack, D/- 30th September 1929.

(a) Penal Code, S. 463—"Intent to defraud"—Meaning explained.

In order to constitute in point of law an intent to defraud, there must be a possibility of some person being defrauded by the forgery, or there must be a possibility of some person being not only deceived but injured by the forgery. 11 Bom. H. C. R. 8, *Foll* [P 459 C 1]

* (b) Penal Code, S. 463—Plaint forged in order to save case being barred by limitation—Act is not fraudulent.

The mere fact that the person forged signature of another person, in a plaint, to enable him to file the plaint in time to save case being barred by limitation will not make the act of the person fraudulent: 17 Cal. 580; 22 All. 55; 19 Cr. L. J. 296 and 11 Bom. H. C. R. 8, *Ref.* [P 459 C 1]

M. S. Das and A. S. Khan—for Petitioner.

Govt. Pleader—for the Crown.

ROSS, J.—The petitioner has been convicted under S. 471, I. P. C., and has been sentenced to one year's rigorous imprisonment by the Sub-Divisional Magistrate of Bhadrak. The subject of the charge was the signing of a plaint in a suit for rent presented in the Collector's Court. The petitioner is the husband of the plaintiff in that suit and he signed the plaint in these terms :

"This signature by Kankan mark and left thumb impression are of Srimaty Kshetramani Dei by the pen of Aparti Chandra Ray."

There was a thumb impression which has been proved to the thumb impression of some one other than Kshetramani Dei. It may be mentioned that the Deputy Collector before whom the plaint was filed refused to prosecute, the complaint being made by the appellate Court.

The learned Sessions Judge in dealing with this case was influenced largely, if not mainly, by the consideration that the plaint was filed on the last date after which it would be barred, as to the claim for one year's rent, by limitation. Now O. 6, R. 14, Civil P. C., requires that "every pleading shall be signed by the party and his pleader," but it is well settled that if a plaint is not signed, it may be amended at any stage and the fact that it is not signed does not any less make it the plaint of the plaintiff: see *Mohini Mohun Das v. Bungsi Buddhan Saha Das* (1) a decision of the Judicial Committee, and *Basdeo v. John Smidt* (2). Consequently if the plaint had been left unsigned, this was only a defect in procedure which was curable. There was a similar case dealt

(1) [1890] 17 Cal. 580 (P. C.).

(2) [1893] 22 All. 55=(1899) A. W. N. 172.

with in this Court, *Ramsarup v. Emperor* (3). There the signature of the plaintiff purported to be in the plaintiff's hand but in fact was put there by his gomastha; it was held that as there was no intention to defraud there was no forgery. The learned Sessions Judge has distinguished this case on the ground that if the plaint had not been filed on the day on which it was filed then the defendant would have had the advantage of the law of limitation; but that will not make the act of the petitioner fraudulent. In *Ileg v. Bhavani-shankar* (4) this very question arose where a plaint was signed by the agent in the name of the plaintiff in order that it might be filed before the mamlatdar, whereas if it had not been filed on that day it would have had to be filed in the civil Court, and thus court-fee was saved. It was suggested that there was an intention to deceive the Government just as it was argued by the learned Government Pleader that there was in this case an intention to defraud the Court, but that contention was overruled. The learned Judges referred to a decision of Cresswell, J., where it was observed that

"in order to constitute in point of law an intent to defraud, there must be a possibility of some person being defrauded by the forgery, or there must be a possibility of some person being not only deceived but injured by the forgery."

Now, here I cannot say that there was any possibility of anyone being injured. The defendant was liable for the rent and no damage was caused to him. Even if the plaint had been unsigned he would still have been liable; and the fact that the signature was added in this incorrect form does not establish any dishonest or fraudulent intent. There was no fraud on the plaintiff because the plaint was filed in her interest and as she says in her evidence under her authority. She is quite clear on this point that she had given a general permission to her husband to file papers in Court on her behalf and had given him authority to sign on her behalf and file papers in Court. I am therefore unable to find any fraud in this matter. Undoubtedly the act of the petitioner was stupid and improper but the necessary criminal intention to

constitute the crime of forgery is, on the facts of the case, wanting.

I would therefore allow this application and set aside the conviction and direct that the petitioner be acquitted and released from bail.

Scroope, J.—I agree.

V.B./R.K. *Application allowed.*

* 1930 Cr. Cases 459

(Sind)

KALUMAL, A. J. C.

S. Rasul—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Sessions Case No. 11 of 1929,
Decided on 8th August 1929.

* **Evidence Act, S. 118**—Child of tender years, sufficiently developed to understand, is competent witness.

A child of tender years is a competent witness when such child is intellectually sufficiently developed to understand what it has seen and afterwards to inform the Court about it; this sufficiency may be tested even in examination-in-chief; understanding is thus the sole test of competency under S. 118: 38 All. 49, Foll.; 41 Cal. 406, Rel. on.; 10 All. 207, Expl.

[P 460 C 1]

Naderbeg K. Mirza—for Petitioner.

D. N. O'Sullivan—for the Crown.

Order.—Immediately the prosecution side expressed a desire to examine Shahzadi, a girl of about five years of age, Mr. Mirza for the defence objected to her examination contending that a person of such tender years could not under law be examined, not being able to understand the nature and obligation of an affirmation which is obligatory under S. 5, Oaths Act, 10 of 1873, read with S. 6 of the same Act. For this view, Mr. Mirza has relied upon a ruling reported as *Queen-Empress v. Maru* (1). All that this ruling lays down is that under S. 6, Oaths Act, it is imperative that no person shall testify as a witness except on affirmation or oath and that notwithstanding S. 13, the evidence of a child of eight or nine years of age is inadmissible if it has been inadvisedly recorded without any such affirmation or oath. It by no means goes so far as Mr. Mirza contends that the testimony of a child of tenders years by reason of age merely is inadmissible or that the Court is debarred from recording such testimony on the ground solely of tender age. If Mr. Mirza's contentions were accepted, it would be tantamount to shutting out in some cases the

(8) [1918] 19 Cr. L. J. 283=13 I. C. 823.

(4) 11 B. H. C. R. 3.

(1) [1888] 10 All. 207=(1888) A. W. N. 86.

most important piece of evidence that could be placed before the trying Court. Any way I am not in accord with this view pressed. This ruling has besides been dissented from by the same High Court in a case reported as *Dhani Ram v. Emperor* (2). It has been held there that a child of tender years should only be examined after the Court has satisfied itself that he or she is intellectually sufficiently developed to enable it to understand sufficiently what it has seen and to afterwards inform the Court thereof. If the Court is satisfied that the child has such intelligence, it should comply with provisions of S. 6, Oaths Act.

Section 118, Evidence Act, deals with persons competent to testify and Ss. 5 and 6, Oaths Act, make it compulsory that such competent persons should be affirmed. S. 118 above referred to says that all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions by tender years etc. etc. Understanding is thus under this section of Evidence Act the sole test of competency. A person though of tender years if he can satisfy this test, is competent as a witness. In a case practically of a recent date reported as *Nafar Sheikh v. Emperor* (3), it was held that the intellectual capacity was the real test and that question, if a witness understands the nature and obligation of an affirmation, is really foreign to the question of competency under S. 118, Evidence Act. It was in this very case further observed, I think very rightly, that the Court is not bound before taking the deposition of a child witness to ascertain as ruled by the Allahabad High Court, by so to say a preliminary inquiry whether the child has capacity to understand the questions put to it and give rational answers to them but the competency of such witness may be tested in the Court of examination. As observed in the standard book of Amirali's Law of Evidence in commentaries to S. 113, Evidence Act, the modern practice is to interrogate the witness either before affirming him, or to elicit the facts upon the examination.

in-chief, when, if his incompetency appears, he will be rejected: Taylor's Law of Evidence, paras. 1392 and 1393.

I have, however, to be on the safe side, in the face of the divergence of opinion above referred to though the preponderance of authority is in support of the view I have accepted, satisfied myself by putting a few simple questions to her, and find that the girl tendered for examination is able to understand the substance of what she is asked and give answers not very satisfactorily to the same. Should it, however, become apparent and clear hereafter in the course of her examination that she is not sufficiently developed intellectually to answer questions intelligently, I would reconsider, if I should not expunge her evidence from the record or if I should place it before the jury.

V.S./R.K.

Order accordingly.

1930 Cr. Cases 460

(Oudh)

STUART, C. J.

Taen—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 117 of 1929. Decided on 19th December 1929, from order of Sess. Judge, Sitapur, D/- 30th October 1929.

Criminal P. C., S. 423—Appeal should not be dismissed in default but should be enquired into.

A Sessions Judge should not dismiss an appeal for default under the provisions of S. 423, but should enquire into the merits of the case and see if there is any force in it. [P 460 C 2]

Zafar Hussain—for Appellant.

H. K. Ghose—for the Crown.

Judgment.—The learned Sessions Judge should not have dismissed the appeal in default under the provisions of S. 423, Criminal P. C., but should have inquired into the merits. But I do not propose to send it back to him for rehearing for I have looked into the merits and I find that there was no force in the appeal at all. The case was a very clear one against all the persons convicted and the sentences are not excessive. In these circumstances I do not propose to interfere and dismiss this application.

V.B./R.K.

Application dismissed.

(2) [1916] 38 All. 49=31 I. C. 1905=18 A.L.J. 1072.

(3) [1914] 41 Cal. 406=18 C. L. J. 58½=20 I.C. 741=18 C. W. N. 147

1930 Cr. Cases 451 (Lahore)

TEK CHAND AND AGHA HAIDAR, JJ.
Allah Ditta—Plaintiff—Appellant.

v.

Mt. Bagan and others—Defendants—Respondents.

First Appeal No. 1429 of 1924, Decided on 4th April 1929, from a decree of Senior Sub-Judge, Gujranwalla, D/- 8th March 1924.

*** (a) Legal Practitioner—Advice should not be taken from Court about evidence to be produced—Legal practitioner must exercise his own independent judgment in conduct of his case.**

It is not right for a counsel to take advice from the Court as to the kind or amount of evidence which has to be produced in support of his client's case, and even if a Court goes out of the way and gratuitously gives such advice, which itself would be an extremely improper act on its part, counsel ought not to be guided by such advice, but must exercise his own independent judgment in deciding as to how to proceed in the conduct of his case. [P 462 C 2]

(b) Evidence Act, S. 114, Illus. (g)—Party not entering witness-box runs great risk.

The fact that a party does not appear in the witness-box is a circumstance going very strongly against him. He runs a great risk if he does not enter into the witness-box and gives evidence in his case upon facts which are directly within his knowledge and which relates to the matter in controversy. [P 463 C 1]

Zafrulla Khan and Bashir Ahmad—for Appellant.

Ghulam Mohyuddin, Md. Akbar Khan and Partap Singh—for Respondents.

Tek Chand, J.—The plaintiff Nizam Din, who alleged himself to be a collateral of Taj Din deceased in the fourth degree instituted this suit against Mt. Bhagan, widow of Taj Din, and certain transferees from her, for possession of three-fourths of the land left by him, to which he claimed he was entitled under the Mahomedan Law which governed the rule of succession among the parties. The defendant denied the plaintiff's alleged relationship with Taj Din and pleaded that the family was governed by custom and not by Mahomedan Law. The learned Senior Subordinate Judge has dismissed the suit holding that the plaintiff had failed to prove his alleged relationship with Taj Din deceased. The plaintiff appeals.

It is admitted that Balmokand respondent 3 died some time in 1926, but the application to bring his representatives on the record was not made till 15th October 1928. The appeal had,

therefore, abated against Balmokand and no valid ground has been urged in the application or in the affidavit for not making the application for more than two and a half years, or for setting aside the abatement. This being so, the appeal must be held to have abated against Balmokand and be dismissed against him. Balmokand deceased was, however, interested in one-half of 4 kanals of land only which had been sold by Mt. Bhagan to him and Vishno Nath respondent 4. The appeal, therefore, abates with regard to Balmokand's own share in this land. It must, however, be heard and decided with regard to the rest of the land in dispute as against the surviving respondents.

The first point urged by the learned counsel for the appellant is that the plaintiff was not able to produce the whole of his oral evidence on the question of relationship, in view of the circumstances mentioned in the affidavit filed by Maulvi Abdul Haq, pleader, who had conducted the case on his behalf in the Court below. This affidavit was sworn to on 27th May 1924, and is printed at p. 20 of the paper-book. It states that

"on the day on which evidence relating to relationship was being recorded, after the evidence of some witnesses had been recorded, the Court intimated to me as a matter of advice that the evidence already recorded was sufficient on the question of relationship and that no further evidence was necessary. Thereupon I gave up the remaining witnesses of the plaintiff who were present."

"I solemnly affirm that in addition to witnesses whose statements were recorded two or three other witnesses of the plaintiff were present."

The affidavit was laid before the learned Judges before whom the appeal came up for preliminary hearing on 26th November 1924, and they while admitting the appeal directed that a copy of the affidavit should be sent to the Judge who decided the case (Sheikh Ali Muhammad, Senior Subordinate Judge) for any remarks that he might like to make. In reply to the affidavit the learned Senior Subordinate Judge furnished an explanation on 19th January 1925, which is printed at p. 23 of the paper-book and is to the following effect:

"I have seen the file and find that the appellant closed his evidence on 1st June 1923, and offered to produce copies of certain documents later on. I do not remember having given any advice to his counsel for closing his

evidence, nor was it my duty to do so. I am not prepared to support the affidavit of Maulvi Abdul Haq, vakil, to the effect that he withheld certain evidence on my suggestion. It is the look out of the parties and their counsel to produce any amount of evidence they wish in Court and they need no advice in this respect from the Court."

It has been pointed out by Mr. Zafrullah Khan for the appellant that in his explanation the learned Senior Subordinate Judge has not definitely denied the allegation made in the pleader's affidavit and that in these circumstances the recital in the affidavit stands uncontradicted and must be accepted as correct. On the other hand, Maulvi Ghulam Mohyuddin for the respondents urges that the learned Senior Subordinate Judge was as definite in his denial as it was possible for any person to be about an incident which had taken place more than 18 months before, and that on this explanation the pleader's affidavit must be held to be false. He also points out that on 1st June 1923, both the plaintiff and his pleader, Mr. Abdul Haq, made statements, closing their evidence.

After giving the matter my best consideration I am of opinion that it is not possible to come to a definite finding on the point on the materials on the record. It is a matter for regret that the explanation of the learned Senior Subordinate Judge was not placed before a Bench of this Court as soon as it was received. If further enquiry had been ordered immediately, it might have been possible to arrive at the truth. But the situation has now changed entirely. The plaintiff has since died and the learned Senior Subordinate Judge has proceeded on leave preparatory to retirement. The matter is now nearly six years old and the persons concerned cannot be expected to be in a position to say anything definite about it. Moreover, the affidavit is defective in so far as it does not give the names of the witnesses who are alleged to have been present in Court on the date on which the evidence was closed and who, but for the advice alleged to have been given by the Subordinate Judge, would have been examined. The deponent is not even definite about their number. He described it as "two or three." We asked Mr. Zafrulla Khan if he was in a position to give the names and particulars of these witnesses even now, but he ex-

pressed his inability to do so. From the record it appears that only four witnesses had been summoned for that date out of whom three were examined by Court and the fourth who had been served and was not examined, is one Bagh Din. It is not known whether he was actually present in Court on 1st June 1923, nor can counsel state if he is alive or dead. Mr. Zafrulla Khan has frankly conceded that his client's case will not be very much advanced by the examination of this witness even if he were alive and were examined at this stage. In these circumstances I am of opinion that no useful purpose will be served in pursuing the matter further and ordering further enquiry.

I wish, however, to remark that even if the statements contained in the affidavit of Maulvi Abdul Haq are correct, he cannot be said to have acted properly in following the course adopted by him. It is not right for a counsel to take advice from the Court as to the kind or amount of evidence which has to be produced in support of his client's case, and even if a Court goes out of way and gratuitously gives such advice, which itself would be an extremely improper act on its part, counsel ought not to be guided by such advice but must exercise his own independent judgment in deciding as to how to proceed in the conduct of the case.

On the merits the plaintiff has no case on the record as it stands. The evidence consists of the testimony of three witnesses and a pedigree-table produced by P. W. 2, Ghulam Ali Shah, who claimed to belong to the family of Pirs of the parties. The evidence has been carefully analyzed by the learned Senior Subordinate Judge in his judgment and after examining it in detail and hearing Mr. Zafrulla Khan at length, I am of opinion that it falls short of proving the allegations of the plaintiff. Imam Din is no doubt the maternal uncle of Taj Din deceased, but the reasons given by him for an intimate knowledge of the relationship of the plaintiff with the deceased are not very convincing, and in the absence of corroborative testimony of an unimpeachable character, I do not find myself able to accept his statement as correct. Karim Bakhsh is the nephew of the plaintiff and is unable to furnish sufficient details to prove the

alleged relationship. Counsel relies principally upon the pedigree-table produced by Ghulam Ali Shah. We have had the advantage of carefully examining this document and find that it appears to have been written up at one time. The person who produced it has no personal knowledge as to when it was prepared and all that he is able to say is that he got it from his father who died four years ago. It appears, however, from the statement of Karim Bakhsh (P. W. 3), that the *Pir* of this family was one Bagh Ali Shah who died during the pendency of the suit. It is significant that the plaintiff himself has not gone in the witness-box to prove the alleged relationship nor has any near relation been produced, though it is admitted that several are still alive.

After a careful examination of the record, I am of opinion that the learned Senior Subordinate Judge came to a correct conclusion in holding that the plaintiff had failed to establish his alleged relationship with Taj Din deceased. I would, therefore, dismiss the appeal with costs.

Agha Haider, J.—I agree. On behalf of the appellant, Mr. Zafrulla Khan has stated at the Bar that Nizam Din's son who is now his legal representative is about 40 years old. This shows that Nizam Din must have been an older man than any of the witnesses who have been produced on behalf of the plaintiff. The fact that Nizam Din did not appear in the witness-box is in my humble judgment a circumstance going very strongly against him, and it is time now, in view of the pronouncements of the highest authority that parties should realize the risk they run if they do not enter into witness-box and give evidence in their cases upon facts which are directly within their knowledge and which relate to the matters in controversy.

R.K.

*Appeal dismissed.***1930 Cr. Cases 463**

(Lahore)

SHADI LAL, C. J. AND DALIP SINGH, J.
Emperor
v.

Mohammad Khan—Accused—Respondent.

Criminal Appeal No. 119 of 1921, Decided on 12th February 1930.

Criminal P. C., S. 417—Appeal from acquittal by lower appellate Court—High Court can interfere to set it aside.

Whatever may be the value of the judgment of a trial Court, which has had the opportunity of seeing the witnesses and observing their demeanour, no such reason can apply where the trial Court convicts the accused and it is the appellate Court which acquits. In such case the High Court is in a better position to weigh the evidence as the lower appellate Court and can interfere to set aside the lower Court's order of acquittal; 11 P. R. 1903, *Cr., Diss. from*; A. I. R. 1927 *Lah.* 178; 7 P. R. 1904 and A. I. R. 1929 *Pat* 491, *Ref.* [P 465 O 2]

Abdur Rashid—for the Crown.

Farukh Hussain—for Respondent.

Dalip Singh, J.—The accused in this case was convicted by the learned District Magistrate under S. 376, I. P. C., and sentenced to four year's rigorous imprisonment and a fine of Rs. 20, in default, to further rigorous imprisonment for two months. On appeal he was acquitted by the learned Sessions Judge on 30th November 1920. The Crown put in an appeal against the acquittal on 14th February 1921. The accused evidently absconded and it was not till he had been arrested that this appeal came up for hearing.

The story for the prosecution is that the accused Muhammad Khan was a railway constable and was travelling on duty in the train going from Rawalpindi to Kohat. One Mrs. Plair was a passenger on this train and it is alleged that the accused entered her compartment between Fateh Jang and Gaggan railway stations and raped her. The accused left her shortly before the arrival of the train at Gaggan railway station and the lady called for assistance and one of the guards of the train came up and released her from the tape with which her feet and hands had been tied. The driver of the train had noticed the accused on the outside of the train at Fateh Jang station and when the train started he had noticed him on the foot-board of a carriage near the carriage in which Mrs. Plair was travelling. Mrs. Plair gave a description of her assailant and the driver suspected the accused from this description and from the fact of having noticed him on the outside of the train. The train proceeded and either at Basal station or Jand railway station the accused appears to have been shown to Mrs. Plair, but Mrs. Plair was, at that time, unable to identify him, though it is sta-

ted that she said that he strongly resembled the man who had raped her.

Three days afterwards an identification parade was held at Kohat in which Mrs. Plair alleged that she first pointed out one Khair Mohammad as resembling her assailant and thereafter picked out Muhammad Khan as also resembling her assailant. She then made both of them speak the words with which the accused had addressed her when he entered her compartment and thereupon she decided that it was Muhammad Khan accused who was her assailant. The Magistrate who conducted the identification parade deposes that at the time she stated that though Muhammad Khan resembled her assailant, she was not prepared to swear on oath that he was the man. In her own deposition Mrs. Plair, however, does not admit that she was unable to identify her assailant at the time of the identification parade. She admits that he was shown to her at some station before the train reached Kohat but that she was in such a disturbed condition that she was unable to identify him at the time. Khair Muhammad constable who was one of the men picked out by Mrs. Plair, has also appeared as a prosecution witness and according to his story she did identify Muhammad Khan as her assailant. The Sub-Inspector Ijaz Hussain who was present at the identification parade and who has appeared also as a prosecution witness, also deposes that she did identify Muhammad Khan as her assailant after making both Khair Muhammad and Muhammad Khan speak. There is, therefore, a contradiction between the statements of Mrs. Plair, Khair Muhammad and Ijaz Hussain (P. Ws. Nos. 1, 5 and 6) and the statement of Agha Sardar Ali (P. W. 2), the Magistrate conducting the identification parade. The whole case was extremely badly tried so much so that Mrs. Plair seems never to have been asked the direct question in the trial as to whether the accused in the dock was the man who had raped her or not. However, her statement clearly implies that the accused was her assailant and she strenuously denied that she had ever said that she was unable to identify him. In the circumstances, after giving full weight to the evidence of the Magistrate in favour of the accused, I consider that the evidence certainly raised

a very strong suspicion against the present accused. If this were all, however, I would be inclined to give him the benefit of the doubt, but this is not all. There is evidence which goes strongly to corroborate the evidence of P. Ws. Nos. 1, 5 and 6 already referred to. P. W. 4, the engine driver Mr. Harradine, says that he noticed the accused on the off side of the train at Fateh Jang station and that he saw him again on the foot-board of a compartment which was either two or three carriages from the engine. Now it is in evidence that Mrs. Plair's carriage was No. 3 from the tender near the engine and therefore the accused was certainly seen by Mr. Harradine standing somewhere near the carriage in which Mrs. Plair was travelling.

The learned Sessions Judge has remarked that the accused may have been standing on the outside of the train in discharge of his duties, but the accused himself gives no such explanation and on the contrary states that he was travelling in a compartment in the rear of the train between Fateh Jang and Gaggan railway stations. Imam Ali Shah (P. W. 9) who was the other constable on duty on the train deposes that the accused travelled with him up to Fateh Jang. At Fateh Jang he left the compartment and at Gaggan the accused re-entered the compartment from the offside of the train. He passed quickly into an adjoining compartment and thence got on to the platform. He states that the demeanour of the accused at the time was such that Imam Ali Shah's suspicions were aroused. The guard deposes that he saw the accused at Gaggan railway station proceeding towards the rear of the train and the guard asked him what he was doing while this 'wardat' had taken place. Thereupon the accused followed the guard without enquiring what 'wardat' had taken place. All this evidence, it seems to me, so strongly corroborates the evidence of Mrs. Plair that in my opinion it leaves no reasonable doubt as to the guilt of the accused.

The learned Sessions Judge has observed that Mrs. Plair failed to identify the accused as Basal. He has said that the woman should have been able to recognize her assailant. It seems to me however, that the learned Judge has not

given adequate weight to the explanation given by Mrs. Plair that she was in a very disturbed condition and was not capable of identifying people at that time. The evidence is to the effect that while Mrs. Plair was seated in the intermediate compartment to which she had been removed the accused was brought near the door and was shown to her. It is quite possible that in her nervous condition she was unable to identify him at the time, but even so, the evidence is unanimous that she said he was very like the man who had assaulted her. The learned Sessions Judge has then relied on the zinnis which have not been proved in the case at all for the fact that the accused was not suspected at the time at all. This is quite contrary to the evidence of Mrs. Plair and of the two guards who are disinterested witnesses and who unanimously say that the accused was shown to her. In my opinion there can be no doubt that the accused was suspected at the time and if no mention of this fact is made in the zinnis, it can only throw doubt on the bona fides of the zinnis and not on the evidence.

The learned Sessions Judge has then proceeded to remark that at no time has the lady identified the man. As already stated, the evidence in Court is perfectly clear and the evidence as to the failure to identify at the identification parade is contradictory and discrepant. I would not, therefore, attach the weight which the learned Sessions Judge has attached to this alleged failure.

The learned Sessions Judge then remarked that the accused has proved that between Fateh Jang and Gaggan he was travelling in the rear compartment. He relies on the statement of one Abdulla who was examined as a defence witness. He says that the zinnis corroborate the statement of Abdulla, but as previously remarked, the zinnis are not evidence in the case at all. It is not clear, as remarked by the trial Court, how the accused who according to his own deposition was only in that compartment for the 21 minutes that it took the train to go from Fateh Jang to Gaggan, came to know the names of these men, nor why these men who had never known the police constable before should have remembered that he travelled with them

from Fateh Jang to Gaggan. Towards the end of his judgment the learned Sessions Judge seems to find that the driver did suspect the accused from the very beginning. This is at variance with his first finding based on the zinnis that the accused was never suspected at all at first.

Lastly, the learned counsel for the respondent has relied on *Queen Empress v. Manget* (1) and on *A. I. R. 1927 Lah. 178*, *A. I. R. 1929 Pat. 491* for the legal proposition that before a judgment of acquittal is set aside, it must be shown that the judgment is perverse or not based on the evidence given in the case. *Queen-Empress v. Manget* (1) was dissented from in *King Emperor v. Chhatar Singh* (2) and whatever may be the value of the judgment of a trial Court which has had the advantage of seeing the witnesses and observing their demeanour, no such reason can apply when the trial Court has convicted the accused and it is the appellate Court which acquits him. I do not see how the Sessions Judge was in any better position to weigh the evidence than this Court, and in my opinion the offence has been clearly proved against the accused.

As regards the sentence, the learned Government Advocate has only asked that the sentence of the trial Court should be restored. In my opinion, that sentence is inadequate, considering the circumstances and the fact that this constable was supposed to guard the passengers of the train. However, I do not think it now necessary to go further into that matter and I would, therefore, restore the sentence passed by the trial Court. The appeal would accordingly be accepted and the accused convicted under S. 376, I. P. C., and sentenced as above.

Shadi Lal, C. J.—I concur.

V.B./R.K. *Appeal allowed.*

(1) [1903] 11 P. R. 1903 Cr.

(2) [1904] 7 P. R. 1904 Cr.=37 P. L. R. 1904.

1930 Cr. Cases 465

(Lahore)

ADDISON, J.

Fakir Chand—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1531 of 1929,
Decided on 31st January 1930.

Legal Practitioners Act, S. 3, 36 (1), 36 (2-A) — Order declaring person to be tout when it is not proved that he is so illegal.

J gave a petition to the District Magistrate that she had come to arrange a transfer of a case from one Court to another and *F* took money from her promising that he would engage a pleader and that instead of doing that *F* ran away with the money. The District Magistrate endorsed the petition to a Subordinate Magistrate for enquiry and report. The Subordinate Magistrate asked the Secretary of the Bar Association about the antecedents of *F*. The Secretary informed that the Executive Committee of the Bar Association had passed a resolution and that *F* was an undesirable man and did not possess good antecedents. The Subordinate Magistrate held that it was not proved that *F* was a tout though it might be that he committed an act of cheating. *F* was present at the inquiry. The District Magistrate stating that he did not agree with this finding declared *F* to be a tout.

Held : that the proceedings against *F* were illegal throughout. There had been no allegation that *F* was a tout. The Subordinate Magistrate did not report name of *F* as having been proved as a tout and District Magistrate could not declare him a tout. The resolution of the Bar Association was not that *F* was a tout but only that he had bad antecedents and the resolution was not passed at a specially convened meeting so as to be evidence under Expl. to S. 36 (1) of the general repute of *F*. The District Magistrate should have heard *F* which he did not do. Lastly there was no evidence that *F* was a tout as defined in S. 3.

[P 466 C 2; P 467 C 1]

Shamair Chand—for Petitioner.

Judgment.—The District Magistrate of Attock has included the name of one Fakir Chand in the list of touts framed and published by him, and Fakir Chand has moved this Court to revise the order on the ground that the action of the authority was illegal.

One Mt. Sahib Jee gave a petition to the District Magistrate to the effect that she had come to arrange the transfer of a case from one Court to another and that Fakir Chand took Rs. 84 from her, saying that he would engage a pleader. Instead of doing so he ran away with the money. The District Magistrate endorsed this petition to a Magistrate First Class, for enquiry and report. The Magistrate, First Class after holding an enquiry reported that it was not proved that Fakir Chand was a tout, though it might be the case that he had committed an act of cheating. The Magistrate, First Class, had asked the Secretary, Bar Association, to let him know about Fakir Chand's character and antecedents and the Secretary wrote that the Executive Committee of the Bar As-

sociation had passed a resolution by a majority that Fakir Chand was an undesirable man and did not possess good antecedents. It may be noted that Fakir Chand was present at the enquiry before the Magistrate First, Class.

The District Magistrate when he received the Subordinate Magistrate's report wrote the order in question declaring Fakir Chand to be a tout and stating that he did not agree with the finding of the Magistrate.

The proceedings which have been had against Fakir Chand have been illegal throughout. In the first place, under S. 36 (2-A), Legal Practitioners Act, the District Magistrate could send to a Subordinate Magistrate the name of any person, alleged or suspected to be a tout, and could order the Subordinate Magistrate to hold an enquiry in regard to such person. There was, however, no allegation that the petitioner was a tout. The only allegation was that made by Mt. Sahib Jee to the effect that he had cheated her. Nor did the District Magistrate in endorsing this petition direct the Subordinate Magistrate to enquire into the question whether Fakir Chand was a tout, but only to enquire into the truth of the petition which was to the effect that he had committed the offence of cheating.

In the second place, the Subordinate Magistrate who held the enquiry did not report the name of Fakir Chand as having been proved to his satisfaction to be a tout. As he did not do so, it seems to follow from S. 36 (2-A) that the District Magistrate could not declare him to be a tout. All that the District Magistrate could do was to include or not to include in the list of touts framed the name of any person who had been proved to the satisfaction of the Subordinate Magistrate to be a tout. Of course if the District Magistrate had himself conducted the investigation he could have come to his own conclusion and acted accordingly.

In the third place, the District Magistrate has relied upon a resolution of the Executive Committee of the Bar Association passed by a majority to the effect that Fakir Chand had bad antecedents and was of undesirable character. Here again there was a clear illegality. If there was a specially convened meeting of the Bar Association and not of the

Executive Committee thereof, and the members present passed a resolution by a majority that Fakir Chand was a tout, that would be evidence under the explanation to S. 36 (1) of the general repute of the person in question. In the present case the resolution was not that he was a tout but only that he had bad antecedents and was an undesirable character. In the second place it was not passed at a specially convened meeting of the members of the Bar Association but at a meeting of the Executive Committee of that body.

In the fourth place, the District Magistrate under the proviso to S. 36 (2-A) should have heard Fakir Chand before placing him on the list, but he did not do so.

In the fifth place, there was no evidence that the petitioner was a tout as defined in S. 3 of the Act.

For the reasons given I accept this petition and set aside the order in question.

R.M./R.K.

Petition allowed.

• 1930 Cr. Cases 467

(Lahore)

JAI LAL, J.

Fateh Haidar and another—Convicts—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 39 of 1930. Decided on 21st February 1930, from order of Sess. Judge, Jhelum, D/- 18th December 1929.

Penal Code, S. 420—Offence under S. 415 is committed when certain documents are taken away by making false representation—It is mere surplusage to state in charge that any person suffered loss thereby and such defect is cured by Criminal P. C. S. 537.

F borrowed money from *M* on security of *N*, on basis of two mortgage bonds and having arranged to sell the mortgaged property induced *M* to accompany him to a petition writer to get a sale deed drafted. The bonds were left with the petition writer and *M* went away to get a document registered. *N* and *F* making a false representation to petition writer that *M* wanted to see to the bonds, took them away. *F* and *N* were followed, but the bonds could not be recovered. In the charge it was recited that *F* and *N* obtained the bonds after making false representation to the petition writer and that as a result of the misrepresentation *M* suffered loss. It was contended that the charge was defective.

Held: that it was not necessary to state in the charge that a result of false representation made by *F* and *N*, *M* suffered any loss. The

mere fact that the petition writer as a result of the deception of *N* handed the bond to him was sufficient to bring his conduct within the definition of cheating. The addition in the charge that *M* suffered loss as a result of the misrepresentation was a mere surplusage and the defect was cured by S. 537, Criminal P. C. [P 468 C 1]

M. L. Puri—for Petitioners.

G. R. Khanna—for the Crown.

Judgment.—The appellants Fateh Haidar and Nawab have been convicted under S. 420, I. P. C., and have been sentenced to nine months' rigorous imprisonment.

It has been found that Fateh Haidar had borrowed money from one Mukha Shah, on the security of Nawab, on the basis of two mortgage bonds, and, having arranged to sell the property, he induced the creditor to accompany him to a petition-writer with a view to let the petition-writer draft a sale deed after calculating the amount due on the mortgage bonds. The bonds were left with the petition-writer and the creditor went to the Sub-Registrar's office to register another document. In the meantime Nawab went to the creditor to ask him how long he would be detained, and after receiving the reply he went back to the petition-writer Amir Singh and both Fateh Haidar and Nawab asked him to hand over the two mortgage deeds to them, representing that the creditor Mukha Shah had wanted them to see. As a matter of fact Mukha Shah had given them no such authority and the representation to Amir Singh petition-writer has been found to be absolutely false.

After receiving the bonds the two culprits ran away, and Mukha Shah was told, on return, by the petition-writer Amir Singh of what had happened. The accused were followed but the bonds could not be recovered from them.

At the trial the accused denied the existence of any such bonds, but the Courts below are agreed that two such bonds had been executed and had been received by the petitioners after a false representation of authority from Mukha Shah.

These facts are, in fact, not contested before me by the learned counsel for the petitioners. He merely contends that the charge in this case was defec-

tive and, therefore, his clients have been prejudiced by the trial. It appears that in the charge it is recited that the petitioners obtained the bonds after making a false representation to the petition-writer and that as a result of such misrepresentation Mukha Shah, the creditor, suffered loss.

Now, S. 415, I. P. C., which defines the offence of cheating, clearly, provides that a person who by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, is guilty of the offence of cheating. The second part of this section which provides for the case of an accused who by deceiving any person intentionally induces the person so deceived to do or to omit to do anything which he would not do or to omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property is independent of the first part; so that in the present case it was not necessary to state in the charge that as a result of the false representation made by the accused, Mukha Shah suffered any loss. The mere fact that the petition writer as a result of the deception of the accused handed over the mortgage bonds to the former was sufficient to bring his conduct within the definition of cheating. The addition in the charge that Mukha Shah suffered loss as a result of misrepresentation of the accused therefore is a mere surplusage and the defect, in my opinion, is cured by S. 537, Criminal P. C.

R.M./R.K.

Petition dismissed.

1930 Cr. Cases 468

(Lahore)

TEK CHAND, J.

Labhu—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 29 of 1930, Decided on 21st February 1930, from order of Sess. Judge Amritsar, D/- 7th November 1929.

Penal Code, Ss. 403, 405 and 406—Municipal Committee selling receipt books relating to sale transaction of cattle in fair—Licensee making entry in receipts contrary to rules fixed—His act held not to be within purview of S. 403 or 405.

The Municipal Committee of Amritsar issued licenses to a number of persons to write re-

ceipts relating to sale transactions of cattle in a certain fair. A receipt book was issued to each licensee who was to pay the price of each receipt book at the rate of eight annas per receipt in advance and when he wrote the receipt in the fair he was to charge eight annas per head of cattle from the seller plus his own writing charges. If an animal sold had a calf with it, two separate and consecutive receipts were to be issued for both respectively. P purchased two receipt books paying full price therefor during the fair, he wrote receipts relating to two transactions of sale of buffaloes, each one of whom had a katti, with it, but instead of issuing four receipts as required by the rules he issued only two and charged one rupee from each purchaser. P was prosecuted under S. 409 and S. 420 but was convicted under S. 406.

Held, that the case could not possibly fall under Ss. 403 and 405. P was not entrusted with any property or with any dominion over any property and there was no criminal breach of trust by him. The mere making of wrong entries in the receipt books might have rendered P liable to the forfeiture of his license but could not possibly bring his action within the purview of S. 403 and S. 405.

[P 469, C 1]

Nand Lal—for Petitioner.

Judgment.—The petitioner has been convicted under S. 406, I. P. C. and sentenced to pay a fine of 25/-. The case against him alleged by the prosecution is that on the occasion of the last Bisakhi fair at Amritsar, the Municipal Committee issued licenses to a number of persons to write receipts relating to sale transactions of cattle within the fair and show enclosure. The practice which was followed in this matter was to issue certain printed receipt books, each containing one hundred or fifty receipts. The licensee was to pay the price of each receipt book at the rate of eight annas per receipt in advance to the Municipal Committee and when he wrote the receipt in the fair, he was to charge eight annas per head of cattle from the seller plus his own writing charges. Should he be unable to use all the one hundred or fifty receipts in the receipt book, which he had bought, he was to return the unused ones with the counterfoil, and get a refund from the Committee at the rate of eight annas per unused receipt. It was also provided that if the animal sold had a calf with it, two separate and consecutive receipts were to be issued for the animal and the calf respectively. The petitioner was one of the licensees, who agreed to work on the conditions laid down by the Committee and purchased two receipt books, Exs. P. A-1 and P. D-1 from the Municipal Committee and paid to

it the full price for all the receipts comprised therein. On the 12th of 1929 he wrote receipts relating to two transactions of sale of she-buffaloes each one of whom had katti with it, but instead of issuing four receipts as he should have done under the rules, he issued only two and charged one rupee from each purchaser. The matter was ultimately brought to the notice of the fair authorities, and he was prosecuted under Ss. 409 and 420, I. P. C. The trial Magistrate held that no offence under S. 420, I. P. C. was committed as the petitioner did not deceive anybody. He also held that S. 409 was inapplicable as the petitioner was not the servant or agent of the committee. He was, however, of opinion that the offence fell under S. 406, I. P. C. and has convicted and sentenced him as stated above.

After examining the judgment of the learned trial Magistrate and the relevant portions of the evidence I am of opinion that the case cannot possibly fall under S. 406, I. P. C. The petitioner was not in any manner entrusted with any property or with any dominion over property which he misappropriated or converted to his own use, or dishonestly used or disposed of it in violation of any direction of law prescribing the mode in which such trust was to be discharged or of any legal contract, express or implied which he had made touching the discharge of such trust. As stated already, the petitioner had paid to the committee in advance at the rate of eight annas for each receipt comprised in the two receipt books. If he made any entry on any receipt in contravention of the directions issued by the committee, that circumstance would not make him guilty of the offence of criminal breach of trust. If the erroneous entry had been made dishonestly and the petitioner at the conclusion of the fair claimed a refund from the Municipal Committee illegally and unlawfully, the position might have been different and he might or might not have been guilty of an attempt to commit an offence under the Penal Code, but in the present case it is not alleged that any such attempt was made by him. The mere making of wrong entries in the receipt book might have rendered the petitioner liable to the forfeiture of his license or other disciplinary action but could not

possibly bring his act within the purview of S. 403 or 405, I. P. C.

In my opinion, on the facts found, the conviction is erroneous and must be set aside. Dr. Nand Lal has argued that the prosecution case is false and the evidence has not been properly weighed. I have not thought it necessary to go into the merits as on the findings of the learned Magistrate himself the conviction cannot stand. I accept the petition, set aside the conviction and acquit the petitioner. The fine, if paid will be refunded.

R M./R.K.

Petition allowed.

1930 Cr. Cases 469 (Lahore)

JAI LAJ, AND ABDUL QADIR, JJ.

Niamat Khan and others—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 785 of 1929, Decided on 27th February 1930, from order of Sess. Judge, Attock, D/- 10th August 1929.

(a) Evidence Act, Ss. 32, 33 and 158—Where a statement of witness previously made is used under Ss. 32 and 33, then any other statement by him can be used under S. 158 to contradict him.

When the statement of a witness previously made is used as evidence under the provisions of Ss. 32 and 33, then any other statement made by that witness can be used by virtue of S. 158 for the purpose of contradicting that witness as if such witness had appeared in Court and was cross-examined on such previous statement and on question being asked had denied the facts mentioned in the same: *A.I.R. 1926 L.A. 122, Foll.* [P 473 C 2]

(b) Evidence Act, Ss. 32 and 33—Previous statement not made in Court can be used for limited purpose of corroborating or contradicting witness only and not as substantive evidence.

A previous statement which is not made in Court and at the trial can be used only for the limited purpose of corroborating or contradicting a witness and does not become substantive evidence in the case: *26 Mad. 191 and 25 A.L.J. 994, Foll.* [P 473 C 2]

(c) Criminal Trial—Duty of Court—Appeal from acquittal—Capital sentence though not usually passed on conviction on appeal from acquittal, may be passed where conduct of accused has been high handed and cruel and opposite party is not proved to have given any provocation.

Ordinarily the Courts refrain from passing a capital sentence on a person who is convicted on an appeal against his acquittal, but where the accused was a party to an attack of a particularly ferocious nature and acted in a high handed manner and with unusual cruelty in assaulting the opposite party consisting of

the deceased and the latter have not been proved to have given any provocation, he may be sentenced to death. [P 474 C 2]

Ghulam Mohyuddin—for Appellants.

Abdul Rashid—for the Crown.

Jai Lal, J.—Fifteen Pathans of Kot Kai in the District of Attock were tried by the Sessions Judge of Attock for an offence punishable under S. 302 read with S. 149, I. P. C., for having caused injuries to Hayat Mir, Ahmad Mir, Waris Mir, Said Mir and Shah Zarin, Kashmiris of Dhok Injarsar of the same district, on 26th September 1928, as a result whereof, it was alleged by the prosecution, these injured persons died. Nine of the accused were acquitted by the learned Sessions Judge, and the remaining six, viz., Niamat Khan and Fazal, sons of Behram Khan, Abdul Rahim, son of Fazal Khan, Said Ghulam, and Lal, sons of Bostan Khan, and Ghafur, son of Fazal Khan, were convicted, the first convicts having been sentenced to death and the last, i. e., Ghafur, having been sentenced to transportation for life owing to his youth.

These convicts have appealed against their convictions, and the cases of those who have been sentenced to death are also before us for confirmation of their sentences.

On behalf of the Crown the Local Government has preferred an appeal against the acquittal of the following six accused: Akbar Khan, Sher Khan and Ghulam Rasul, sons of Behram Khan, Abdul Rehman, son of Akbar Khan, Fazal Khan, son of Said Khan, and Ahmad Gul, son of Niamat Khan. Of these all except Abdul Rehman have been arrested in pursuance of a warrant issued under the directions of this Court.

There is no appeal against three accused who were tried, i. e., Nadir, son of Hayat, Waris, son of Ajab Khan, and Muzaffar, son of Muhammad Khan. Their cases, therefore, need not be considered any longer.

With regard to the six accused against whose acquittal an appeal has been preferred by the Local Government, we have heard the learned Additional Government Advocate and also the counsel engaged on behalf of those who have been arrested. Abdul Rehman was not represented before us as it was

doubtful whether he had been served with notice of the appeal against him.

The prosecution case is as follows:

The Kashmiris of Dhok Injarsar as well as the Pathans of Kot Kai are the tenants of the Pathans of the village Malak Mala. All these villages are adjacent to each other and it appears that there have been several incidents previous to the date of the occurrence between the Kashmiris and the Pathans of Kot Kai which have resulted in producing strained relations between the two.

The Pathans of Kot Kai claimed a right to graze their cattle in the grazing area, known as Utli Rakh, which belongs to the Pathans of the Malak Mala, but it is not necessary here to state or to decide the respective claims of the parties with regard to this right as this is not relevant to this case. It appears, however, that, on 19th August 1928, the Pathans of Malak Mala granted a lease of the Rakh to the residents of Jhamra village which also is at a short distance from Malak Mala. Whether as a result of this lease the Jhamra people entered into peaceful possession of the Rakh is not clear from the record. It is, however, apparent that the Pathans of Kot Kai were not prepared to allow them to have peaceful possession of the Rakh and thus to interfere with their alleged rights therein. The Kashmiris of Dhok Injarsar were on friendly relations with the residents of the village Jhamra and, being tenants of the Pathans of Malak Mala, apparently sided with them in the dispute about the Rakh.

It seems that on 26th September 1928, the Pathans of Kot Kai went armed to the Rakh in order either to enforce their alleged rights or to defend them against any aggression by the people of the village Jhamra.

There was, however, no actual fight. This may have been due to the fact that Abdul Ghafur Khan, the Sarbarah Zaildar of Malak Mala, and Pathan of that village, had warned the Jhamra people not to fight the other party as deposed to by some witnesses, or it may be that both parties being fully armed and equally balanced in numbers, the Pathans of Kot Kai thought better of it and allowed themselves to be persuaded back to their village as deposed to by P. W. 17, Faqir. On their way back the

Pathans had to pass by the Dhok Injarsar where the Kashmiris resided. They decided to punish the Kashmiris for their past conduct and for taking the side of the Jhamra people and consequently, it is alleged that, seventeen Pathans of Kot Kai, including the fifteen persons who were tried and two others, Yusuf and Hasham Khan, who are alleged to be fugitives from justice in this case, on seeing the Kashmiris, challenged them as they neared their village. The Kashmiris, however, fearing an attack ran away, but were pursued by the culprits, were overtaken near a place which is called the Gol Dheri, and were attacked with spears, lathis and stones. The Kashmiris, it is admitted, in order to defend themselves threw stones at the accused causing injuries to some of them. The actual assault is described as follows by P. W. 4 Sultan Mir :

" Ghafur caught hold of Hayat Mir, and Fazal son of Behram, stabbed him with a spear. As Hayat Mir fell down Ghafur belaboured him with sticks, Yusuf, absconder, caught hold of Waris Mir and Abdul Rahim stabbed him with a spear. As he fell down Yusuf belaboured him with sticks. Ghulam Rasul accused brought down Shah Zarin with a spear thrust. Abdul Rehman accused caught hold of Ahmed Mir and Sher Khan struck him with a kulhari. Abdul Rehman accused and Hasham Khan absconder then struck Ahmed Mir with lathis. Said Mir was beaten by Niamat Khan, Ahmad Gul and Yusuf, who had sticks in their hands. As he fell down, his three assailants jumped on his chest. Said Ghulam and Lal Khan accused beat me with sticks. Salamat Mir (P. W. 5), Qalandar (P. W. 6), Haidar Mir (P. W. 8) and Hazrat Mir (P. W. 9) were also beaten by the accused We flung stones at our assailants and wounded Said Ghulam and Lal Khan. Abdul Rahim, Nadar, Waris and Muzaffar accused were also injured with the stones flung by our party. Our cries for help brought Nawab (P. W. 10), Muhammad Din (P. W. 11) and Ahmad, brother of Faqira (P. W. 12) to the spot, but none of them had the courage of rescuing us and the assailants went away of their own accord."

As a result of the injuries Hayat Mir and Waris Mir died on the spot, while Ahmad Mir and Said Mir died the next day and Shah Zarin died on 2nd May 1929, i. e. about eight months later. It is not, however, necessary to consider the question whether the accused are directly responsible for the death of Shah Zarin so as to be guilty of his murder, in view of the fact that four other injured persons certainly died as a result of the injuries received by them

during this assault and all the members of the party who assaulted them are undoubtedly guilty of murder if the prosecution version is true. The accused, on the other hand, with the exception of two, plead an alibi. Said Ghulam and Lal admit a fight with the Kashmiris. They both say that they went with their cattle to Utli Rakh for the purpose of grazing and that other men of their village were also grazing their cattle in that Rakh and so were some men of Jhamra. The men of the accused's village rounded up the cattle of the Jhamra people with a view to take them to the cattle pound on the ground that they had tropped on the Rakh, as the residents of Kot Kai alone were entitled to graze their cattle in the Rakh. One of the Jhamra people thereupon ran back to the village and brought about 400 or 500 men armed with spears, sticks and hatchets. On seeing these men the accused left the cattle and ran away but were followed and overtaken by the other party and beaten. It is alleged that the Kashmiris of Dhok Injarsar were also present on this occasion, and there was a promiscuous fight in which the Kashmiris were also injured. This is all the information that these two accused are able to give on the subject.

It is to be observed that, according to these two accused, the assault or the fight took place at the Utli Rakh, whereas, according to the prosecution witnesses it took place near the Dhok Injarsar at the Ghol Dheri. The testimony of Sayed Ahmad Shah, Sub-Inspector of Police, who investigated the case and who reached the village soon after the incident, shows that he found blood on the earth in various places in the Ghol Dheri. This fact clearly corroborates the prosecution version as to the place of assault, and falsified the defence version.

The prosecution case, as deposed to by P. W. 4, Sultan Mir, is corroborated by P. W. 5, Salamat Mir, P. W. 6 Qalandar, P. W. 7 Shah Zarin, P. W. 8. Haidar Mir and P. W. 9 Hazrat Mir, who all had received injuries on this occasion; and also by P. W. 10 Nawab and P. W. 11 Muhammad Din. Their description of the affair, however, is styled by the learned Sessions Judge as too consistent, and it is really so, as they have given evidence almost in

exactly the same words. Still the learned Sessions Judge has accepted in main the prosecution version of the affair, and, in my opinion, he came to the right conclusion. The place of the occurrence, in my opinion, is the main factor which determines the correctness or otherwise of the two versions placed before the Court. The prosecution case further receives support from the testimony of P. W. 17 Faqir who does not appear to have any concern with either party. On the other hand, from the answers given by him to the questions asked from him in cross-examination, it appears that this witness is entirely disinterested. He says that, on the afternoon of the day of occurrence, sixteen or seventeen persons, including the accused went towards the Rakh and, when they reached the bank of the ravine, they found the Jhamra people assembled on the opposite bank. He adds that a fight was imminent but he stopped it and advised the men who had collected to fight to go to the landlord and to settle their differences. He also says that Hayat Mir, Ahmad Mir and Said Mir were with the Jhamra people at that time and that of the Kot Kai party he saw Sher Khan, Niamat Khan, Ghulam Rasul and Fazal whom he knew by name and identified the other accused though he did not know them by name. The testimony of this witness is also supported by P. W. 15 Muhammad. He, however, is a resident of Jhamra and much reliance cannot be placed on his statement alone. I consider that the testimony of Faqir and the Sub-Inspector read together establishes the fact that Kot Kai Pathans went to the Utli Rakh with a view to fight the Jhamra people whose partisans the Kashmiris were but were prevented from fighting by the intercession of Faqir, and probably also by the fact that they found the other party in strong numbers.

It appears that there are two routes by which one can return to Kot Kai from the Rakh, both of which converge at the Diok Injarsar and that is the reason why Hayat Mir, Ahmad Mir and Said Mir reached their village before the Pathans who came by the longer route. The Pathans seeing the Kashmiris in their village and being annoyed at their conduct and especially

seeing Hayat Mir, Ahmad Mir and Said Mir among them, decided to punish them and assaulted them in the manner already described.

The fact that the Pathans were the aggressors in the affair is, in my opinion, established by the number and nature of injuries caused by them and the weapons carried by them. The prosecution witnesses are unanimous in saying that some of them carried barchhis and other sharp-edged weapons, and this is fully supported by the medical evidence from which it appears that Hayat Mir deceased had one incised wound caused by some sharp-edged instrument like a barchhi (a spear): that Waris Mir died from shock and haemorrhage due to an incised punctured wound in the abdomen from which large intestines had come out, this injury also having been caused probably by a barchhi, and also that Said Mir had two small punctured wounds on the left side of the neck. Shah Zarin had one incised wound on the front side of right chest just above the nipple.

I have not thought it necessary to describe the other injuries received by the Kashmiris. They were fairly large in number and of a serious nature; some of them were caused by lathis but a large number of them were caused by stones.

Some of the accused also received injuries and it appears that the number of injuries received by them was larger than these received by the Kashmiris, but they were mostly caused by stones, though a few were caused by lathis. This, in my opinion, is a clear indication of the fact that the Kashmiris were not prepared for a fight and were set upon by the Pathans in the manner described above, and that they were driven to defend themselves by throwing stones at their assailants. The existence of some lathi marks on the persons of some of the accused can easily be understood under the circumstance. Many persons ordinarily carry lathis with them and it is not surprising that those of the Kashmiris who carried lathis used them when brought to bay.

I have, therefore, no hesitation in agreeing with the learned Sessions Judge that those of the accused who are proved to have taken part in this affair

are guilty of murder and are punishable under S. 302 I. P. C., read with S. 149.

At this stage it will be convenient to deal with a contention raised on behalf of the convicts by their learned counsel. Shah Zarin, I have already stated, died on 2nd May 1929. This was before the trial was held.* He was, however, examined by the committing Magistrate and his statement was also recorded under S. 156, Criminal P. C., by a Magistrate of the First Class on 28th September 1928, that is to say, two days after the incident. The statement made by him before the committing Magistrate is exactly what has been stated by the other prosecution witnesses, but the statement made on 28th September 1928 is somewhat different. That statement is marked Ex. D-A. At the trial the statement made by Shah Zarin before the committing Magistrate was transferred to the Sessions Judge's record under S. 33, Indian Evidence Act, and was read as evidence in the case. Ex. D-A was read over to Shah Zarin before the committing Magistrate in the course of the cross-examination of this witness by the accused, and was admitted by him, with the addition that he did not remember what statement he made as he was not then in his senses. The accused did not draw the attention of the witness to those portions of Ex. D-A, which according to them, contradicted the statement made by him before the committing Magistrate, but apparently, in the course of the arguments, the counsel who appeared on behalf of the accused wanted to use the whole of the statement recorded in Ex. D-A, for the purpose of contradicting the statement made by Shah Zarin before the committing Magistrate; the learned Sessions Judge, however, declined to allow the use of this statement for the purpose, except those portions thereof on which Shah Zarin was cross-examined.

The learned counsel for the appellants in this Court criticised this procedure of the Sessions Judge and relied upon a judgment of this Court in *Hari Ram v. Emperor* (1). In that case it was held that when the statement of a witness previously made is used as evidence under the provisions of Ss. 32 and 33, Evidence Act, then any

other statement made by that witness can be used by virtue of S. 158, Evidence Act, for the purpose of contradicting that witness as if such witness had appeared in Court and was cross-examined on such previous statement and on question being asked had denied the facts mentioned in the same. In my opinion, therefore, the accused were entitled to use the whole of Ex. D-A, for the purpose of contradicting Shah Zarin and this was conceded by the learned Government Advocate.

The learned counsel, however, wanted to treat the statement of Shah Zarin contained in Ex. D-A as substantive evidence in the case. This in my opinion, he was not entitled to do. A previous statement which is not made in Court and at the trial can be used only for the limited purpose of corroborating or contradicting a witness and does not become substantive evidence in the case. This was held in *Emperor v. Cherath Choyi Kutti* (2) and in *Bishan Datt v. Emperor* (3), and with the view taken in these cases I entirely agree. Even, however, if the statement of Shah Zarin is used as substantive evidence, it does not materially affect the prosecution case against the accused as from that statement also it is clear that the accused were the aggressors in the matter and they assaulted the Kashmiris who had merely asked them not to go to the Utli Rakh and the assault, according to that statement also, took place at the Ghol Dheri.

This leaves the question of determining which of the appellants are proved to have taken part in the assault. All the appellants, of course, are mentioned by the prosecution witnesses Nos. 4 to 11. The learned Sessions Judge, however, has chosen not to base his conclusions on the testimony of these witnesses alone on the question of the presence of each accused, on the ground that there is generally a tendency on the part of the injured persons to take vengeance on the opposite party by naming a large number of members of their family as accused in the case than have actually participated in the crime. The learned Sessions Judge has, therefore, looked for other corroborative circumstances before convicting the ac-

(2) [1903] 26 Mad. 191.

(3) A. I. R. 1927 All 705.

(1) A. I. R. 1926 Lah. 122.

caused on such evidence and in my opinion in the peculiar circumstances of this case, he adopted a prudent course.

Now with regard to Said Ghulam and Lal, both these appellants admit their presence in a fight with the Kashmiris on the date of the occurrence and there were injuries on their persons. There can, therefore, be no manner of doubt as to their guilt.

Similarly, Abdul Rahim had injuries on his person which he has not explained.

In the case of Niamat Khan, human blood was found on his clothes. So far as Fazal is concerned some blood was found on his clothes, but it is not proved that it was human blood, but he was one of the persons who carried a spear and actually caused injuries to Salamat Mir. The testimony of P. W. 17 Faqir further corroborates the evidence of eye witnesses as against this convict.

In my opinion the case against all these convicts has been established by the prosecution evidence. I would, therefore, dismiss their appeal, and confirm the sentence of death passed upon them, as in my opinion, in view of the nature of the assault and of the injuries caused that is the only appropriate sentence in their case.

With regard to Ghafur appellant, he is a young man, who according to his own statement, is fourteen years of age, but according to the Sessions Judge probably about seventeen years of age. It appears that he was arrested on 8th October 1928, i. e., about ten days after the incident and the presence of human blood on his clothes under the circumstances cannot be considered as a positive incriminating circumstance against him. Beyond the testimony of the Kashmiri witnesses, therefore, there is no other evidence against him. I would accept his appeal and acquitting him direct that he be released forthwith.

This leaves the appeal by the Local Government. Having already expressed the opinion that the learned Sessions Judge was right in refusing to convict those of the accused against whom the only evidence was of the Kashmiri witnesses, I consider that there is no ground to interfere with the acquittals of Akbar Khan, Sher Khan, Abdur Rehman, Fazal Khan and Ahmad Gul.

The appeal against them will, therefore, be dismissed.

With regard to Ghulam Rasul, son of Behram Khan, the case stands on a different footing. Shah Zarin has consistently stated that it was this accused who had caused him an injury with a spear, and P. W. 17 Faqir also says that this accused was armed with a spear and was in the crowd of the Kot Kai Pathans who had assembled at the Utli Rakh to fight the Jhamra people. This crowd, I have already stated, on their way back, assaulted the Kashmiris, so that there is corroboration of the testimony of the Kashmiri witnesses with regard to Ghulam Rasul in the evidence of Faqir. I am also of opinion that, as against Ghulam Rasul the testimony of Shah Zarin ought to be treated as of special value because he definitely implicates this accused as the person who caused him an injury with a spear. I would, therefore, accept the appeal against the acquittal of Ghulam Rasul and convict him of murder and sentence him under S. 302, I. P. C., read with S. 149. Ordinarily the Courts refrain from passing the capital sentence on a person who is convicted on an appeal against his acquittal, but in the present case the attack by the Pathans was of a particularly ferocious nature and the accused acted in a high handed manner and with unusual cruelty in assaulting the Kashmiris who have not been proved to have given them any provocation. I would, therefore, sentence Ghulam Rasul to death.

Abdul Qadir, J.—I concur.

B.M./R.K.

Order accordingly.

1930 Cr. Cases 474 (Lahore)

TEK CHAND, J.

Bhag—Convict-Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1197 of 1929, Decided on 14th December 1929, against order of Sess. Judge, Ferozepore, D/- 25th June 1929.

Penal Code, S. 451 — Court yard surrounded by walls and indivisible from the house when "building used as human dwelling"—Determining factor explained.

Where the question is whether a court yard forming an intergal and indivisible part of a house and surrounded by walls on all sides is a "building used as a human dwelling" within

the meaning of S. 451, 'the determining factor is not the existence of the shutters, or the fact that the doors was shut or open, at the time of entry by the accused, but the nature of the structure as a whole, and the purpose for which it was intended to be and was being used: 11 P. W. R. 1919 Cr.; A. I. R. 1924 Lah. 623; A. I. R. 1925 Lah. 279, Dist.

[P 475 C 2]

Jagan Nath Bhandari—for Petitioner.

Hem Raj Mahajan for the Government Advocate—for the Crown.

Judgment.—The petitioner Bhag Jat, has been convicted under S. 451, I. P. C., for having trespassed into the sahn of the house of his neighbour Mathura Das, Brahmin, on the night of 5th May 1929, with the intention of committing adultery with his wife, Mt. Persinni, and has been sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs. 50.

The finding that the petitioner trespassed into the sahn, with the intention mentioned above, is not now disputed and is amply borne out by the evidence on the record. The only question argued is that the conviction should have been under S. 447 and not under S. 451, as the trespass was not committed by entering into a "building used as a human dwelling," within the meaning of S. 442, but into an open courtyard.

After examining the record and hearing counsel, I am unable to accept this contention. The plan and the evidence show that the sahn is an integral and indivisible part of the building which constitutes the house of Mathura Das. It is enclosed by walls on all sides and has a number of kothas opening into it. Access to it from outside is had by means of three doors, which apparently have "door frames" affixed to them. About the time of the occurrence, however, only one of these doors had shutters on it, while the other two were without shutters. It is conceded that if these two doors also had been provided with shutters, S. 442 would have applied, as held in *Shera v. Empress* (1) and *Ismail v. Emperor* (2) and *Wali Mahomed v. Emperor* (3). But it is contended that the absence of the shutters at the time takes the case out of the rule laid down therein. In my opi-

nion this contention is without force. The determining factor is not the existence of the shutters, or the fact that the door was shut or open, at the time of entry by the accused, but the nature of the structure as a whole, and the purpose for which it was intended to be and was being used. Mr. Jagan Nath Bhandari has strongly relied upon *Sunder v. Emperor* (4), *Buta v. Emperor* (5) and *Mulchand v. Emperor* (6) but they are all distinguishable. In the first of these cases the courtyard was not enclosed on all sides but had a mud wall on a portion of the front side with no door or gateway leading into the street. In *Buta v. Emperor* (5) the courtyard was not provided with a door at all, and in *Mulchand v. Emperor* (6) it was enclosed by low walls on three sides only.

In my opinion the petitioner has been rightly convicted. Having regard to the circumstances in which the trespass was committed, I do not think the sentence is severe. I dismiss the petition for revision. The petitioner must surrender to his bail bond and serve the remaining period of imprisonment.

V.B./R.K.

Petition dismissed.

(4) [1919] 11 P.W.R. 1919 Cr.=49 I. C. 864=20 Cr. L. J. 240.

(5) A. I. R. 1924 Lah. 623.

(6) A. I. R. 1925 Lah. 279.

1930 Cr. Cases 475

(Lahore)

TEK CHAND AND JOHNSTONE, JJ.

Allah Din—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1126 of 1929, Decided on 17th December 1929, from order of Sess. Judge, Attock, D/- 29th October 1929.

Penal Code, S. 302—Improper overtures by stepmother to her stepson do not amount to grave and sudden provocation—Maximum sentence, however, should not be levied.

When the deceased makes improper overtures to the accused who is her stepson and the latter in a fit of resentment stabs her with a knife to death, the act of the deceased does not amount to grave and sudden provocation and the accused is guilty of murder. But the act, however, may be taken into consideration and is a sufficient ground for not imposing the maximum penalty of death. [P 476 C 2]

Bal Kishen Mehra—for Appellant.

I. M. Mackay—for the Crown.

(1) [1879] 35 P. R. 1879 Cr.

(2) A. I. R. 1925 Lah. 28=6 Lah. 463.

(3) A. I. R. 1929 Sind 17=22 S. L. R. 466.

Johnstone, J.—The appellant Allah Din, a Musalli aged 25, residing in Khagwani village, Attock District, has been convicted under S. 302, I. P. C., and has been sentenced to death for the murder of his stepmother, Mt. Hayat Nur, a woman of between 40 and 45 years of age, on the morning of 7th July 1929.

About eleven months before the occurrence Sharaf Din (P.W. No. 3) father of the appellant, married Mt. Hayat Nur, after being a widower for some five years. The appellant himself had been married about two years before, but was not living with his wife. On the night of 6th July, Sharaf Din, Mt. Hayat Nur and daughter of Sharaf Din by his first wife slept on the roof of the adjoining pasar. In the early morning when Mt. Sarwar went down below, she heard the sounds of a struggle going on inside the kotha between the appellant and the deceased. She at once ran up to the roof and told her father, who descended and told the appellant to open the door, which was chained from within. The appellant not obeying Sharaf Din went and fetched his neighbour and friend, Ahmad Khan (P. W. No. 5), and three other villagers also appeared on the scene, Shahinchi, Amir Khan and Zardar (P. Ws. Nos. 6, 7 and 8). Shahinchi forced the door of the kotha open and inside the party found Mt. Hayat Nur lying dead and the appellant with a bloody knife in his possession. The matter was reported without delay at the Hazro Police Station. It has been proved that some of the appellant's clothes and the knife recovered from his possession were stained with human blood.

The appellant admitted at the trial that he had killed Mt. Hayat Nur and set up the plea of grave and sudden provocation. She was, he said, a woman of bad character, with whom he had formerly himself had an intrigue. When his father married Mt. Hayat Nur he stopped his former relations with her but she still pestered him with her attentions. On the morning in question he stated, he went into the kotha whether the deceased followed him and urged him to have sexual intercourse with her. In a fury of resentment at the proposal he grabbed a knife and stabbed her to death.

The prosecution tried to show that the appellant was actuated by anger arising out of domestic bickerings, but the two incidents to which witnesses depose hardly establish a strong motive. On one occasion, one and a half months before the occurrence, he had taken the deceased's shoes and only a few days before 7th July he had taken away and pawned a quilt. On the other hand, it is in the evidence of Shahinchi that the deceased was a loose woman and had actually had an intrigue with the appellant before her marriage with Sharaf Din. Moreover, not only Shahinchi, but Ahmad Khan, Amir Khan and Zardar all definitely state that as soon as the appellant was caught he explained that he had killed Mt. Hayat Nur because she had entreated him to have sexual intercourse with her.

In the absence of any other motive and in view of the fact that there is unanimous evidence as to the appellant's explanation of his crime from the very beginning, I am of opinion that the version put forward by him is much more probable than that which the prosecution has endeavoured to establish, and that his version must be accepted. At the same time it cannot be held that the improper overture of the deceased to the appellant amounted to grave and sudden provocation and I would maintain the conviction under S. 302, I. P. C. In awarding sentence, however, I think that consideration must be given to the circumstance and that the ends of justice can be met without imposing the maximum penalty. I would accept the appeal so far that I would reduce the sentence from capital punishment to a sentence of transportation for life.

Tek Chand, J.—I agree.

R.M./R.K.

Order accordingly.

1930 Cr. Cases 477

(Bombay)

PATKAR AND WILD, JJ.

Daljitsing Fautehsing—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 242 of 1929, Decided on 20th July 1929, from judgment of First Class Magistrate, Bhusawal.

(a) Arms Act, S. 27—Notifications imposing penalty must be construed strictly.

Notifications relating to the Arms Act imposing a penalty upon the subject must be construed very strictly. [P 478 C 2]

(b) Arms Act, S. 19 (a) and (d)—Sikh carrying kirpans is not guilty.

Sikh found in possession of kirpans of the length varying from nine to ten inches is not guilty of the offence under S. 19 (a) and (d) as such kirpans are not swords. A.I.R. 1924, Lch. 600, Dist. [P 478 C 1]

V. B. Karnik and P. B. Gajendra-gadkar—For Applicant.

P. B. Shingne for the Crown.

Patkar, J.—In this case the accused was tried on a charge under S. 19 (a) and (d), Arms Act 11 of 1878, before the Honorary First Class Magistrate at Bhusawal, and convicted and sentenced to pay a fine of Rs. 250. On appeal, the learned Sessions Judge confirmed the conviction and reduced the fine to Rs. 50.

The accused, who is a Sikh resident of Delhi, was found in possession of thirty-five kirpans or jambias at Bhusawal. The accused admitted that he had brought them from Delhi and desired to take them in the Nizam's territory for sale and also admitted that he had already sold two kirpans at Bhusawal. Out of the thirty-five kirpans nine kirpans were below nine inches, twenty-three were between nine and nine and a half inches, and there were ten inches in length.

Under S. 27, Arms Act, 1878, the Governor General in Council may, from time to time, by notification publish in the Gazette of India :

(a) exempt any person by name or in virtue of his office, or any class of persons, or exclude any description of arms or ammunition, or withdraw any part of British India, from the operation of any prohibition or direction contained in the Act; and

(b) cancel any such notification, and again subject the persons or things of the part of British India comprised therein to the operation of such prohibition or direction.

Section 5, Arms Act, prohibits un-

licensed manufacture, conversion and sale of any arms, ammunition or military stores. S. 6 prohibits unlicensed importation and exportation. S. 13 prohibits going armed without a license. S. 14 prohibits unlicensed possession of any cannon or firearms or any ammunition or military stores.

Government of India Notification No. F. 829, dated 3rd November 1923, was made under Ss. 4, 10, 17 and 27, Arms Act. Under R. 3 (1) of the notification, the persons and classes of persons, the arms and ammunition, and the parts of British India specified or described in Schs. 1 to 4 are, respectively, exempted, excluded and withdrawn to the extent and subject to the conditions therein specified from the operation or prohibitions and directions contained in the Act. In Sch. 2, in British India except the Punjab, Burma and the Delhi Province all arms except cannons and other firearms mentioned in the second column are excluded from the operation of all the prohibitions and directions contained in the Act provided, as laid down in Col. 3, that the Local Government may by notification in the local official Gazette, retain all or any of the prohibitions and directions contained in the Act in respect of any arms, in the case of any class of persons or of any specified area.

In Government Notification No. 7228 dated 2nd August 1920, the item relating to "kirpans not exceeding nine inches in length carried by Sikhs" appears in Cl. (g) under entry No. 3 relating to all swords. According to that notification kirpans exceeding nine inches in length or kirpans not carried by Sikhs would come under entry No. 3 relating to all swords and will be subject to all the prohibitions mentioned in Col. 5 and the sale and transport of such kirpans would be prohibited under Ss. 5 and 6, Arms Act, and will be punishable under Cls. (a) and (d), S. 19, Arms Act. It appears, however, that by a subsequent notification No. 1234, dated 3rd August 1925, printed at p. 2093 of the Bombay Government Gazette, Part 1 for the year 1925, Cl. (g) relating to "kirpans not exceeding nine inches in length carried by Sikhs" has been transferred from entry No. 3 relating to all swords and put as Cl. (g) under entry No. 2 relating to all arms.

The effect of the change in the notification would be that kirpans exceeding nine inches in length and not carried by Sikhs would be subject to the prohibition and direction contained in S. 13 as mentioned in Col. 5 and would, therefore, not be subject to the prohibitions contained in Ss. 5 and 6, Arms Act. In the Notification of 1920 the kirpans not exceeding nine inches in length carried by Sikhs were included in the exemptions of certain kinds of swords, and this inclusion would indicate that kirpans were swords. In the Notification of 1925, the same item was removed from the exemptions relating to swords and included in the exemptions relating to arms. This change is indicative of the intention of removing kirpans from the category of swords.

It is urged on behalf of the Crown that the word "kirpan" can only be understood and read as meaning a sword, and comes within the definition of sword and reliance is placed on the decision in *Hari Singh v. Emperor* (1). The weapons in that case were thirty-six inches in length with curved blades measuring twenty-eight inches. The word "kirpan" would mean a weapon for cutting from its etymological meaning and in Monier Williams' Sanskrit dictionary the word is defined as meaning a sword or a sacrificial knife. In the present case, out of the thirty-five kirpans in the possession of the accused, in the case of twenty-three the blade is nine and a half inches, in the case of three it is ten inches, and in the case of nine weapons it is below nine inches. With regard to the kirpans below nine inches no offence would be committed by the accused as they are exempted from all the prohibitions under the entry No. 2 in the notification. With regard to twenty-six kirpans, which are above nine inches, they will be subject to the prohibition contained in S. 13, Arms Act, as mentioned in Col. 5 of the notification. Kirpans with blades of nine to ten inches cannot, in my opinion, be considered as swords. They may be miniature or model swords, but if it was intended that they should be considered as swords, the entry with regard to kirpans ought to have been allowed to remain in entry No. 3 as in the notification of 1920, and

(1) A. I. R. 1924 Lah. 600=5 Lah. 808.

ought not to have been transferred from entry No. 3 relating to all swords to the entry relating to all arms. The effect of the removal of Cl. (g) from entry No. 3 relating to swords and inclusion of Cl. (g) relating to kirpans under the heading "all arms" in entry No. 2 would make kirpans above nine inches in length liable to the prohibition contained only in S. 13. If the kirpans in the present case had been thirty-six inches in length with curved blades measuring twenty-eight inches, as in the Lahore case, it would have been possible to hold that the kirpans with such long blades might be considered as swords, and would come under entry No. 3 and would be subject to all the prohibitions. The notifications relating to the Indian Arms Act imposing a penalty upon the subject must be construed very strictly. If it is intended to impose all the prohibitions contained in the Act on kirpans with blades above nine inches whether carried or not by the Sikhs, the notification must be clear on the point.

I think, therefore, that the accused is not guilty of the offence under S. 19 (a) and (d), Arms Act. I would, therefore, set aside the conviction and sentence of the accused and order the fine, if paid, to be refunded. The order of confiscation is set aside.

Wild, J.—The petitioner in this case was convicted under S. 19 (a) and (d), Arms Act 11 of 1878, in respect of certain kirpans between nine and ten inches in length and the question is whether such kirpans are swords, the selling and transporting of which are prohibited in serial No. 3 of Government Notification of the Bombay Government, Political Department No. 1234 of 3rd August 1925. It may be noted that serial No. 3 relates to swords and certain kinds of swords are exempted. Kirpans not exceeding nine inches in length when carried by Sikhs are excepted in serial No. 2 from the prohibition contained in S. 13 of the Act which relates to going armed without a license and the fact that the last exemption does not appear in serial No. 3 would seem to show that, in the view of the department which issued the notification, kirpans not exceeding nine inches in length are not swords. In the previous notification No. 7228 of 2nd August 1920, as

subsequently amended, the exception as to kirpans not exceeding nine inches in length was to be found in serial No. 3 as an exception to swords and it would seem that in 1920 the view of the department was that kirpans exceeding nine inches in length were swords.

The word "sword" is defined in the Concise Oxford Dictionary as an offensive weapon consisting of a long, variously shaped blade for cutting or thrusting, or both, and a hilt with hand-guard. It is evident from the case of *Hari Singh v. The Crown* (1) that a kirpan may be an ordinary sword of full size but that the word "kirpan" also means a small model or miniature sword worn by Sikhs in their turbans. The kirpans in this case were obviously mere model or miniature swords. I do not consider that a miniature sword between nine and ten inches in length including its hilt is an offensive weapon with a long blade as the definition of the sword requires. I am, therefore, of opinion that such a kirpan is not a sword to which all the provisions of the Indian Arms Act apply in accordance with serial No. 3 of the Government Notification of 1925. I, therefore, agree with my learned brother that the conviction in this case should be set aside. I would add that if it is desired that kirpans exceeding nine inches in length should be subject like swords to all the prohibitions of the Arms Act the Notification of 1925 should be amended to make this clear.

V.S./R.K.

Conviction set aside.

1930 Cr. Cases 479

(Bombay)

PATKAR AND WILD, JJ.

Emperor

v.

Sana Mathur — Accused — Respondent.

Criminal Appeal No. 280 of 1927, Decided on 4th October 1929, from order of acquittal of Sess. Judge, Kaira, in Criminal Appeal No. 46 of 1929.

(a) Criminal P. C., Ss. 179 to 184 and 188 — Ss. 179 to 184 are controlled by S. 188.

Sections 179 to 184 are controlled by the provisions of S. 188 and the alternative jurisdiction conferred by those sections can be exercised on the production of the certificate of the Political Agent according to the special

provisions of S. 188 : 41 *All. 452, Rel. on.*; 21 *M. L. J.* 441 and 5 *S. L. R.* 266, *Ref.* 88 *Mad.* 779, *held no longer good law.*

[P 481 C 1]

(b) Criminal P. C., S. 188 — Alternative charge under Penal Code Ss. 379 and 411 — Offence under S. 411 committed in Native State — Jurisdiction cannot be exercised unless Magistrate gets certificate under S. 188.

The framing of an alternative charge under Ss. 379 and 411, I. P. C., does not confer jurisdiction on a Magistrate when the offence under S. 411 is committed beyond the limits of British India, for, under the express terms of S. 188, he cannot exercise it without a certificate from the Political Agent. [P 481 C 1]

P. B. Shingne—for the Crown.

H. V. Divatia—for Respondent.

Patkar, J.—In this case two accused were tried on charges under Ss. 379, 411 and 414, I. P. C., before the First Class Magistrate, Kaira. The learned Magistrate held that there was no direct evidence as to the commission of the offence of theft, but relying on S. 114, ill. (a), Evidence Act, convicted the accused under S. 379 and in the alternative under S. 411, I. P. C. The offence under S. 414, I. P. C., did not, in the opinion of the learned Magistrate, fall within his jurisdiction as the certificate from the Political Agent was not obtained.

Accused 2 appealed to the Sessions Court but accused 1 did not file an appeal. On the appeal of accused 2 the learned Sessions Judge came to the conclusion that the offence under S. 379, I. P. C., was not made out as there was no direct evidence as to the commission of the offence. With regard to the offence under S. 411, I. P. C., he came to the conclusion that a certificate of the Political Agent was necessary under S. 188, Criminal P. C. He, therefore, acquitted accused 2 and made a reference to this Court to acquit accused 1 on the same ground. The Government of Bombay have appealed against the order of acquittal of accused 2.

It is urged on behalf of the Crown that the lower Court erred in acquitting the accused under S. 379, I. P. C., and that under S. 114, ill. (a), a presumption ought to have been drawn that both the accused were either the thieves or the receivers of stolen property. There appears to be no evidence on the record that the accused committed the theft in question, and there is considerable lapse of time from the date of the offence to

the date of the alleged receipt of the stolen property and its disposal by the accused in a village in the Idar State. We think, therefore, that the acquittal of the accused under S. 379, I. P. C., is correct.

The next question is, whether the Magistrate had jurisdiction to try the accused with regard to the offence under S. 411, I. P. C., without a certificate from the Political Agent of Mahikantha Agency under S. 188, Criminal P. C. It is conceded that the offence under S. 411 was committed beyond British India, Under S. 181, Cl. (3), Criminal P. C. :

"the offence of theft, or any offence which includes theft or the possession of stolen property, may be inquired into or tried by a Court within the local limits of whose jurisdiction such offence was committed or the property stolen was possessed by the thief or by any person who received or retained the same knowing or having reason to believe it to be stolen."

Illustration (b) to S. 180 is to this effect:

"A charge of receiving stolen goods may be inquired into or tried either by the Court within the local limits of whose jurisdiction the goods were stolen, or by any Court within the local limits of whose jurisdiction any of them were at any time dishonestly received or retained."

Under S. 177, Criminal P. C. :

"Every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed."

That section embodies the general rule of jurisdiction. The following Ss. 179 to 184 lay down the alternative jurisdiction conferred on other Courts in certain cases. S. 188, Criminal P. C., says that:

"When a Native Indian subject of Her Majesty commits an offence at any place without and beyond the limits of British India,

he may be dealt with in respect of such offence as if it had been committed at any place within British India at which he may be found :

Provided that notwithstanding anything in any of the preceding sections of this chapter no charge as to any such offence shall be inquired into in British India unless the Political Agent, if there is one for the territory in which the offence is alleged to have been committed, certifies that, in his opinion, the charge ought to be inquired into in British India."

In the case of *Sessions Judge, Tanjore v. Sundara Singh* (1), where a dacoity was committed in British territory and a Native Indian British subject was

found in possession of the stolen property in a Native State and a charge under S. 412, I. P. C., was preferred against him, it was held that, though under S. 180, Criminal P. C., the offence could be tried at the place where the property was retained or where the theft or dacoity took place, yet under S. 188 of the Code a certificate of the Political Agent was necessary if the charge was to be tried in British India. In *Emperor v. Tribhuan* (2), where a charge had been framed against the accused of an offence of criminal breach of trust under S. 406, I. P. C., and a complaint had been filed in British India on the assumption that the Court had jurisdiction under S. 181, Cl. (2), Criminal P. C., it was held that S. 181, Cl. (2), only applied as between Courts of different local areas whose jurisdictions have been limited under S. 12, Criminal P. C., and to which the Code of Criminal Procedure applied, and had no application to an offence committed in a Native State, and that the Magistrate could not take cognizance of such an offence without a certificate from the Political Agent.

In the case of *Assistant Sessions Judge, North Arcot v. Ramaswami Asari* (3), where the accused, who was entrusted with certain jewels, pledged some of them in Bangalore contrary to the arrangement that he should return the jewels or their price at Vellore, it was held that the Vellore Court had jurisdiction to try the accused for criminal breach of trust or misappropriation without a certificate under S. 188. The judgment proceeded on the ground that the fact that loss of the jewels which was the consequence occurred to the complainant at Vellore in British India, was sufficient under S. 179 to give jurisdiction to the British Indian Court to try the offence, and that S. 188, Criminal P. C., did not control the operation of the previous Ss. 179 to 184. After the decision in *Ramaswami Asari's* case (3), the Code has been amended and S. 188, proviso, says that notwithstanding anything in any of the preceding sections of this chapter no charge with regard to an

(2) [1911] 5 S. L. R. 266=15 I. O. 802=18 Cr. L. 530.

(3) [1915] 38 Mad. 779=28 M. L. J. 235=1 M. L. W. 302=22 I. O. 931=(1914) M. W. N. 824.

(1) [1910] 21 M. L. J. 441=6 I. O. 808=(1910) M. W. N. 143.

offence committed outside British India shall be inquired into in British India without a certificate of the Political Agent. The amendment makes it clear that the Madras decision is no longer good law, and that Ss. 179 to 184 can have no application where the offence is committed outside British India unless a certificate of the Political Agent is obtained under S. 188, Criminal P. C. The same view appears to have been taken in *Emperor v. Narain* (4). It would, therefore, follow that Ss. 179 to 184, Criminal P. C., are controlled by the provisions of S. 188, Criminal P. C., and the alternative jurisdiction conferred by those sections can be exercised on the production of the certificate of the Political Agent according to the special provisions of S. 188, Criminal P. C.

It is urged on behalf of the Crown that in the present case there is an alternative charge under Ss. 379 and 411, I. P. C. S. 188 refers to an offence committed without and beyond the limits of British India. It is conceded that the offence under S. 411 was committed beyond the limits of British India. The framing of an alternative charge in the present case does not confer jurisdiction on the Magistrate and under the express terms of S. 188, he cannot exercise it without a certificate from the Political Agent. We think, therefore, that the order of acquittal by the lower Court is correct.

We would, therefore, dismiss the appeal against the order of acquittal, and in the reference made by the learned Sessions Judge we would direct accused 1 to be acquitted and discharged. The bail bond of accused 1 is cancelled.

V.S./R.K. *Appeal dismissed.*

(4) [1919] 41 All. 452=50 I.C. 161=17 A.L.J. 450.

* 1930 Cr. Cases 481

(Bombay)

K. KEMP, J.

Emperor

v.

Wahiduddin Hamiduddin No. 1—Opposite Party.

Case No. 2, Criminal Sessions No. 4 of 1929, Decided on 26th November 1929.

(a) Evidence Act Ss. 9 and 11—Several persons charged of conspiracy—Evidence to

show previous association for criminal purposes with approver is admissible to corroborate approver under S. 9 and/or S. 11 as regards his statement regarding conspiracy.

Where several persons are charged with committing or conspiring to commit a particular dacoity and evidence is tendered to show that prior to the dacoity the accused were closely and intimately associating with the approver and the object of the association was commission of theft and other discreditable acts:

Held: that as far as the evidence of close association with the approver is concerned corroborating the approver's statement that a conspiracy existed, it is admissible under S. 9 and/or S. 11 of the Act. [P 482 C 1]

* (b) Evidence Act, S. 54—Evidence to show character of persons associating with accused and nature of association is also inadmissible.

There is no substantial difference between evidence tending to show the character of the accused and evidence tending to show the character of the persons with whom he is alleged to have associated and the nature of the association. Such evidence is therefore inadmissible. [P 482 C 1]

(c) Evidence Act, S. 14—Evidence of committing theft—Not relevant to show state of mind in committing dacoity.

Evidence of commission of other offences such as thefts does not show an intention to commit a different kind of offence, such as dacoity and is therefore not relevant as showing the existence of any relevant state of mind etc. [P 482 C 1]

Velinker—for the Crown.

Azad—for Opposite Party.

Judgment. In the course of the evidence for the Crown, a question has arisen as to whether the prosecution is entitled to prove not only that accused 2, 3, 4, 5, 6, 7 and 9 were closely and intimately associated with the approver Haji Sirajuddin but that the object of that association during a period of several months prior to the dacoity in question had been the commission of thefts and other discreditable acts. The mere fact that the evidence adduced would tend to show the commission of crimes other than that charged does not of course render it inadmissible, if it is in fact otherwise relevant to any issue properly before the Court. But having regard to the prejudice which must inevitably be introduced by such evidence, especially in a jury trial, I think the Court should be careful to see that its relevancy is clearly made out. The accused above referred to are not in this case charged with belonging to any gang but are charged with committing, or conspiring to commit, a particular dacoity a transaction entirely unconnected with any of the aforesaid thefts.

It is, I think, clear, in the first place, that, in so far as such evidence may be tendered with a view of showing the character of the accused concerned, it would be irrelevant under S. 54, Evidence Act, their bad character not being in itself a fact in issue. Nor would it, to my mind, be relevant in this case under S. 14 as showing the existence of any relevant state of mind, etc., inasmuch as the tendency to commit thefts generally could not fairly be deemed to throw any light on the existence of an intention to commit, or to engage in a conspiracy to commit, this particular dacoity.

Mr. Velinker has in fact given up this contention, but has argued that a conspiracy can in the nature of things ordinarily only be proved by inference, and that the evidence he tenders would show the closeness of the association alleged to have existed, and would therefore be relevant under S. 9, Evidence Act, as supporting the inference suggested and or under S. 11 as making the existence of the conspiracy highly probable. As far as the evidence of close association with the approver is concerned, there could, I think, be no objection to the admission of such evidence, for what it is worth, in support of the approver's statement that a conspiracy in fact existed. But as far as regards the nature and character of the association, I am unable to see that there is any substantial difference in the distinction thus attempted to be drawn between evidence tending to show the character of the accused himself, and evidence tending to show the character of the persons with whom he is alleged to have associated, and the nature of the association. It seems to me that in each case the inference is one against which the law sets its face. To take what is perhaps an extreme case, it would, I think, be highly unreasonable to argue that proof of association with the express object of committing petty thefts renders highly probable the existence of a conspiracy to commit murder; and yet it seems to me to be a conclusion that would follow from the acceptance of the contention here put forward. I, therefore, disallow the evidence tendered on this point.

J.M./R.K.

Evidence disallowed.

1930 Cr. Cases 482

(Bombay)

K. KEMP, J.

Emperor

v.

Wahiduddin Hamiduddin No. 2—Opposite Party.

Case No. 2, Criminal Sessions No. 4 of 1929, Decided on 26th November 1929.

(a) Criminal P. C. (1923), S. 162 — Statement made before Bombay police officer may be proved as applicability of S. 162 is excluded by Criminal P. C., S. 1 (2).

Section 1, sub-S. (2) of the Code lays down that nothing contained in the Act shall apply to the Bombay Police. Therefore S. 162 does not exclude a statement before a Bombay police officer from being proved except in so far as it is inadmissible under the Bombay City Police Act, 1902. [P 483 C 1]

(b) Bombay City Police Act (1902), S. 63 — Terms of S. 63 identical with old Criminal P. C., S. 162 — Objection to evidence must therefore fall under S. 63, Bombay City Police Act.

The terms of S. 63 have remained unaffected by amendment of S. 162, Criminal P. C., by the amending Act of 1923 and remain identical with the corresponding section of the old Code. Therefore any objection to the evidence being admissible must fall within the terms of S. 63, Bombay City Police Act, 1902. [P 483 C 1]

(c) Evidence Act, S. 157 — Written record inadmissible — Still oral evidence of statement before competent police officer may be proved.

For corroborating a witness, his statement before competent police officer at the identification parade held by the police in the course of the investigation may be proved by oral evidence though the written record of the statement is not admissible. [P 483 C 1]

Velinker—for the Crown.

Azad—for Opposite Party.

Judgment.—Mr. Velinker tenders, in corroboration of the evidence of a certain witness for the prosecution, oral evidence of what that witness had said on the occasion of an identification parade held by the police in the course of the investigation. The previous statement relied on is recorded in a panchnama written on that occasion in the presence of a competent police officer. It is objected that evidence, whether oral or written, of that statement is not admissible. The position is that a witness may, under S. 157, Evidence Act, be corroborated by proof of any former statement made by him at or about the time when the fact deposited to took place or before any authority legally competent to investigate the fact. Here there is no question of the

first alternative but the statement objected to was certainly made before an authority legally competent to investigate. The power to investigate, however, would ordinarily rest on the powers conferred on the police by Chap. 14, Criminal P. C., and it is argued that the terms of S. 162 of that Code, as amended in 1923, exclude the evidence now tendered. There is no doubt as to the effect of the amended section, and I need only refer in this connexion to the case of *Emperor v. Vithu Balu* (1). This does not, however, conclude the present case, as the investigation with which I am concerned was one conducted by the Bombay police. I had understood that the distinction was recognized, but I find there is no direct decision on the point. S. 1, sub-S. (2), Criminal P. C., specifically lays down that nothing contained in the Act shall apply to the police in the town of Bombay, and it cannot, therefore, be said that the provision in S. 162 of the Code excluding statements :

"made to a police officer in the course of an investigation under this chapter"

applies to any statement made to a Bombay police officer. Such a statement remains unaffected except in so far as it may be excluded by anything in the City of Bombay Police Act, 1902. The objection of the defence must therefore be based on S. 63 of that Act, and the terms of that section have remained unamended, being still identical with the terms of the corresponding section in the old Code. As such they have been judicially interpreted, by decisions which it is now too late to question and which are certainly binding on me, to mean that, although the use of the written record of the statement of the witness is prohibited, the general provisions of the Evidence Act as to proof of such statement by oral evidence are not overridden, and the statement can be proved by oral evidence and is admissible under S. 157 of the Act. I, therefore, allow the evidence.

J.M./R.K.

Evidence admitted.

* 1930 Cr. Cases 483 (Bombay)

MIRZA AND BROOMFIELD, JJ.

Emperor

v.

Babaji Manaji Patil—Accused.

Criminal Ref. No. 123 of 1929, Decided on 23rd January 1930, made by Sess. Judge, Belgaum.

* Arms Act, S. 19 (f)—Possession of jambia is not offence in Bombay Presidency under S. 19.

Possession of a jambia or a kind of dagger is not an offence under S. 19 unless the prohibition contained in S. 15 has been retained by some notification of the Local Government. The only prohibition retained by the Bombay Government by its notification published at p. 2093 of the Bombay Government Gazette is that contained in S. 13, and therefore possession of a jambia does not constitute an offence in Bombay Presidency under S. 19 (f). [P 483 C 2]

P. B. Shingne—for the Crown.

Broomfield, J.—This is a reference made by the Sessions Judge of Belgaum reporting for the orders of this Court a case in which one Babaji Manaji Patil has been convicted of an offence under S. 19 (f), Arms Act and sentenced to a day's simple imprisonment and a fine of Rs. 40.

The weapon in respect of which the accused was convicted was a jambia, a kind of dagger, which the Sub-Inspector of Police found in his house when searching the house for stolen goods. The possession of such a weapon is not an offence under the Arms Act unless S. 15, which makes the possession of arms of any description without a license an offence, is applicable to the District of Belgaum. It is clear from Sch 2, Arms Act 1878, as amended up to date, that throughout British India, with the exception of the Punjab, Burma and the Delhi Province, all arms except those coming under the general classification of firearms are excluded from the operation of all prohibitions and directions contained in the Act, provided that the Local Government may, by notification in the local official Gazette, retain all or any of the prohibitions and directions contained in the Act in respect of any arms in the case of any class of persons or of any specified area. The possession of this weapon is not, therefore, an offence under S. 19 of the Act unless the prohibition contained in S. 15 of the Act has been retained by some notification of the Local Government.

The notification of the Bombay Government in connexion with Sch. 2 is published at p. 2093 of the Bombay Government Gazette, dated 6th August 1925, and from this it appears that the only prohibition which has been retained is that contained in S. 13. We, therefore, accept the recommendation of the Sessions Judge, set aside the conviction and sentence and direct the fine, if paid, to be refunded.

Mirza, J.—I agree.

V.B./R.K. Conviction set aside.

*** 1930 Cr. Cases 484 ***
(Bombay)

PATKAR AND BAKER, JJ.

Popatlal Bhaichand Shah—Applicant.

v.

Emperor

Criminal Revn. Appln. No. 364 of 1929, Decided on 29th November 1929, against conviction and sentence passed by First Class Magistrate, Bhusaval.

(a) Railways Act, S. 108 — Pulling communication chain to remove overcrowding is sufficient cause under S. 108.

Pulling the communication chain of a railway compartment to remove the overcrowding, which it was the duty of the railway administration to prevent under S. 93 is a reasonable and sufficient cause under S. 108 of the Act : A. I. R. 1924 Pat. 8, Rel. on. [P 84 C 2]

* (b) Railways Act, S. 108 — Additional reasons for pulling chain not sufficient—Accused is not deprived of his defence of other sufficient cause.

The accused is not deprived of the defence under S. 108 of the Act of sufficient and reasonable cause merely because there was an additional reason for pulling the chain which in the opinion of the Magistrate was not sufficient and reasonable. [P 495 C 1]

* (c) Railways Act, S. 121—Obstruction to railway servant in discharge of duties—Pulling chain does not amount to—Railways Act, S. 108.

Where a person without sufficient and reasonable cause pulls the emergency chain, he renders himself liable for prosecution under S. 109 only, and not under S. 121 for preventing the running of the train and thus obstructing or impeding a railway servant in the discharge of his duty : 43 Bom. 103, *Foll.*

[P 485 C 1]

Chhagla and Kamdar & Co.—for Applicant.

P. B. Shingne - for the Crown.

Patkar, J.—In this case the accused was tried on charges under Ss. 108, 109, and 121, Railways Act, and convicted under Ss. 108 and 121, and sentenced to pay a fine of Rs. 25, in default simple imprisonment for one month, for each offence. With regard to the offence under

S. 109, the learned Magistrate found that it was not sufficiently proved that the accused entered the compartment after it contained the maximum number of passengers, and therefore acquitted the accused under S. 258, Criminal P. C.

With regard to the offence under S. 108, Railways Act, the learned Magistrate, relying on the case in *Ishwar Das Varshni v. Emperor* (1), held that the accused pulled the chain for sufficient and reasonable cause for removing the overcrowding. The finding of the Magistrate is that there were forty-five passengers, whereas the utmost capacity allowed by law was for thirty passengers. Under S. 63, Railways Act, it is the duty of the railway administration to fix the maximum number of passengers for each compartment. S. 93 of the Act provides penalty for neglect of the provisions of S. 63. S. 102 provides penalty on a railway servant compelling passengers to enter carriages already full. S. 109 lays down the penalty on a passenger entering a compartment already containing the maximum number of passengers exhibited thereon under S. 63. Whether the cause is reasonable and sufficient would depend on the facts of each particular case. In the present case the necessity for pulling the chain arose from the neglect of the railway administration to observe the provisions of S. 63. We think the accused had reasonable and sufficient cause to pull the chain in order to remove the overcrowding, which it was the duty of the railway administration to prevent under S. 93 of the Act. But the learned Magistrate convicted the accused on the ground that in the written statement of the accused he stated that one of the reasons for pulling the chain was to obtain the names of European passengers who were in the first or second class compartments and who came and used abusive language to him. The accused in his statement stated :

"In this way on account of overcrowding as there was a havoc in the compartment and in order to reduce the overcrowding the railway authorities in spite of their having been told from time to time did not pay heed. I had no other remedy, but to pull the chain for the safety of myself and other passengers and only for as many times as was necessary. Two European passengers abused me and came to assault me. I asked the railway authorities and the police to get me their names. But they did

(1) A. I. R. 1922 Pat. 8 = 1 Pat. 260.

not do so and this is also one of the reasons for pulling the chain."

If the learned Magistrate considered that one of the reasons for pulling the chain, viz., the removal of the overcrowding, was a sufficient and reasonable cause under S. 108 of the Act, we think that the learned Magistrate erred in holding that the accused was deprived of the defence of sufficient and reasonable cause merely because there was an additional reason for pulling the chain which in the opinion of the Magistrate was not sufficient and reasonable. We think, therefore, that the conviction under S. 108 must be set aside.

With regard to the conviction under S. 121, Railways Act, we think that in a case where a person without sufficient and reasonable cause pulls the emergency chain, he renders himself liable for prosecution under S. 103 only, and not under S. 121 for preventing the running of the train and thus obstructing or impeding a railway servant in the discharge of his duty. In the case of *Girjashankar Dayashankar v. B. B. & C. I. Ry. Co. (2)*, Batchelor, J., observes (p. 120) :

"Reading the sections together, the fair conclusion seems to me to be that the stopping of the train by the wrongful pulling of the communication chain is one special kind of obstruction, for which the legislature has made special provision. It has ordained a particular punishment, which is lighter than that allowed for other obstructions presumably because the stopping of the train by this mechanical means is not likely to be attended with any danger to the travelling public. This differentiation of the consequences or results seems to me strongly in favour of the view that the special provisions of S. 108 are not to be controlled by the more general language of the wider sections."

It was, therefore, held by Batchelor, J. following the maxim *generalia specialibus non derogant*, that the offence committed by the plaintiff in that case was punishable under S. 103 and not under S. 121 or S. 123. The facts proved in the present case are not sufficient to attract the operation of S. 103 of the Act. We think therefore, that the accused cannot be convicted under S. 121, Railways Act.

For these reasons we would set aside the convictions and sentences; and order the fines, if paid, to be refunded.

J.M./R.K. *Conviction set aside.*

* 1930 Cr. Cases 485
(Bombay)

MIRZA AND B ROOMFIELD, JJ.

Ganesh Ramchandra Rajwade—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 415 of 1929, Decided on 22nd January 1930, from decision of 1st Class Magistrate, Ratnagiri.

* Motor Vehicles Act, S. 7 (1)—Expression "to ply for hire" means to exhibit vehicle so as to invite public to travel in it.

The expression "to ply for hire" ordinarily means to exhibit a vehicle in such a way as to invite those who may desire to do so to hire it or to travel in it on payment of the usual fares, and also to offer its use on payment to any member of the public, thereby soliciting custom. The owner of a bus driving it on a private errand cannot therefore be said to have been using it as a motor vehicle plying for hire : *A. I. R. 1928 Mad. 166* and *A. I. R. 1929 Lah. 422, Rel. on.* [P 486 C 1]

S. R. Parulekar—for Petitioner.

P. B. Shingne—for the Crown.

Mirza, J.—This is an application for revision of a conviction of the applicant under S. 16, Motor Vehicles Act 8 of 1914. The applicant is the owner of a Ford bus which is licensed to ply for hire. He holds a general license under S. 6, Motor Vehicles Act, which entitles him to drive motor cars generally all over British India. In respect of the Ford bus he has in employment a driver of the name Pathare, who holds a license in form "B" entitling him to drive the bus as a vehicle "let or plying for hire". The applicant also holds a license in form "A" under R. 3 (1) of the rules regulating the use of motor vehicles let or plying for hire which entitled him originally to let or ply the bus for hire on the Ratnagiri-Kolhapur Road only. On 28th April 1920, the applicant was proceeding in the bus from Ratnagiri to Dapoli to interview the District Superintendent of Police who was encamped at Dapoli in order to obtain from him an extension of the permit contained in license form "A" for the bus to ply for hire throughout the Ratnagiri District. The applicant was driving the bus himself on this occasion. He was accompanied by the driver Pathare and two of his friends Messrs. Mandrekar and Rege who are both senior pleaders practising at Ratnagiri. The applicant received no fare from any of the three persons accompanying him in the journey. On these

facts the City Magistrate, First Class, Ratnagiri, before whom the applicant was tried, held that the applicant had contravened the provision of R. 7 (1), Motor Vehicles Rules which requires that a motor vehicle (meaning a motor vehicle let or plying for hire) :

"shall not, in any circumstances, be driven by any person other than a driver, who shall carry with him and produce, whenever required by a police officer, a public driver's 'B' permit, signed by the District Superintendent of Police that he is a competent and careful driver, that he has a thorough knowledge of the rates for hire sanctioned, and that he is in all respects a fit person to be the driver of a motor vehicle to be let or plied for hire."

The learned Government Pleader contends that the use of the words "in any circumstances" in R. 7 (1) implies that once a motor car is licensed for being let or for plying for hire it can be driven only by a driver possessing a permit in form "B" whether as a matter of fact it was at the time let or was plying for hire or not.

In *Local Fund Overseer, Mayavaram v. Pakkirisami Thevan*, A. I. R. 1928 Mad. 166, the Madras High Court has held that the act of plying for hire can only be done at the place and time that the hiring is effected. Similarly, in *Sardul Singh v. Emperor* (1) the Lahore High Court has held that the expression "to ply for hire" as used in the Punjab Motor Vehicles Plying for Hire Rules ordinarily means to exhibit a vehicle in such a way as to invite those who may desire to do so to hire it or to travel in it on payment of the usual fares, and also to offer its use on payment to any member of the public, thereby soliciting custom. The Punjab Motor Vehicles Rules are similar to the rules applicable in the present case. We see no reason to differ from the rulings of these two High Courts. It is clear from the evidence that the applicant was driving the bus on a private errand and cannot be said to have been using it as a motor vehicle meaning a motor vehicle let or plying for hire. We reverse the conviction and sentence and order that the fine if paid, be refunded to the applicant.

Broomfield, J.—I agree.

R.M./H.K. *Conviction set aside.*

*** 1939 Cr. Cases 486**
(Bombay)

MIRZA AND BROOMFIELD, JJ.
Ganpat Dattu Raskar—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 437 of 1929, Decided on 10th January 1930, from order of First Class Magistrate, Kopergaon.

***(a) Factories Act, S. 2 (3) (a)—Gurhal Ghar—Engine shed separate employing less than twenty persons—Total persons employed on crushers and engine shed and boiling pans exceeding twenty—Gurhal Ghar is a factory.**

A Gurhal Ghar is a factory within the meaning of S. 2 (3) (a), Factories Act, even though the engine shed is a separate building and less than twenty persons are employed therein but over twenty persons are employed in the Gurhal Ghar inclusive of those employed on the crushers and those employed in the boiling shed, and these latter must be said to be employed both "on the premises and within the precincts of the Gurhal Ghar." A. I. R. 1927 Mad. 345, *Rel. on.* [P 497 C 1]

(b) Factories Act, S. 2 (3) (a) — Mechanical power used only in aid of manufacturing process—Persons simultaneously employed in premises exceeding twenty—It is a factory.

Even where mechanical power is used only in aid of a manufacturing process but over twenty persons are simultaneously employed on the premises or within the precincts, it is still a factory within the meaning of S. 2 (3) (a). [P 487 C 2]

P. V. Kane—for Applicant.

P. B. Shingne—for the Crown.

Broomfield, J.—This is a revision application against an order of the First Class Magistrate, Kopergaon, convicting the applicant under S. 41 (i), Factories Act, 12 of 1911, as amended up to date, and sentencing him to pay fine of Rs. 20.

The applicant is the manager of a concern called Gurhal Ghar in which jaggery is manufactured from sugarcane. There is an engine in a separate walled room and outside it are machines called crushers for extraction of juice from sugarcane and the juice is then pumped through pipes to a shed in which it is stored in pans for boiling. All these buildings are in the same compound surrounded by a fence. Three men were employed on the engine, fourteen on the crushers and thirty-seven worked in the shed where the pans are. The building has been registered under the Factories Act and the prosecution arose owing to a complaint from the

(1) A. I. R. 1929 Lah. 432=10 Lah. 505.

Assistant Factory Inspector, who on visiting the premises found that the engine was not properly fenced.

The main contention put forward by Mr. Kane who appears for the applicant is that this Gurhal Ghar is not a factory as defined in the Factories Act, and that therefore, S. 18 which relates to the fencing of machinery does not apply to it. "Factory" is defined as follows in S. 2:

(9) "factory" means:

(a) any premises wherein, or within the precincts of which, on any one day in the year not less than twenty persons are simultaneously employed and steam, water or other mechanical power or electrical power is used in aid of any manufacturing process."

It is now argued that as only three persons were employed on the engine and fourteen on the crushers and the remaining thirty-seven in the shed in which the pans are, and as the engine shed and the latter shed are separate buildings, there were not as many as twenty persons simultaneously employed on the premises or within the precincts within the meaning of this definition.

The word "premises" is defined in Murray's Oxford Dictionary as "a house or building with its grounds or other appurtenances." According to the ordinary use of this expression when speaking of a concern like a factory "premises" will include all the buildings of the factory together with the compound in which they stand. "Precinct" is defined in the same dictionary as

"The space enclosed by the walls or other boundaries of a particular place or building" and

"more vaguely, the region lying immediately around a place, without distinct reference to any enclosure, the environs."

It appears to us to be perfectly clear that according to the ordinary use of language all these persons, those employed on the engine, those employed on the crushers and those employed in the boiling shed must be said to be employed both "on the premises" and "within the precincts" thereof, and, if any authority in support of that proposition be required, it will be found in the case of *Ramanadham v. Emperor* (1).

A further point raised was that the manufacturing process in this case does not begin until the juice reaches the pans, and that the crushing of the sugar cane for which the engine is required is

not part of the manufacturing process. It appears to us that there is no substance in this contention. It is to be noted that the purpose for which the persons on the premises are employed is not material. All that the definition requires is that a number of persons not less than twenty shall be simultaneously employed in the premises or within the precincts, and that mechanical power is used in aid of any manufacturing process. It appears to us to be absurd to say that the engine in this case is not used in aid of the process of manufacturing the jaggery.

Finally a point was raised that S. 48 of the Act provides that no prosecution under S. 41 shall be instituted except by or with the previous sanction of the Inspector, which is not shown to have been obtained in this case. This point was not taken at the trial nor has it been raised in the revision application made to this Court. We cannot be sure therefore that we have all the materials before us necessary for the consideration of this point. But we have been referred to a Government Resolution of 1st April 1924, by which the Inspectors and Assistant Inspectors of Factories have been appointed to be Inspectors of Factories within the whole of the Bombay Presidency. The complaint in this case was made by an Assistant Inspector. There seems to be no reason therefore to suppose that there is any substance in this point either.

In our opinion there is no ground for this Court to interfere in revision. The application is dismissed and the rule discharged.

Mirza, J.—I agree.

J.M./R.K.

Rule discharged.

1930 Cr. Cases 487

(Bombay)

MIRZA AND BROOMFIELD, JJ.

Shanmukh Basapa Dhamanji

v.

Emperor

Criminal Ref. No. 132 of 1929, Decided on 30th January 1930, made by Sess. Judge, Belgaum.

Criminal P. C., S. 367 — Language of S. 367 is per-emptory and failure to comply with it vitiates order.

The language of S. 367 is peremptory on the point that the judgment shall contain point or points for determination, the decision thereon and reasons for the decision and consequently

(1) A. I. R. 1927 Mad. 345=50 Mad. 831.

if an appellate Court fails to comply with these requisitions, the irregularity amounts to an illegality and vitiates the order: *A.I.R. 1926 Bom. 512, Dist.* [P 488 C 2, P 489 C 1]

H. B. Gumaste—for Complainant.

P. B. Shingne—for the Crown.

Broomfield, J—This is a reference by the Sessions Judge of Belgaum recommending that an order passed by the District Magistrate of Belgaum, dismissing an appeal, should be set aside on the ground that the order is not in accordance with S. 367, Criminal P. C.

It appears that one Shanmukh and five other persons have been convicted by the Bench Court of Belgaum of offences punishable under Ss. 323 and 426, I. P. C. They appealed and the District Magistrate issued notices and heard both parties. Having done so he passed the following order :

"The lower Court's order contains a full statement of facts and there is nothing for me to describe. The lower Court's appreciation of evidence in the case appears to me to be correct. The appellants' pleaders' arguments were not convincing against the appellant's guilt.

I do not, therefore, see any reason to interfere in the lower Court's judgment. Appeal dismissed."

It is manifest and is not disputed that as the appeal was not summarily dismissed the District Magistrate was required to record a judgment, which judgment should have satisfied the requirements of S. 367. Numerous authorities have been quoted by the Sessions Judge in support of his view that failure to comply with these requirements is a material irregularity which vitiates the decision. The learned Government Pleader, who has opposed the reference, has attempted to distinguish these cases on the ground that the District Magistrate before passing his order made notes of the arguments of pleaders. He suggests that the points for determination in the case can be gathered from these notes of the arguments and that they may fairly be read together with the order as constituting when combined a proper judgment. We are unable to agree with this view. We have read the notes of the arguments and it appears to us that the District Magistrate has merely jotted down a few rough and disconnected notes of certain points which were pressed before him. It cannot be said that these notes contain even the points for determination

in the case, much less the reasons for the decision arrived at by the District Magistrate. Our attention has been drawn to one case: *Emperor v. Patilbuva* (1), in which it was held that an irregularity in the mode of drawing up a judgment, that is to say, the particular irregularity which was noticed in that case, might be cured by S. 537. The whole of the judgment which was then under consideration does not appear to be contained in the report, but from those passages which have been quoted it would appear that it went much further to satisfy the requirements of S. 367, Criminal P. C., than the order with which we are concerned in the present case. We think it desirable to point out that the head-note in this case is misleading. The head-note is :

"Section 537, Criminal P. C., covers any irregularity in the mode in which a Magistrate has drawn up a judgment."

It is quite clear, however, that there is no such finding. Fawcett, J., who delivered the judgment of the Court, merely held that the case before the Court was one in which there was some irregularity in the way in which the Magistrate had drawn up his judgment, and that the irregularity there present could legitimately be brought within the provisions of S. 537. In the present case the irregularity appears to us to be of a more serious nature. We think also that the referring letter of the Sessions Judge ought to weigh with us in the matter. He has stated in his letter that if, upon a perusal of the lower Court's judgment, he had been fully satisfied that no failure of justice had in fact occurred, he might not have troubled the High Court with this reference. In the circumstances we cannot say that the irregularity complained of in the present case is a mere technicality. We think we have no alternative but to set aside the order of the District Magistrate under reference and to direct that the appeal be reheard and judgment recorded in accordance with law.

Mirza, J.—I agree. The language of S. 367, Criminal P. C., is peremptory on the point that the judgment :
"shall contain the points or points for determination, the decision thereon and the reasons for the decision."

(1) *A.I.R. 1926 Bom. 512=28 Bom. L.R. 1029.*

The order with which we are here concerned fails to comply with these requisitions. The irregularity amounts, in my opinion, to an illegality and vitiates the order.

V.B./R.K.

Order set aside.

*** 1930 Cr. Cases 489**

(Bombay)

MIRZA AND BROOMFIELD, JJ.

Sherif Dadumiyaji—Applicant.

v.

Emperor

Criminal Revn. Appln. No. 433 of 1929, Decided on 17th January 1930 against decision of Presy. Magistrate, Second Court, Bombay.

*** (a) Transfer of Property Act, S. 105—Lease and license distinguished—Exclusive possession main characteristic of lease—Agreement giving mere use to occupier restraining possession in owner is a license—Easements Act, S. 52.**

The main test for deciding whether a person is a licensee of a property or a lessee is that of exclusive possession. If the effect of the agreement is to give exclusive possession to the holder, though subject to certain reservations then it is a lease; if the agreement is merely for the use of the property in a certain way and on certain terms while it remains in the possession and control of the owner it is a license: *Glenwood Lumber Co., v. Phillips*, (1904) A. C. 405; *A. I. R. 1923 Bom. 213, Rel. on.* [P 410 C 2]

(b) Deed—Construction—Lease or license—Holder to be in exclusive possession—Duration not specified—Provision for month's notice—Agreement is lease not license.

Where it is clear from the terms of the agreement that the holder is put in exclusive possession of certain premises although the time for which the property was to remain with him is not expressly specified but there is a provision that he need not give vacant possession without one month's notice, this provision implies that the exclusive possession of the holder is to be for one month at least and the effect of the agreement is a lease in favour of the holder. [P 490 C 1]

(c) Bombay City Municipal Act, S. 231—Rent farmer is deemed to be owner.

A person who is a "rent farmer" in respect of certain property is deemed to be the owner thereof within the meaning of S. 231: *A. I. R. 1928 Bom. 527, Foll.* [P 491 C 1]

Y. V. Bhandarkar—for Applicant.

Engineer and Crawford, Bayley & Co.
—for the Crown.

Mirza, J.—The applicant applies for revision of his conviction and sentence on a charge under S. 231, Bombay City Municipal Act.

The Bombay Municipality acquired in 1924 certain premises at Bapty Road for a public purpose which was the extension of the Municipal workshops. At

the date of the acquisition 16 persons including the applicant were in occupation of the premises as tenants from the original owner and were using the premises as bullock and buffalo stables. The municipality did not proceed with the demolition of the stables but allowed the occupants to continue on the premises by leave and license. Later the municipality experienced a difficulty in collecting compensation from the occupants and on 10th March 1925, entered into an agreement with the applicant whereby the applicant was to pay to the municipality a monthly sum of Rs. 180 as compensation for the use and occupation by him as licensee of the said premises. During the continuance of the agreement, the licensee was to be at liberty to continue the occupancy of the remaining 15 occupants of the premises as licensee, to recover from them the amounts they had agreed to pay for their occupancy of the premises as licensees, and in case any of them vacated the premises to substitute for him any other occupant but on condition that such new occupant was to occupy the premises only as licensee and would vacate the same on being given 48 hours' notice. The agreement further provided that the applicant was to give vacant possession of the premises to the municipality on being given one month's notice.

It appears that the applicant is the owner of all the buffaloes that are now on the premises and is using one of the stalls on the premises as a place for garaging his motor car. On 2nd May 1929, the Municipal Commissioner on behalf of the municipality served a requisition on the applicant requiring him under S. 231, Bombay City Municipal Act, to drain the motor garage into the existing drain with all the necessary appliances and fittings. The requisition is dated 24th April 1929. The applicant having failed to comply with the requisition the present prosecution was launched against him.

In his statement before the learned Presidency Magistrate, Second Court, the applicant stated that he was a tenant of the Municipal Commissioner but was not a rent farmer. He admitted that in part of the stable he had kept buffaloes and that there was a garage where he had kept in his motor car. He

further admitted that all the buffaloes in the stable belonged to him.

It has been urged before us by Mr. Bhandarkar on behalf of the applicant that the applicant is not an owner or occupier of the premises within the meaning of S. 231, Bombay City Municipal Act. In view of the applicant's statement before the Magistrate it is not open to Mr. Bhandarkar in our opinion to contend that the applicant is not the occupier of the motor garage in respect of which the requisition has been made. Mr. Bhandarkar has further contended that the requisition made by the municipality is in respect of the premises which are alleged to be in the applicant's occupation as a rent farmer and the applicant is not a rent farmer under the terms of the agreement but only a licensee. The terms of the agreement no doubt do not use the terms lease, demise, or rent. But to constitute a lease it is not essential that such terms should be used.

A lease is defined in S. 105, T. P. Act, as:

"... a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, . . . to be rendered periodically or on specified occasions to the transferrer by the transferee, who accepts the transfer on such terms.

The transferrer is called the lessor, the transferee is called the lessee, the price is called, the premium, and the money, share, service or other thing to be so rendered is called the rent."

It is clear from the terms of the agreement that the applicant was put in exclusive possession of the premises although the time for which the property was to remain in the applicant's possession is not expressly specified. But there is a provision that he need not give vacant possession without a month's notice. That provision, in our opinion, implies that the exclusive possession or enjoyment of the property which the applicant was to have under the agreement was to be at least for a period of one month. Further, there is a provision in the agreement that a sum of Rs. 180 was to be paid every month in respect of the use and occupation of the premises by the applicant. The consideration here set out would, in our opinion, be the money rendered periodically within the terms of the definition in S. 105, T. P. Act.

In order to determine whether the

relation subsisting between the municipality and the applicant is that of lessor and lessee as contended by the municipality or of licensor and licensee as contended by the applicant, regard must be had to the substance of the agreement subsisting between them. The test to be followed in such cases is laid down Halsbury in the article on "landlord and tenant" in Vol. 18 of the Laws of England, p. 337, para. 770, as follows:

"It is essential to the creation of a tenancy of a corporeal hereditament that the tenant should have the right to the exclusive possession of the premises. A grant under which the grantee takes only the right to use the premises without exclusive possession operates as a license, and not as a lease. In deciding whether a grant amounts to a lease, or is only a license, regard must be had to the substance of the agreement. If the effect of the instrument is to give the holder the exclusive right of occupation of the land, though subject to certain reservations, or to a restriction of the purposes for which it may be used, it is a lease: if the contract is merely for the use of the property in a certain way and on certain terms, while it remains in the possession and control of the owner, it is a license. To give exclusive possession there need not be express words to that effect; it is sufficient if the nature of the acts to be done by the grantee require that he should have exclusive possession."

The same principle is illustrated by the case of *Glenwood Lumber Co. v. Phillips* (1). At p. 408 Lord Davey in his judgment observes:

If the effect of the instrument is to give the holder an exclusive right of occupation of the land, though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself."

In the case of *Indian Hotels Co. v. Phiroz* (2). Fawcett, J., in his judgment at p. 89 in comparing the definition of a lease under S. 105, T. P. Act, and a license under S. 52, Easements Act, observes:

"Having regard to these definitions, there is no substantial difference between the Indian and the English Law on the subject. The words "right to enjoy" in S. 105, T. P. Act, when read with the rights of the lessee laid down in S. 105, of the same Act, clearly show that there should also be a right to exclusive possession to constitute a lease under the Transfer of Property Act. Therefore, I take it that the test of exclusive possession is the main one to be applied in deciding this case."

The agreement dated 10th March 1925 amounts, in our opinion, to a lease. The money paid under the agreement is rent. If the applicant is the sole tenant of

(1) [1904] A. C. 405=73 L. J. P. O. 62=20 T. L. R. 531=30 L. T. 741.

(2) A. I. R. 1923 Bom. 228.

these premises he would be the occupier within the meaning of S. 231 and therefore liable to comply with the requisition. If he has allowed other persons to occupy parts of the premises and recovers money or any other consideration from them in respect of such occupancy whether it be called rent or compensation for use and occupation, he would be a rent farmer. The agreement mentions in one of its preambles that the municipality has agreed to farm the premises to the applicant. That also indicates that the intention of the agreement was for the applicant to be the rent farmer in respect of these premises in relation to the then occupants of the premises. If the applicant is to be held to be the rent farmer in respect of these premises he would be deemed to be the "owner" according to the ruling in *Emperor v. Aziz Gaffoor* (3).

The conviction, in our opinion, is correct. The application is dismissed and the rule discharged.

Broomfield, J.—I agree and have nothing to add.

J.M./R.K. *Application dismissed.*

(3) A. I. R. 1928 Bom 527.

1930 Cr. Cases 491 (1)

(Bombay)

MIRZA AND BROOMFIELD, JJ.

Emperor

v.

Ganpat Krishnaji Parit—Accused.

Criminal Ref. No. 115 of 1929, Decided on 23rd January 1930, made by Dist. Magistrate, Kolaba.

* Penal Code, S. 378—Creditor removing property of debtor for coercing him to pay—Creditor commits offence under S. 378.

A creditor by taking any moveable property of the debtor from the debtor's possession without his consent with the intention of coercing him to pay his debt commits the offence of theft as defined in S. 378: 18 All. 88 and 22 Cal. 1017 (F.B.), *Foll.* [P 491 C 2]

P. N. Shingne—for the Crown.

M. V. Bhat—for Accused.

Broomfield, J.—This is a reference made by the District Magistrate, Kolaba, in a case in which one Ganpat Krishnaji has been convicted of an offence under S. 379, I. P. C., and has been bound over for six months under S. 562, Criminal P. C.

The facts are that the complainant owed a small sum of money to the accused, and the accused, in order to put

pressure on him to pay the debt, drove off two bullocks belonging to the complainant, which were grazing, and tied them up in the verandah of his house. The accused pleaded guilty, but the District Magistrate is of opinion that on the facts found the conviction of the offence of theft is illegal, and he recommends that it should be quashed. In our opinion the District Magistrate is mistaken in his view of the law. It has been held in *Queen-Empress v. Aga Muhammad Yusuf* (1) and in *Queen-Empress v. Sri Churn Chungi* (2), the latter a Full Bench ruling, that

"A creditor by taking any moveable property of his debtor from the debtor's possession without his consent with the intention of coercing him to pay his debt commits the offence of theft as defined in S. 378, Penal Code."

The opinion of the trial Magistrate, therefore, that though the accused was guilty of what he calls a technical offence of theft he had no dishonest intention is not correct. We see no reason why we should differ from the statement of the law in the cases referred to.

The conviction is correct and as the accused has been dealt with under S. 562 we see no reason to interfere. The papers should be returned to the District Magistrate.

Mirza, J.—I agree.

v.B./R.K. *Conviction upheld.*

(1) [1895] 18 All. 88=(1895) A. W. N. 233.

(2) [1895] 22 Cal. 1017 (F.B.).

1930 Cr. Cases 491 (2)

(Lahore)

ADDISON, J.

Gurdas and others—Petitioners.

v.

Narain Das—Complainant—Respondent.

Criminal Revn. Petn. No. 1504 of 1929, Decided on 14th February 1930, against order of Sess. Judge, Attock, D/- 11th May 1929.

Criminal P. C., Ss. 145, 146—Where petitioner under S. 145 is not proved to be in possession of house within next two months before preliminary order, action under S. 145 (6) cannot be taken—Opposite Party admittedly in possession at date of order—S. 146 is inapplicable.

N applied under S. 145 for an order restoring him to possession of a house from which he had been dispossessed by G, five days before the date of the petition. G replied that he had been in possession of the house for many years and that there was no such dispute as was likely to bring

about a breach of peace. The Magistrate holding that the evidence of either party was untrustworthy held that it was impossible to decide on the evidence whether any or which of the parties was at the date of his preliminary order in possession of the house. He, however, took action under S. 146.

Held; that the portion of the order of the Magistrate where he stated that it was impossible to decide which party was in possession on the date of the preliminary order was wrong as admittedly *G* had been in possession since at least five days before the application by *N*. There was no necessity to decide as to who was in possession on the date of his order.

[P 492 C 2]

Held further: that it could have been competent for the Magistrate to take action under S. 146, had none of the parties been in possession at the date of the preliminary order if it could not be decided as to which of them was in possession at that date. But as *G* was in possession then S. 146 did not apply. The Magistrate could have also restored possession under S. 145 (6) to *N* if he could have held that he was in possession within two months next before the date of the preliminary order.

[P 492 C 2]

Bhawani Singh Puri—for Petitioners.
Kishan Dayal for Respondent.

Judgment.—One Narain Das applied under S. 145, Criminal P. C., for an order restoring him to possession of a house as he had been dispossessed by Gurdas and some others five days before the date of his petition. The respondents replied that they had been in possession of the house for many years and that there was no such dispute as likely to bring about a breach of the peace, particularly as the respondents had already been bound down under S. 107, Criminal P. C. at the instance of the petitioners. The Magistrate First Class held that the evidence of both parties was equally interested and untrustworthy and that he was not prepared to accept the evidence of either side. He therefore held that it was impossible to decide on this evidence whether any and which of the parties was at the date of his preliminary order in possession of the house. He was unable to hold that the petitioner had been dispossessed forcibly and wrongfully within two months before the date of his order. He, however, considered it proper to take action under S. 146, Criminal P. C., and ordered the attachment of the property until a competent Court determined the rights of the parties thereto or the person entitled to possession thereof. Against this order both sides have put in revision petitions in this Court.

That portion of the order of the Magistrate, First Class, is clearly wrong where he states that he is not prepared on the basis of the oral and contradictory evidence to decide whether any and which of the parties was at the date of his preliminary order in possession of the house. Admittedly the respondents have been in possession of the house since at least five days before the petitioner presented his application. The respondents continued in possession and they were in possession at the date of the Magistrate's preliminary order. There was, therefore, no necessity to decide who was in possession on the date of the Magistrate's preliminary order for that was admitted. What the Magistrate meant to find was that he could not say on the evidence who was in possession within two months next before the date of his preliminary order.

In these circumstances it is obvious that S. 146 does not apply. Had none of the parties been in possession at the date of the Magistrate's preliminary order, or if it could not be decided as to which of them was in possession at that date, it would have been competent for the Magistrate to take action under S. 146. But as the respondents were in possession then, that section did not apply. Of course, if the Magistrate could have held that the petitioner was in possession within two months next before the date of his preliminary order, under S. 145 (6) he could have restored the possession to the petitioner. As he was unable to come to this finding and as the respondents were in possession on the date of his preliminary order the matter ended there.

I, therefore, dismiss Criminal Revision No 1845 of 1929, presented by the petitioner and, accepting Criminal Revision No. 1504 of 1929 presented by the respondents, I set aside the Magistrate's order of attachment. The respondents must remain in possession until dispossessed in due course of law.

R.M./R.K.

Order accordingly.

1930 Cr. Cases 493

(Madras)

BEASLEY, C. J., AND

PANDALAI J.

(Shroff) Veerappa and others — Accused — Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Cases Nos. 336 and 337 of 1929 and Criminal Revn. Petns. Nos. 303 and 304 of 1929, Decided on 17th October 1929, from orders of Sess. Judge, Kurnool, D/- 25th March 1929, in Criminal Revn. Petns. Nos. 1 and 2 of 1929.

(a) Madras Local Boards Act (1920), S. 166 (1)—S. 166 (1) is intended to make persons who use road of District Local Board to pay for that privilege.

Section 166 (1) is intended to make persons who use the road of a District Board for making money by using motor vehicles upon it pay for that privilege. The first part is intended to make persons who ply a motor vehicle for hire within the limits of the District Board pay for it by taking out a license, and the latter part of it is intended to make persons who pick up passengers at separate fares outside the area of the District Board and who carry those passengers over a road of the District Board also take out a license : A. I. R. 1928 Mad. 166, Dist. [P 494 C 2]

(b) Madras Local Boards Act (1920), S. 166 (1)—Meaning of "separate fares" explained.

What is meant by "separate fares" is individual fares as distinguished from a fixed amount for the whole vehicle. [P 494 C 2]

(c) Interpretation of Statutes — Words clearly expressing intention of legislature—Definition from English cases should not be accepted.

Where a Court is dealing with the words of a section which clearly express the intention of the legislature, no definitions of the same words should be accepted from English cases. [P 494 C 2]

L. C. Veeraraghava Iyer — for Petitioners.

Public Prosecutor—for the Crown.

Order. — The Assistant Engineer, Kurnool, under the authority of the President, District Board, Kurnool, filed a complaint against the owner and driver respectively of Bus No. K. V. 62 alleging that they had committed an offence by using that bus on 14th October 1928 for carrying passengers at separate fares on the Chittoor—Kurnool road without the District Board's license, an offence coming within the purview of S. 166 (1), Madras Local Boards Act of 1920 and punishable under S. 207 of that Act. The complaint was presented to the Stationary

Sub-Magistrate, Kurnool. He recorded the complainant's sworn statement and, holding that the act complained of was not "plying a bus for hire" and that the contracts with the passengers had been entered into within the limits of the Kurnool Municipality and not within the limits of the jurisdiction of the District Board, decided that upon the allegations made, there had been no contravention of S. 166 (1), Local Boards Act. He therefore dismissed the complaint. A petition for revision was presented to the Sessions Court, Kurnool Division by the complainant against that order and the Sessions Judge set aside the order of the Sub-Magistrate and directed the District Magistrate to take the complaint on the file and make such further enquiry into it as was necessary under the law. Against that order the petitioners have presented this criminal revision petition.

According to the sworn statement of the Local Fund Assistant Engineer, on the date in question the bus was carrying passengers at "separate fares" from Kurnool to Nandyal and the owner of the bus had not obtained the license from the District Board required by S. 166 (1), Madras Local Boards Act. The facts seem to be that the passengers were picked up within the municipal limits of Kurnool and carried in the bus to Nandyal going over, in the course of the journey, one of the roads belonging to the District Board of Kurnool. For the purposes of the argument before us and in the Court below it was not suggested that any passengers were picked up by the petitioners at any place within the limits of the District Board.

The short point for consideration by us is whether this motor bus under the circumstances must obtain a license from the District Board of Kurnool. S. 166 (1), Madras Local Boards Act is as follows :

"No person shall, on any public road in a district, ply any motor vehicle for hire or use any such vehicle for carrying passengers or goods at separate fares or rates on such road, except on a license obtained from the President of the District Board."

The Stationary Sub-Magistrate held that the second part of Cl. (1), S. 166 namely, "use any such vehicle for carrying passengers or goods" must have the same interpretation placed

upon it as that applicable to the first part, namely, "plying for hire," and that, as there had been no plying for hire within the limits of the District Board's area, no license was necessary and no offence had been committed. Before the learned Sessions Judge the petitioners relied on a decision reported in *Local Fund Overseer, Mayavaram v. Pakkiriswami Thevan* (1). In that case Madhavan Nair and Curgenvan, JJ. held that a person who lets out his car for hire within a municipality need not obtain a license from a District Board, if the car travels beyond the municipal limits and traverses any of the District Board roads and that the "plying of a motor vehicle for hire" means the act of waiting for or soliciting custom, and therefore, so soon as any person has hired it, the act of plying for hire is complete and that it cannot be said that a vehicle plies for hire on a public road merely because it is made use of a hired vehicle on that road and that a vehicle cannot be said to ply for hire on a road unless the actual hiring takes place on that road. The facts are set out on p. 215 as follows:

"The case was tried as a summons case and he was asked to show cause why he should not be convicted upon a complaint that he had plied his motor car for hire from Mayavaram to Tranquebar on the 27th, 28th and 29th March 1925 without obtaining a license."

Although, however, the terms of the complaint were not supported by the prosecution evidence, a defence witness was examined who deposed that the accused was in the habit of letting out his car for hire to vakils, mirasdars and others wishing to engage a car for a trip from Mayavaram. It may be taken, therefore, that the accused in this case admitted hiring out his car for journeys from Mayavaram. In the other case (C. C. 200) the question put to the accused was in similar terms and the evidence was in consonance with it. In both the cases only the first portion of S. 166 (1) would apply, because admittedly there is no proof that the vehicles were used for carrying passengers or goods at separate fares or rates. The statement of the facts, in our view, makes this clearly distinguishable from that because according to the sworn statement of the Local Fund Assistant Engineer the passengers in

this case were carried at separate fares whereas in *Local Fund Overseer, Mayavaram v. Pakkiriswami Thevan* (1) the whole bus had been engaged for the trip from Mayavaram. Therefore the only thing that that Bench had to consider was the first part of S. 166 (1) and not the latter part of it and the argument on behalf of the Board in that case was that a vehicle plies for hire on a public road if it is made use of as a hired vehicle on that road, so that it is not a necessary condition that the actual hiring should take place upon that road. That argument, however, did not find favour with that Bench and we think quite rightly. We are in entire agreement with the decision in that case. But here the facts are different. Before us on behalf of the petitioners it is argued that the latter words of Cl. (1) of the section namely, "use any such vehicle for carrying passengers at separate fares" on a District Board road mean plying for hire on the District Board road. If this is so, then the latter part of the clause is redundant. We cannot accept that argument. We think that that section is intended to make persons who use the road of a District Board for making money by using motor vehicles upon it pay for that privilege. The first part is intended to make persons who ply a motor vehicle for hire within the limits of the District Board pay for it by taking out a license and the latter part of it is, in our view intended to make persons who pick up passengers at separate fares outside the area of the District Board and who carry those passengers over a road of the District Board also take out a license. What is meant by "separate fares" is individual fares as distinguished from a fixed amount for the whole vehicle and it was as we read the facts in the *Local Fund Overseer, Mayavaram v. Pakkiriswami Thevan* (1) the latter case that was there being considered.

We are referred to several English cases but except where the definitions are given of what is "plying for hire" they do not assist us because we are here dealing with the words of a section which in our view, clearly express the intention of the legislature. Under these circumstances, we are satisfied that the order of the Sessions

(1) A. I. R. 1928 Mad. 166=51 Mad. 527.

Judge was quite proper and we agree with the reasons he has given for that order. This criminal revision case is, therefore dismissed. For the reasons given above, criminal revision case 337 of 1929 is also dismissed.

P.R.S./V.S.

Petition dismissed.

1930 Cr. Cases 495

(Madras)

WALLACE, J.

Nogi Reddy—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 946 of 1928, and Criminal Rvyn. Petn. No. 683 of 1928, Decided on 26th April 1929, from judgment of Sess. Judge, Kurnool, in Criminal Appeal No. 12 of 1928.

(a) Criminal Trial—Judgment vitiated by confusion and wrong notion about facts cannot be upheld—Criminal P. C. S. 439.

A judgment in a criminal appeal, which is vitiated by a confusion of ideas, by a wrong view of facts and by a too cursory dismissal of the defence evidence, cannot be upheld in revision. [P 495 C 2]

(b) Criminal P. C., S. 202—Person making enquiry under S. 202 can import his personal knowledge.

There is nothing which prohibits a person to whom a complaint is sent for enquiry under S. 202 from importing his own personal knowledge into it or examining witnesses whom he knows to be able to throw light on the matter : *A. I. R. 1927 Mad. 19, Ref.* [P 496 C 2]

V. V. Srinivasa Iyengar and B. Somayya—*for* Petitioner.

N. S. Mani *for* Public Prosecutor—*for* the Crown.

Order.—This is a petition against the conviction of the petitioner for criminal misappropriation. It was charged and found against the petitioner that he in his capacity as Village Munsiff misappropriated for himself a sum of Rs. 10 collected by him from the complainant in the case. The conviction was confirmed on appeal and the petitioner asks me to interfere in revision.

It is necessary to go shortly into the facts alleged. The petitioner admits having passed to the complainant a receipt for Rs. 10, Ex. A-1, on 12th January 1928. That receipt is on a sheet of paper and appears between two other receipts, Ex. A, for Rs. 10 dated 3rd January 1928, and Ex. A-2, for Rs. 20 on 5th February 1928. Exs. A-1 and A-2 are on a piece of paper which has been passed to the sheet on which A

appears. The complainant's case was that he paid all three sums. It is admitted by the petitioner that no credit has been given in his accounts to the complainant for the payment on 12th January 1928. His explanation is that no payment was made on that date, but that he made the entry as the complainant said to him that he had lost the former sheet with the receipt given on 3rd January 1928, and so he has given a duplicate. In explanation of the difference of date the petitioner's case was that as the complainant did not remember the date he himself only inserted the year and the month and that the figure 12 is not his. The complainant examined in the witness box stated that the payment of Rs. 10 on 12th January 1928, was entered on the same sheet as the receipt Ex. A, and that a new sheet was begun with the receipt Ex. 42 on 5th February 1928. That is quite obviously not correct. On the other hand, the petitioner has not explained how if the sheet containing A was not with him when he entered A-1, he entered the word "ditto" in Cols. 2 and 4, and why the entry A-1 is not stated therein to be a duplicate receipt. I do not further go into these points as I am of opinion that the appeal will have to be re-heard by the lower Court and I do not wish to hamper its decision.

I consider that the appeal must be re-heard because the lower Court's judgment is vitiated by a confusion of ideas and by a too cursory dismissal of the defence evidence. The defence case was that the complaint which the complainant made to the Tahsildar really was not that he had paid Rs. 10 to the petitioner which has not been credited but that he had paid Rs. 5 in excess of what was due. The petitioner admitted that he had collected a few rupees in excess from the complainant but that excess collection was duly credited and therefore, was not misappropriated. Such small excess collections are very common and almost inevitable during the kist collection season, and so long as they are duly credited no real harm is done. But the lower appellate Court fixes on the admission of excess collection as an admission that the petitioner had dishonestly collected that amount and as a proof, therefore, of embezzle.

ment. That is obviously a wrong view altogether, since the accounts show the excess collection and, therefore, there was nothing dishonest about it. In another part of its judgment the lower appellate Court seems to think that there was not, as a fact any excess collection. I do not follow its argument here. It admits that the actual amount due from the complainant was Rs. 56-3-10. The trial Court puts at Rs. 55, and that the complainant paid Rs. 30 to the petitioner, and then Rs. 29-11-9 on a distraint. So obviously there was excess collection. The Sessions Judge thinks D. W. No. 8 in setting out the story of this excess collection "gives away the appellant completely," and in another passage he speaks of the defence story as being that complainant suspected the petitioner of having misappropriated Rs. 5; but the defence story was that the complainant suspected the petitioner of having collected Rs. 5 in excess. As a matter of fact this excess collection has no real relevancy to the case of the embezzlement of Rs. 10 and the fact that a few rupees were collected in excess and credited in the petitioner's account is no evidence whatever that he collected and misappropriated Rs. 10.

The Sessions Judge again too cursorily dismissed the defence evidence. The strong part of the defence case was the evidence of the Tahsildar and his Revenue Inspector and duffadar that on 11th February 1928 the complainant had admitted to them that his only complaint against the petitioner was the matter of the excess collection and not any matter of misappropriation. It happened that the complainant in this case was sent on 20th March 1928, by the Magistrate to the Tahsildar (as Taluk Magistrate) for enquiry under S. 202, Criminal P. C. He examined the karnam who supported the complainant and returned the complaint with his opinion (Ex. G) that the petitioner was criminally responsible. When it was returned again with a direction to examine the petitioner himself the Taluk Magistrate refused to do so quoting a recent Full Bench decision of this Court in *Appa Rao Mudaliar v. Janki Ammal* (1). Now in

neither report by him did the Tahsildar mention that at a conversation a few days earlier the complainant had admitted that he had no complaint to make about the misappropriation; nor did he examine the Revenue Inspector and duffadar about this conversation. This is undoubtedly a remarkable circumstance to which due weight has to be given. The Tahsildar's explanation is that at that stage he should not import facts within his personal knowledge, and thought he had no jurisdiction to examine the Revenue Inspector and duffadar. He was not pressed further and asked what provision of law prevented him from examining them or importing his own personal knowledge. It is suggested before me that he might have thought that the Full Bench decision prevented him from going into the accused's side of the case. If it were so his view was clearly mistaken. There is nothing in the decision which prohibits a person to whom a complaint is sent for enquiry under S. 202 from importing his own personal knowledge into it or examining witnesses whom he knows to be able to throw light on the matter. But the lower appellate Court has jumped, rather hastily, to my mind, to the conclusion that the Tahsildar's explanation is dishonest, and that the story of the admission of the complainant is, therefore, untrue. I think this part of the case requires a more balanced consideration than has been given to it especially since the lower Court proceeds to infer from the Tahsildar's dishonesty that neither the Revenue Inspector nor the duffadar can be speaking the truth. I regard the lower appellate Court's judgment as vitiated by these unsatisfactory features which have prevented a proper decision of the appeal. I consider that the appeal ought to be re-heard because the alleged offence is not a trivial one, and if really committed by the petitioner he cannot be allowed to go unpunished. I, therefore, reverse the decision of the lower appellate Court and remand the appeal for being re-heard. The petitioner will remain on bail pending the re-hearing.

P.R.S./V.S. *

Case remanded.

(1) A. I. R. 1927 Mad. 19-46 Mad. 918 (F.B.).

1930 Cr. Cases 497

(Madras)

CURGENVEN, J.

Ramanujam Naidu—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 115 of 1929 and Criminal Revn. Petn. No. 97 of 1928. Decided on 29th July 1929, from judgment of Joint Magistrate, Kumbakonam, in Criminal Appeal No. 49 of 1928.

Motor Vehicles Act, S. 4 (a)—Police officer stopping vehicle need not be one engaged in regulating traffic.

Part (a) of the section requires that a driver should stop in three sets of circumstances, firstly that traffic may be regulated, secondly that a name and address may be obtained with a view to prosecution, and thirdly for the purpose of enforcing any of the provisions of the Act, such as checking the license and inspecting a bus where it is suspected to be overloaded and it is not necessary that the police officer stopping the vehicle should be engaged in regulating traffic. [P 497 C 2]

Watrap S. Subramania Ayyar—for Petitioner.

K. Venkatraghavachari for Public Prosecutor—for the Crown.

Judgment.—These proceedings under the Motor Vehicles Act were instituted against the petitioner on a report by Head Constable No. 1346 to the Sub-Inspector of Kumbakonam. In the charge framed against him it was alleged that he drove bus No. 333 in Kaluthai Tope Road, Kumbakonam, and "instead of stopping his bus on seeing bus No. 416, which came in the opposite direction, and without caring for the regulation under which C. P. I. (the Circle Inspector) asked him to stop, drove very fast."

There are two separate actions imputed in this charge, the first being that the accused failed to stop his bus on seeing bus No. 416. I understand it to be the rule that, when two motor buses are about to pass each other, it is the duty of one of them to stop, presumably in the interests of safety. It has been admitted, however, by the prosecution in this case that, on the occasion in question, it was the duty of the driver of the other bus 416 to stop his vehicle and accordingly the petitioner was found not guilty of failing to observe this rule.

There remains the charge that he failed to stop when the Circle Inspector asked him to do so. It has been contended on behalf of the petitioner that, under S. 4, Motor Vehicles Act, a driver

can only be stopped by a police officer who is engaged in regulating traffic. This, I think, is so clearly against the language of the section as not to merit further discussion. Part (a) of the section requires that a driver should stop in three sets of circumstances, firstly, that traffic may be regulated, secondly that a name and address may be obtained with a view to a prosecution, and thirdly, for the purpose of enforcing any of the provisions of the Act. The allegation by the prosecution is that the bus was overloaded and that the Inspector wished to inspect it and to check the license. These, I think, were reasons for stopping it coming under the third and last category above the enforcement of the Act.

There remains the question of fact whether, before the petitioner's bus passed the bus in which the Inspector was seated, he made a sign to the petitioner to stop which the petitioner saw and disregarded. I should in ordinary circumstances have accepted the evidence of the two police witnesses, were there not considerable difficulty in the way of such a course. The report of the Head Constable, which certainly ought to contain the elements of the offence charged is, as I read it, that the petitioner's bus ought to have stopped when passing the other bus and that it not only failed to do so but did not stop in spite of the order of the Circle Inspector. I am quite unable to extract from this report the definite statement that, irrespective of the rule requiring the stopping of the bus upon meeting the other bus, the Circle Inspector signalled to the petitioner to stop before the passing took place. This is also the impression which I get from the examination-in-chief of both the Head Constable and the Circle Inspector. The Head Constable says :

"Bus Tan No. 333 driven by the accused passed and it was not stopped even when I and the Inspector asked him to do so."

In chief examination the Inspector says "It did not stop when it passed my bus" and it was only elicited from him in cross-examination that hands were put up to stop the bus. The driver and the conductor of bus No. 416 were examined as D. Ws. 1 and 2 and one was unable to state whether, before the accused passed bus No. 416, the Inspec-

ment. That is obviously a wrong view altogether, since the accounts show the excess collection and, therefore, there was nothing dishonest about it. In another part of its judgment the lower appellate Court seems to think that there was not, as a fact any excess collection. I do not follow its argument here. It admits that the actual amount due from the complainant was Rs. 56-3-10. The trial Court puts at Rs. 55, and that the complainant paid Rs. 30 to the petitioner, and then Rs. 29-11-9 on a distraint. So obviously there was excess collection. The Sessions Judge thinks D. W. No. 8 in setting out the story of this excess collection "gives away the appellant completely," and in another passage he speaks of the defence story as being that complainant suspected the petitioner of having misappropriated Rs. 5; but the defence story was that the complainant suspected the petitioner of having collected Rs. 5 in excess. As a matter of fact this excess collection has no real relevancy to the case of the embezzlement of Rs. 10 and the fact that a few rupees were collected in excess and credited in the petitioner's account is no evidence whatever that he collected and misappropriated Rs. 10.

The Sessions Judge again too cursorily dismissed the defence evidence. The strong part of the defence case was the evidence of the Tahsildar and his Revenue Inspector and duffadar that on 11th February 1928 the complainant had admitted to them that his only complaint against the petitioner was the matter of the excess collection and not any matter of misappropriation. It happened that the complainant in this case was sent on 20th March 1928, by the Magistrate to the Tahsildar (as Taluk Magistrate) for enquiry under S. 202, Criminal P. C. He examined the karnam who supported the complainant and returned the complaint with his opinion (Ex. G) that the petitioner was criminally responsible. When it was returned again with a direction to examine the petitioner himself the Taluk Magistrate refused to do so quoting a recent Full Bench decision of this Court in *Appa Rao Mudaliar v. Janki Ammal* (1). Now in

neither report by him did the Tahsildar mention that at a conversation a few days earlier the complainant had admitted that he had no complaint to make about the misappropriation; nor did he examine the Revenue Inspector and duffadar about this conversation. This is undoubtedly a remarkable circumstance to which due weight has to be given. The Tahsildar's explanation is that at that stage he should not import facts within his personal knowledge, and thought he had no jurisdiction to examine the Revenue Inspector and duffadar. He was not pressed further and asked what provision of law prevented him from examining them or importing his own personal knowledge. It is suggested before me that he might have thought that the Full Bench decision prevented him from going into the accused's side of the case. If it were so his view was clearly mistaken. There is nothing in the decision which prohibits a person to whom a complaint is sent for enquiry under S. 202 from importing his own personal knowledge into it or examining witnesses whom he knows to be able to throw light on the matter. But the lower appellate Court has jumped, rather hastily, to my mind, to the conclusion that the Tahsildar's explanation is dishonest, and that the story of the admission of the complainant is, therefore, untrue. I think this part of the case requires a more balanced consideration than has been given to it especially since the lower Court proceeds to infer from the Tahsildar's dishonesty that neither the Revenue Inspector nor the duffadar can be speaking the truth. I regard the lower appellate Court's judgment as vitiated by these unsatisfactory features which have prevented a proper decision of the appeal. I consider that the appeal ought to be re-heard because the alleged offence is not a trivial one, and if really committed by the petitioner he cannot be allowed to go unpunished. I, therefore, reverse the decision of the lower appellate Court and remand the appeal for being re-heard. The petitioner will remain on bail pending the re-hearing.

P.R.S./V.S. c

Case remanded.

(1) A. I. R. 1927 Mad. 19=46 Mad. 918 (F.B.).

1930 Cr. Cases 497

(Madras)

CURGENVEN, J.

Ramanujam Naidu—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 115 of 1929 and Criminal Revn. Petn. No. 97 of 1928, Decided on 29th July 1929, from judgment of Joint Magistrate, Kumbakonam, in Criminal Appeal No. 49 of 1928.

Motor Vehicles Act, S. 4 (a) — Police officer stopping vehicle need not be one engaged in regulating traffic.

Part (a) of the section requires that a driver should stop in three sets of circumstances, firstly that traffic may be regulated, secondly that a name and address may be obtained with a view to prosecution, and thirdly for the purpose of enforcing any of the provisions of the Act, such as checking the license and inspecting a bus where it is suspected to be overloaded and it is not necessary that the police officer stopping the vehicle should be engaged in regulating traffic. [P 497 C 2]

Watrap S. Subramania Ayyar—for Petitioner.

K. Venkatraghavachari for Public Prosecutor—for the Crown.

Judgment.—These proceedings under the Motor Vehicles Act were instituted against the petitioner on a report by Head Constable No. 1346 to the Sub-Inspector of Kumbakonam. In the charge framed against him it was alleged that he drove bus No. 333 in Kaluthai Tope Road, Kumbakonam, and "instead of stopping his bus on seeing bus No. 416, which came in the opposite direction, and without caring for the regulation under which C. P. I. (the Circle Inspector) asked him to stop, drove very fast."

There are two separate actions imputed in this charge, the first being that the accused failed to stop his bus on seeing bus No. 416. I understand it to be the rule that, when two motor buses are about to pass each other, it is the duty of one of them to stop, presumably in the interests of safety. It has been admitted, however, by the prosecution in this case that, on the occasion in question, it was the duty of the driver of the other bus 416 to stop his vehicle and accordingly the petitioner was found not guilty of failing to observe this rule.

There remains the charge that he failed to stop when the Circle Inspector asked him to do so. It has been contended on behalf of the petitioner that, under S. 4, Motor Vehicles Act, a driver

can only be stopped by a police officer who is engaged in regulating traffic. This, I think, is so clearly against the language of the section as not to merit further discussion. Part (a) of the section requires that a driver should stop in three sets of circumstances, firstly, that traffic may be regulated, secondly that a name and address may be obtained with a view to a prosecution, and thirdly, for the purpose of enforcing any of the provisions of the Act. The allegation by the prosecution is that the bus was overloaded and that the Inspector wished to inspect it and to check the license. These, I think, were reasons for stopping it coming under the third and last category above the enforcement of the Act.

There remains the question of fact whether, before the petitioner's bus passed the bus in which the Inspector was seated, he made a sign to the petitioner to stop which the petitioner saw and disregarded. I should in ordinary circumstances have accepted the evidence of the two police witnesses, were there not considerable difficulty in the way of such a course. The report of the Head Constable, which certainly ought to contain the elements of the offence charged is, as I read it, that the petitioner's bus ought to have stopped when passing the other bus and that it not only failed to do so but did not stop in spite of the order of the Circle Inspector. I am quite unable to extract from this report the definite statement that, irrespective of the rule requiring the stopping of the bus upon meeting the other bus, the Circle Inspector signalled to the petitioner to stop before the passing took place. This is also the impression which I get from the examination-in-chief of both the Head Constable and the Circle Inspector. The Head Constable says :

"Bus Tan No. 333 driven by the accused passed and it was not stopped even when I and the Inspector asked him to do so."

In chief examination the Inspector says "It did not stop when it passed my bus" and it was only elicited from him in cross-examination that hands were put up to stop the bus. The driver and the conductor of bus No. 416 were examined as D. Ws. 1 and 2 and one was unable to state whether, before the accused passed bus No. 416, the Inspec-

tor raised his hand, whereas the other denied that such an action took place. There is no doubt that, after the petitioner had driven his bus by, the police officers called out to him to stop and he eventually stopped. But inasmuch as the conviction is based on the finding that the petitioner received and disregarded the signal to stop before passing the other bus I am unable to agree that the evidence supports it.

I allow the petition, set aside the conviction and direct that the petitioner be acquitted and the fine, if paid, be refunded.

F.R.S./P.R. *Conviction set aside.*

1930 Cr. Cases 498 (Madras.)

BEASLEY, C. J., AND PANDALAI, J.
Gunduthalayan — Accused — Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 432 of 1929 and Criminal Revn. No. 733 of 1929, Decided on 2nd November 1929, from order of Sess. Judge, Salem, in Criminal Case No. 18 of 1929.

(a) Penal Code, S. 302 — High Court's power to enhance sentence defined.

The High Court should not enhance the sentence unless it is satisfied that the sentence of death was the only possible sentence which could have been passed by the Sessions Judge: *A. I. R. 1925 Bom. 268, Rel. on.* [P 499 C 2]

(b) Criminal P. C., S. 423—Appeal to High Court—It is desirable before sending notice of enhancement of sentence, that record of case is sent for.

Although it is quite legal for High Court to issue notice of enhancement at the time of admitting an appeal, when an appeal comes up for admission by the appellate Court, it would be desirable if before causing a notice to show cause against enhancement of sentence to be sent, the records of the case were sent for.

[P 499 C 2]

N. S. Mani—for Appellant.

Public Prosecutor—for the Crown.

Beasley, C. J.—There were two charges against accused in the Sessions Court of Salem, one of murder under S. 302, I. P. C. and the other of causing hurt with a dangerous weapon under S. 324, I. P. C. He was convicted of both the offences and was given a sentence of transportation for life in respect of the charge of murder and three months' rigorous imprisonment in respect of the other charge.

When the appeal came up for admission by the High Court the learned

Judge who had to consider it admitted the appeal as of course is the invariable custom in cases of murder appeals, and at the same time ordered notice to issue to the accused to show cause why the sentence of transportation for life awarded to him should not be enhanced; so that we have here his appeal against his conviction and also his appearance on notice to show cause why the sentence passed on him should not be enhanced.

The facts of the case can be stated quite briefly and they are that in the village of Pavalathampatti there was the usual festival in connexion with the Pongal and the procession of bulls in front of the temple and the custom, according to the evidence, is that the first honours should go to certain persons. In this case, P. W. 10, was entitled to the first honours, according to the evidence being so entitled on the hereditary principle. But the accused who is a distant cousin questioned P. W. 10's right to enjoy the first honours; there was a dispute about it and the Goundan headman thought that it would be better to adjourn the bull play for two days in order that the matter might be settled. Then (there is a conflict about this), the accused is said by the majority of the prosecution witnesses to have objected to any adjournment of the play saying that he was entitled to the honours; and there is evidence that the deceased man also objected to the adjournment saying that the matter might be decided on the spot, that the deceased remonstrated with the accused for interfering with the judgment of the headman and that the result was a sort of a challenge to him, whereupon the accused took out his knife and stabbed him on his left nipple inflicting a very serious injury from which he died. At this P. W. 3 ran forward to interfere and he was also stabbed by the accused and this forms the subject of the other charge against the accused, namely, causing hurt with a dangerous weapon. The dying man was taken to the Salem Hospital. In the meantime his father, P. W. 6, gave a report to the Village Munsiff in which the accused was charged with the offences. The deceased also made a dying declaration, Ex. C, to the Stationary Sub-Magistrate in which he sets out the dispute with regard to the honours and states that

it was the accused who stabbed him. He died on the 17th, the date of the occurrence being the 15th. Although in his defence the accused denies that he ever stabbed the deceased and says that the crime was foisted on him, the evidence is quite clear and abundantly proves that it was the accused and none other who stabbed the deceased and clearly justifies his conviction of the offence of murder and Mr. Mani who appears on his behalf does not dispute the justice of his conviction. He, however, is concerned with the question of sentence and argues that under all the circumstances the sentence passed by the learned Sessions Judge is the correct one and the learned Sessions Judge has properly exercised his discretion in awarding the lesser sentence. What the learned Sessions Judge says about it is contained in para 6 of his judgment. He therein states

"As regards the punishment to be awarded, this appears to be an offence committed without premeditation. Some evidence has been adduced for the prosecution that there was ill feeling between the accused and the deceased on account of a woman called Thailammal, who had been allowing the accused her favours, and whom the accused suspected of becoming intimate with the deceased. I do not attach much weight to this evidence, and I do not think that any such enmity was the cause of the stabbing. I find, therefore, that the offence was committed without premeditation and on one of these unfortunate momentary impulses which seem to be so common amongst the inhabitants of this district. I consider, therefore, that the accused, who is a young man of 24, may be shown mercy; and the sentence of the Court is that he be sentenced to transportation for life upon the first count under S. 302, I. P. C."

Those are the reasons given by the learned Sessions Judge and we think the proper test to be applied to these cases for enhancement of sentence is whether the only sentence which could have been passed on the evidence was the sentence of death. In a case before a Bench of the Bombay High Court, *Emperor v. Mangal* (1), Sir Norman Macleod, C. J. says this:

"There are many murder cases which come on appeal to this Court in which it has been evident that the Sessions Judges were too lenient and had exercised the discretion which they are given by law too much in favour of the accused. But, as I have already stated, we do not like to interfere except when we think that the sentence of death is the only possible sentence to be inflicted. In this case, although we think that the Sessions Judge

ought to have sentenced the accused to death, we are not disposed to proceed with the notice to enhance the sentence."

We are of the opinion that the reasons stated by Sir Norman Macleod, C. J. for not interfering with the discretion of the Sessions Judge are sound, namely, that the High Court should not enhance the sentence unless it is satisfied that the sentence of death was the only possible sentence which could have been passed by the learned Sessions Judge. In this case, although we think that the sentence that should have been passed upon the accused was one of death, we cannot say that it was the only possible sentence which could have been passed.

Under those circumstances we are not disposed to interfere with the punishment awarded by the learned Sessions Judge.

At the same time we are quite satisfied that the accused was properly convicted of the offence of murder and of causing hurt with a dangerous weapon and his appeal against his conviction must be dismissed.

Another matter to which our attention was directed by Mr. Mani was that the learned Judge who admitted the appeal ought not, at the time of admitting the appeal, to have caused notice to issue for enhancement of sentence and that the proper procedure is for the Criminal Bench itself on hearing an appeal, if satisfied that there should be an enhancement of the sentence, to issue notice to show cause against enhancement and he has referred us to the case in *Emperor v. Mangal* (1), to which we have already referred. But in that case the Bench of the Bombay High Court, whilst holding that this procedure adopted was quite legal, expressed the opinion that it was undesirable. We agree that the procedure is not illegal and it is one which has been very frequently adopted in this Court. At the same time we wish to say that we think that when an appeal comes up for admission by the appellate Court it would be desirable in future if, before causing a notice to show cause against enhancement of sentence to be sent, the records of the case were sent for. We think that would be more regular than merely reading the judgment of the learned Sessions Judge and

(1) A. I. R. 1925 Bom. 263=19 Bom. 450.

issuing notice as was done in this case though no doubt sufficient of the facts appear in that judgment.

P.R.S./V.B. *Appeal dismissed.*

1930 Cr. Cases 500 (1) (Madras)

JACKSON, J.

Public Prosecutor—Appellant.

v.

Munusami Mudali—Accused—Respondent.

Criminal Appeal No. 329 of 1929, Decided on 6th September 1929, from acquittal order of Sess. Judge, North Arcot, in Criminal Appeal No. 40 of 1928.

Madras Abkari Act (1 of 1886), S. 30—Officer has no power to arrest though armed with search warrant.

Though an officer armed with his own report can arrest a person under S. 31 an officer armed with a search warrant from the Collector under S. 30 is not authorized under that or any other section to arrest. [P 500 C 1]

S. Venkatachala Sastri—for Respondent.

Judgment.—This is an appeal against an acquittal. Accused was acquitted for an offence under S. 224, I. P. C., because his arrest in his house by a searching abkari officer was held to be illegal.

The point taken by the learned Public Prosecutor is that under S. 30, Act 1 of 1886, the Collector may issue a warrant authorizing a search, and under S. 31 an abkari or police officer of a certain rank after recording reasons may search. The officer in the latter case under S. 31 may, if necessary, arrest, but, though the person to whom a warrant is given, may be an officer of the same rank, he is not authorized under S. 30 or any other section to arrest. It is anomalous that an officer armed with nothing more than his own report can arrest, and an officer armed with a regular search warrant cannot arrest.

I fully see the anomaly, but I am unable to read the Act so as to avoid it. The Act seems to be badly drafted.

In these circumstances, the acquittal must stand. The appeal is dismissed.

P.R.S./J.M. *Appeal dismissed.*

* 1930 Cr. Cases 500 (2) (Madras)

JACKSON, J.

Ramasami Mudaliar—Petitioner.

v.

Ramalinga Udayar and another—Respondents.

Criminal Revn. Case No. 755 of 1929, and Criminal Revn. Petn. No. 684 of 1929, Decided on 21st November 1929, from order of Addl. Dist. Magistrate, Tanjore, D/- 26th August 1929.

* Criminal P. C., Ss. 251 to 259—Accused leading evidence of good character by way of defence—Prosecution cannot as of right lead rebutting evidence—If essential to just decision, Magistrate may allow such rebutting evidence but prosecution cannot insist upon his doing so.

In a warrant case tried under Chap. 21, when the accused leads evidence of good character by way of defence the prosecution cannot as a matter of right claim to lead rebutting evidence for the Code of Criminal Procedure gives the prosecution no such privilege. If the Magistrate in his discretion thinks such evidence essential to the just decision of the case he may summon it, but the prosecution cannot insist upon his doing so. [P 500 C 2]

A. Srirangachariar for V. *Rathnam*—for Petitioner.

Parakat Govinda Menon—for the Crown.

Order.—The question raised in this petition is whether in a warrant case tried under Chap. 21, Criminal P. C., when the accused leads evidence of good character by way of defence, the prosecution may as a matter of right claim to lead rebutting evidence. The learned Magistrate is right in holding that the Criminal Procedure Code gives the prosecution no such privilege. If the Magistrate in his discretion thinks such evidence essential to the just decision of the case he may summon it, but the prosecution cannot insist upon his doing so.

The reason for this rule is probably that it is only in rare cases that general evidence of good character is of much avail; especially as till the contrary is proved an accused person is always presumed to be of good character. Therefore, to make character a substantial issue in an ordinary case would be waste of time. Anyhow the law of procedure is clear, and there is no ground for this petition. The petition is dismissed.

P.R.S./V.S.

Petition dismissed.

1930 Cr. Cases 501

(Nagpur)

PRIDEAUX, A. J. C.

Punamchand Amarchand Marwadi—
Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal. No. 27-B of 1928,
Decided on 12th September 1928.

Criminal P. C., S. 237—Accused charged with substantive offence only—Conviction for abetment is legal if on facts both charges could be sustained

A person charged with substantive offence may be convicted of abetment although the offence of abetment was not separately charged against him provided on the facts charged the two charges, namely, the commission of the substantive offence and abetment could be framed: 23 *M. L. J.* 722, *Rel. on*; 33 *Mad.* 264 and *A. I. R.* 1927 *Cal.* 63 *Ref.* [P 501 C 1]

H. S. Gour—for Appellant.

G. P. Dick—for the Crown.

Judgment.—In Civil Suit No. 266 of 1924 on the file of the Sub-Judge No. 2, Yeotmal, Udobhan son of Madhoji sued Mt. Tulja wife of Narayan, and Nenuram son of Jogidas Marwari, on a contract alleged to have been entered into with the plaintiff by defendant 1 for the sale of her two fields Survey Nos. 9 and 42 of mouza Kotamba. These fields were said to be inherited by the woman on the death of her mother Mt. Mukti. She was to sell for Rs. 1,100 and was alleged to have executed a souda-chitti on 24th February 1924, having received Rs. 1,000, and agreeing to execute the sale deed within a month. She failed to do so. She was said to have executed a bogus sale-deed in defendant 2's favour on 12th April 1924, of the same fields. The plaintiff sued for specific performance of the contract of sale on payment of Rs. 100, the balance of the consideration.

For defendant 1 it was contended that on the death of her father Zingu, who owned the fields Survey Nos. 42 and 9, about 27 years ago his widows Deoki and Mukti enjoyed this land till their death. Deoki sold Survey No. 42 to Narayan and Tukaram 18 years ago and Mukti, i. e., defendant 1's mother, sold Survey No. 9 to Bhagoo Bhamti about 25 years ago. Defendant 1 was the sole heir of her father Zingu on the death of his widows and defendant 2 fraudulently got a sale deed from her on 12th April 1924, without giving her any

writing about the agreement to give her Survey No. 9. One Punamchand who attested that sale deed undertook to fight out a litigation with defendant 2 and to give Survey No. 9 to defendant 1 and in order to do so he obtained thumb marks of defendant on blank papers. It was denied that defendant 1 ever entered into any contract of sale of the fields with the plaintiff or executed the souda-chitti, dated 24th February 1924 or received any consideration.

For defendant 2 it was denied that defendant 1 executed the souda-chitti. It was said to be antedated, bogus, fraudulent and fabricated after the sale-deed to defendant 2 to defraud him. Punamchand was said to have created it in the name of the plaintiff, his servant having himself attested defendant 2's sale deed. Defendant 2 further contended that he was a bona fide purchaser for value without notice of the alleged contract of sale in plaintiff's favour and that as such the contract could not be enforced as against him.

The suit was tried on the following issues:

"1 (a) Did defendant 1 agree to sell the fields in suit to plaintiff for valid consideration as per plaint?

(b) If so, did defendant 2 know of it at the date of his sale-deed?

(c) Is the transaction under the souda patrak dated 24th February 1924, a real genuine one?

"2 (a) Is the souda chitti dated 24th February 1924, antedated, bogus, fraudulent and fabricated to defraud defendant 2 as alleged?

(b) Is it obtained by one Punamchand under misrepresentation and fraud and under the circumstances alleged by defendant 1, in the plaintiff's name as alleged?

(c) Is the agreement under the souda chitti in suit with plaintiff for an inadequate consideration as alleged?

"3 (a) Is defendant 2 a bona fide purchaser of the property from defendant 1 without notice of the alleged agreement of sale with plaintiff?

(b) If so, can the plaintiff's agreement of sale be enforced by superseding defendant 2's sale-deed in suit?

"4. Is the plaintiff's claim not maintainable for not including the relief of possession as alleged?

"5. Should the agreement of sale in suit be specifically enforced?

"6. To what relief, if any, is the plaintiff entitled?"

The Judge in his judgment, referring to the evidence adduced by the plaintiff, writes:

"It clearly reveals the fraudulent nature of the transaction embodied in the souda-patrak. It exposes Punamchand Marwari completely, though he had taken all care to screen himself

in order to finance and fight out the litigation as a third uninterested party. This he obviously did as he had attested the sale-deed in favour of defendant 2. I have carefully considered the evidence adduced to prove that the date 25th February 1924, of the death of Mukti mother of Tulja, in the register of births and deaths for Kotumba maintained at the Police Station, Babulgaon, was false and fabricated later on."

The Judge found that the fields were worth Rs. 5000 to Rs. 6000 and that the consideration of the agreement of sale was grossly inadequate. The entry of 25th February 1924, was genuine. He found on issue 1 (a) and (c) in the negative and the whole of issue 2 in the affirmative. Dealing with issue 1 (b) and issue 3 (a) and (b) the Judge found that defendant 2 was the purchaser of the fields from Tulja for value, and further that he had no notice of the alleged agreement to sell in the plaintiff's favour, and that the agreement of sale could not be specifically enforced. The plaintiff's claim was dismissed with costs. This judgment was dated 30th November 1925.

The Judge on 1st December 1925, suo motu took proceedings under S. 476, Criminal P. C., for offences under Ss. 463, 467, 471, 191 and 192 and 196, I. P. C., in respect of the souda-chitti dated 24th February 1924, filed by Udebhan, the plaintiff in Civil Suit No. 266 of 1924. Notices were issued to Udebhan, Laxman, Bahiru, Bholchand and Punamchand. Those proceedings resulted in an order dated 22nd July 1926, the Sub-Judge finding that the non-applicants committed the offences mentioned above, namely, under S. 109 read with Ss. 467 and 471, and under S. 193 read with S. 191, I. P. C., and that the non-applicant Udebhan had also committed an offence under S. 423. The Judge held that Punamchand had brought into existence a false souda chitti, and ordered the complaint against the four persons to be tried.

Punamchand, Laxman, Bahiru and Udebhan came to this Court in Civil Revisions Nos. 182-B to 185-B of 1926 against the order of the District Judge, Amraoti, who rejected an application made to him against the complaint laid. The four civil revisions were rejected here. Bholchand had died and, therefore, did not come to this Court.

The criminal case was committed to the Court of Sessions. Laxman, a plea-

der's clerk, was given a pardon and Udebhan, Bahiru and Punamchand were sent to stand their trial before the Court of Sessions. The trial resulted in the conviction of Udebhan and Bahiru under S. 467, I. P. C., they being given three months' rigorous imprisonment each, and in the conviction of Punamchand under the same section, he being sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs. 4,000 or in default to further rigorous imprisonment for one year. Against that conviction the present appeal has been filed.

Before entering into the legal objection raised to the appellant's conviction I will deal with the arguments advanced on the merits of the case. Much time was spent to establish the unreliability of the entries in the Kotwar's book and the police station register as regards the date of the death of Mukti, mother of Mt. Tulja. But it is unnecessary to go into this in any detail, for I agree with the opinion expressed by the trial Court in para 10 of its judgment that it would be unsafe to rely upon the entries in Exs. P-8 and P-14. And the recital in Ex. P-17 tends to show that Mt. Mukti died on 25th February 1924. But even if that has not been established, and the woman died on 22nd February, we have the approver's story that the souda chitti was not executed until the month of May 1924. The conviction really depends on the approver's statement and its corroboration in material particulars. Much of his story is admitted by the defence. Tulja seems now to have been got at, but in the civil suit it is clear that she admitted that she gave a blank paper to Punamchand with the thumb-impression on it, being told that the paper would be used to write the plaint on which the suit was intended to be brought. She denied then executing the souda-chitti in favour of Udebhan and said it was false and fraudulent. In her present statement she also states, though siding with the present appellant Punamchand, that he took her thumb-mark on four blank papers, and denies that she executed the souda-chitti. It seems to me that the story of the approver as regards the blank paper with her thumb-impression on it has been sufficiently corroborated.

There are other circumstances in the case which leave little doubt as to Punamchand's guilt. His story is that he had a ten annas eight pies share in the sale taken in the name of Nenuram, Nenuram and Pannalal owing the balance, and he has called evidence to show that this was the case, and that entries showing this transaction were entered in the books of Hiralal. This is denied by Nenuram, and Panralal states that Punamchand had no interest in that transaction. But taking it for granted that this was the case, it does not follow that Punamchand then held the souda-chithi dated February, that year executed in the name of his servant Udebhan. And it further seems that because Nenuram and Pannalal denied Punamchand's interest in Nenuram's sale, deed that the false souda-chitthi was called into being. It is very unlikely that there should have been any sale in the name of Nenuram alone if the property could already be claimed by Punamchand from his servant Udebhan. The sale-deed itself states that the property had not been sold nor was it encumbered by Tulja. It has to be remembered that Punamchand was an attesting witness to that document, and I find it hard to believe that he would, by that attestation, agree to a sale to Nenuram alone, though he and Pannalal might have had a share in it, when in reality the property, which it is evident he was very anxious to obtain, was in his power to obtain by virtue of a civil suit in the name of the nominal transferee Udebhan. All the circumstances point to the truth of the approver's story, that Mt. Tulja was not present when the souda-chitthi was prepared and that the document was antedated.

It seems to me that it has been established that the false souda-chitthi was executed at Yeotmal and not at Kotamba. Reliance is placed on the evidence of witnesses 2, 3 and 4 for the defence who testify to the dharwar chitthi. The story of that dharwar chitthi and its assignment by Chunnilal to the appellant seems to have been carefully manufactured to meet a case like the present arising out of the transaction. I think that the approver's story is true and that the souda-chitthi is a forgery.

The charge under which the appellant has been convicted is one under S. 467,

viz., forgery of a valuable security. An elaborate legal argument has been addressed to me by the learned counsel for the appellant, contending that though his client might be guilty of an abetment of forgery he cannot be punished for the offence of forgery itself, nor can he be punished for the abetment without being charged with that specific offence; and that at least the case must go back to enable the Sessions Court to charge the accused with abetment of forgery. Now, the case is that though the appellant did not actually with his own hand scribe the false document, yet he had it made and was present when it was prepared. I am referred to the case of *Padmanabha Panji Kannaya v. Emperor* (1) and *Hulas Chand Baid v. Emperor* (2), which lays down that the effect of the recent amendment of S. 238, Criminal P. C., by the insertion of sub-S. 2-A therein, specifically mentioning the case of an "attempt" to commit an offence, is that S. 238, Criminal P. C., does not justify a conviction for abetment without a separate charge therefor, and it is argued that the defective charge cannot be changed here. But it seems to me that S. 238, Criminal P. C., provides for conviction for a minor offence where evidence is insufficient to prove a graver offence. S. 114, I. P. C., lays down that whenever any person is present when the act or offence, for which he would be punishable in consequence of the abetment, is committed, he shall be deemed to have committed such act or offence.

Section 238, Criminal P. C., expressly provides that when a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged. The test seems to me to be that all the legally necessary elements of the offence of which the accused is convicted are also necessary elements of the offence with which the accused was charged. The graver charge gives the accused notice of all the circumstances going to constitute the minor charge of which he may be convicted; and it seems to me immaterial in the present case whether the accused was tried for a substantive offence or abetment. S. 236,

(1) [1910] 33 Mad. 254=2) M. L. J. 34=5 I. C. 145=7 M. L. T. 79.

(2) A. I. R. 1927 Cal. 63.

Criminal P. C., lays down that where there is doubt as to what offence has been committed, the accused may be charged with having committed all or any of such offences, or he may be charged in the alternative with having committed some one of the said offences; and in which case, under S. 237, of that Code, if the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of S. 236, he may be convicted of the offence which he is shown to have committed, although he was not charged with it. Sundara Aiyar, J., in *Subhaya v. Emperor* (3), after referring to *Padmanabha Panji Kannaya v. Emperor* (1), the case relied on by the appellant states:

"I do not think that the learned Judges, who decided the case: *Padmanabha Panji Kannaya v. Emperor* (1), intended to lay down a universal rule that in no case can a conviction for abetment be possible where the charge was only of the principal offence. The question is what were the facts charged? If on those facts two charges could be framed namely, the commission of the principal offence, and the abetment, then by virtue of provisions of S. 237, the accused may be convicted of the offence of the abetment though it was not charged separately against him. The Act lays down no specific provision with respect to the question decided here. But the principle is laid down in Ss. 236 and 237."

In the present case, not only did the accused instigate the forgery of the souda-chitthi but he was present when the forgery was made, and it seems to me that the appellant is the real person, and the actual writer may have been the abettor; and appellant being present he is guilty of the principal offence. I think that in the present case the accused could have been convicted under S. 464/114 on the present charge.

I confirm the conviction. As to the sentence it is argued that it is severe. But here we have the case that not only did the accused make a false document but that a suit was filed thereon, and under these circumstances I do not think the punishment inflicted, viz., that of three years' rigorous imprisonment and a fine of Rs. 4,000, can be deemed excessive. The appeal is dismissed. The appellant's bailbond is cancelled and he is sent to Yeotmal.

V.B./R.K.

Appeal dismissed.

(3) [1912] 23 M. L. J. 722=15 I. C. 85=(1912) M. W. N. 735.

1930 Cr. Cases 504

(Nagpur)

SUBHEDAR, A. J. C.

Kondia—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 6-B of 1929, Decided on 22nd April 1929, from decision of 2nd Addl. Sess. Judge, Akola, D/- 19th September 1928, in Criminal Appeal No. 261 of 1928.

Criminal P. C., S. 110 — Testimony of police officer that person is by habit thief only matter of opinion and hearsay—Such evidence is inadmissible under S. 110.

•The testimony of a police officer that a person is by habit a thief is inadmissible in evidence against a person against whom proceedings are instituted under S. 110 when such evidence is only a matter of opinion and hearsay. This fact, however, is not sufficient to set aside the order passed against him under S. 110 when the latest incident is coupled with two previous convictions on charges of his belonging to, and associated with, a gang of habitual thieves and robbers: 48 *Mad* 450, *Rel. on.*

[P 504 C 2, P 505 C 1]

G. G. Hatvalna—for Applicant.

G. P. Dick—for the Crown.

Order.—The applicant, who has had two previous convictions under S. 401, I. P. C., has been bound over by the Sub-Divisional Magistrate, Akola, under S. 110 (a) read with S. 118, Criminal P. C., to be of good behaviour for a period of one year. This order was passed on 7th August 1928. It was sought to be revised under S. 125, Criminal P. C., by the District Magistrate, Akola, who, however, refused to interfere in the matter. An appeal was then filed by the applicant to the Court of the Additional Sessions Judge, Akola, but it was also rejected and he has, therefore, come up to this Court in revision.

It is contended on behalf of the applicant that there is no evidence except that of the police officers to prove that the applicant was by habit a thief, and therefore in the absence of more reliable evidence no order under S. 110, Criminal P. C., should have been passed against him. It is also argued that the testimony of these police officers is only a matter of opinion and hearsay, and therefore was not admissible as a piece of evidence.

Having myself read the evidence of the police officers (P. Ws. 1, 2, 6, 7 and 8) the remarks made by the learned pleader for the applicant with regard

to the legal character of their evidence are perfectly true in the light of the observations to be found in the case of *K. Ranga Reddi v. Emperor* (1). I, therefore, agree that the whole of this evidence was inadmissible and legally insufficient to prove that the applicant was by habit a thief.

But as the learned Government Advocate rightly contended that is not enough to discharge the order passed by the Sub-Divisional Magistrate against the applicant. It is admitted that the applicant has had two previous convictions under S. 401, I. P. C., though a long time has elapsed since the last conviction. The latest incident that happened at the shop of Mt. Badji (P. W. 3) which has been believed in by all the three lower Courts coupled with the two previous convictions on charges of his belonging to and associated with a gang of habitual thieves and robbers, is, in my opinion, enough to warrant the passing of the order for binding the applicant over to be of good behaviour. I accordingly uphold the order sought to be revised and dismiss this application for revision.

P.N./R.K.

Order upheld.

(1) [1920] 48 Mad. 450 = 33 M. L. J. 97 = 11 M. L. W. 331 = 55 I. C. 722 = (1920) M. W. N. 393.

1930 Cr. Cases 505

(Nagpur)

MOHIUDDIN, A. J. C.

Ramdularey—Accused—Applicant.

v.

Manohar—Complainant—Non-Applicant.

Criminal Revn. No. 344 of 1929, Decided on 28th November 1929, from decision of Dist. Magistrate, Bilaspur, D/- 29th July 1929, in Criminal Appeal No. 105 of 1929.

Cattle Trespass Act, S. 22—Compensation cannot be awarded in absence of loss and unless specifically claimed—Sentence of imprisonment under S. 22 in default of compensation is illegal.

Compensation under S. 22 cannot be allowed in the absence of loss alleged or proved. The Magistrate cannot award it arbitrarily at his own sweet will. The complainant must make a specific claim about it. Further the Magistrate can only award compensation for illegal seizure of cattle and cannot impose fine. He is also not competent under S. 22 to pass sentence of imprisonment and thus when he passes a sentence of imprisonment in default of payment of compensation, the sentence is illegal. [P 505 C 2]

S. T. Bhawe—for Applicant.

Order.—The applicant *Ramdularey* was convicted under S. 22, Cattle Trespass Act, by Mr. C. F. Cleophas, Magistrate, Second Class, Bilaspur, and was ordered to pay Rs. 140-13-0 as compensation. He filed an appeal in the Court of District Magistrate, Bilaspur, who reduced the compensation, for the loss caused by the seizure or detention from Rs. 70-6-6 to Rs. 20 and ordered that: "in default of these payments, the accused shall suffer simple imprisonment for one month."

The only ground pressed by the learned pleader for the applicant runs as follows:

"The lower appellate Court erred in allowing under S. 22, Cattle Trespass Act, compensation Rs. 20 to the complainant in the absence of any loss alleged or proved."

The contention is correct and must prevail. There is no allegation either in the complaint dated 1st September 1918 or in the statements made by *Manohar* on 1st September 1928, 18th September 1928 and 4th May 1929 that any loss was caused by the seizure or detention. The law has provided summary and expeditious mode of recovering compensation under S. 22, Cattle Trespass Act, for loss caused by such seizure and detention, but it cannot be awarded arbitrarily at the sweet will of the Magistrate, unless the complainant makes a specific claim about it. No such claim was made in this case. The complainant, not having claimed any compensation, was not entitled to any. The order passed by the District Magistrate awarding Rs. 20 as compensation is wrong and illegal and is hereby set aside.

The use of the word "fine" in para. 3 of the judgment of the lower appellate Court is also wrong. No fine can be imposed under S. 22, Cattle Trespass Act, and a Magistrate can only award compensation for illegal seizure of cattle. The learned District Magistrate has also passed the following order:

"In default of these payments, the accused shall suffer simple imprisonment for one month."

A sentence of imprisonment in default of payment of compensation is illegal. A Magistrate is not competent to pass a sentence of imprisonment under S. 22, Cattle Trespass Act. As laid down in S. 23 of the same Act,

the compensation, fines and expenses mentioned in S. 22, may be recovered as if they were fines imposed by the Magistrate. The order about the payment of fines paid and expenses incurred by the complainant in procuring the release of cattle and about the Court costs is upheld, and the order about "reasonable compensation" is set aside. The amount if already paid will be refunded to the applicant.

P.N./R.K. *Order set aside.*

1930 Cr. Cases 506(1).

(Nagpur)

MACNAIR, A. J. C.

Mathuraprasad—Applicant.

v.

Narendra Singh and others—Non-Applicants.

Criminal Revn. No. 410 of 1929, Decided on 5th December 1929, from order of Addl. Sess. Judge, Jubbulpore, D/- 23rd July 1929.

Criminal P. C., S. 439—Complaint enquired into by two Magistrates and dismissed—Sessions Judge refusing to take action in revision—High Court will interfere only if there is strong probability that further enquiry will result in conviction.

Where a complaint is dismissed under S. 203 but under directions of the Sessions Judge an enquiry is again made into the case by another Magistrate with the result that no sufficient grounds are made to commit him to sessions trial and where the Sessions Judge refuses to revise the order, there must be very strong reasons for the High Court to interfere and it will interfere only if there is a very strong probability that further enquiry would result in a conviction: 26 All. 564, *Hel. on.* [P 506 C. 2]

Forbes—for Applicant.

Order.—A man named Patali Dhait was found lying dead in a railway line, the head being completely severed from the body, on 5th September 1927. The police considered the advisability of charging the non-applicants with causing his death but decided to take no action. The applicant Mathuraprasad, brother of deceased, filed a complaint against the non-applicants. This complaint after investigation was dismissed under S. 203, Criminal P. C. The Sessions Judge directed further enquiry into the case and a full inquiry was made by another Magistrate, Mr. Dewey. Mr. Dewey considered there were no sufficient grounds for committing the accused to sessions trial. The applicant applied to the Sessions Judge for

revision of this order but his application was unsuccessful. He has now applied to this Court asking that further enquiry should be ordered.

In *Fattu v. Fattu* (1), Knox, J., remarked that, where an accused person had been discharged and the Sessions Judge directed a commitment, the High Court should be most unwilling to interfere. It is obvious that, where the Sessions Judge refused to take action, this Court should require even stronger grounds before deciding to interfere. The offence in this case was committed two years ago. There have been enquiries before two Magistrates and interference in this Court would be proper only if there was a strong probability that further enquiry would result in a conviction. There is no special reason for holding that the evidence of the witnesses, who have been disbelieved by the experienced Magistrate who heard them, is, in reality, convincing. It is not of great consequence that the Magistrate has laid excessive stress on contradictions which are, perhaps, not material. *Satola* made a statement at an early stage, but this is not a strong guarantee that his statement is true. Evidence about hearing cries in the night is of a nature which renders it open to doubt. None of the witnesses appear to be above suspicion. The evidence of Col. Oxley throws great doubt upon the prosecution case. I see no reason to think that Mr. Dewey was wrong in thinking that there was no really credible evidence to support the prosecution case: there is certainly no reason for interference by this Court. This application is dismissed.

P.N./R.K.

Revision dismissed.

(1) [1904] 26 All. 534=1 A. L. J. 292=(1901) A. W. N. 125.

1930 Cr. Cases 506(2)

(Nagpur)

MACNAIR, A. J. C.

Emperor

v.

Chotekhan and others—Non-Applicants.

Criminal Rev. No. 452 of 1929, Decided on 10th January 1930, case reported by Sessions Judge, Jubbulpore, under S. 438, Criminal P. C.

Criminal P. C., S. 340—Deputy Commissioner appointing Public Prosecutor to defend accused—Public Prosecutor though not member of bar held to have been so appointed by accused—Criminal P. C., S. 4 (r).

The District Magistrate considering it possible that the complaint against two Government Officials was a false one, made in consequence of the accused performing their duty, directed the Prosecuting Inspector to defend the accused. The trying Magistrate allowed the Prosecutor to so defend the accused.

Held: that though the Public Prosecutor was not a member of the Bar it could not be held that he was not a person appointed by the accused with the permission of the Court to defend them though it was desirable that they had made such appointment: *A. I. R. 1926 Bom. 218, Ref.* [P 507 C 1, 2]

V. Bose—for the Crown.

Judgment.—The Sessions Judge, Jubbulpore, reports the case under S. 438, Criminal P. C. A complaint of criminal trespass and assault was filed against two Government Officers. The District Magistrate, considering it possible that this complaint was a false one made in consequence of the accused performing their duty, directed the Prosecuting Inspector to defend the accused. The trying Magistrate, in an order dated 13th November 1929 allowed the Prosecuting Inspector to appear for the defence: the Magistrate recognised that the direction of the District Magistrate did not override the necessity of permission of the Court. The pleader for the complainant objected to his appearance and the Sessions Judge made a reference to this Court, expressing the opinion that the order of the District Magistrate was *ultra vires*; he stated that it was doubtful whether the time of the Public Prosecutor should be utilized in defending cases.

It is not for this Court to decide how a Prosecuting Inspector should be employed. The only question I have to consider is whether the Inspector, who is not a member of the Bar, was rightly allowed by the Court to defend an accused person. S. 310, Criminal P. C., states that an accused may be defended by a pleader. S. 4 (r) of the same Code states that "a pleader" included any person appointed by the permission of the Court to act in a proceeding. The definition of "pleader" was recently considered by the Bombay High Court in *Emperor v. Dorabsha Bomanji* (1). The words are general, and I can see no reason for holding that the Prosecuting

Inspector was not a person appointed by the accused with the permission of the Court to defend them, though it is desirable that they had made such appointment. There is no reason for interference by this Court. The case is returned to the trying Magistrate.

P.N./R.K.

Revision dismissed.

1930 Cr. Cases 507

(Madras)

BEASLEY, C. J. AND PANDALAI, J.

V. Seeniah Naidu — Complainant — Petitioner.

Abdul Wahab Sahib — Accused — Respondent.

Criminal Revn. Case No. 156 of 1929 and Criminal Revn. Petn. No. 135 of 1929, Decided on 25th October 1929, against judgment of Sub-Divisional First Class Magistrate, Chittoor, D/- 13th August 1928.

(a) Criminal P. C., S. 250 (3) — Appeal against order for compensation — Forum indicated in Chap. 31 — Appellate Court competent to record additional evidence under Criminal P. C., S. 428.

Though S. 250 (3) gives the complainant a right to appeal against an order for compensation in certain cases the section does not indicate a forum, which has to be found out by reference to Chap. 31. The appeal would therefore lie under S. 250 (3) coupled with the relevant section in Chap. 31 viz. S. 407 and all the provisions in that chapter including the power to take additional evidence given by S. 428 apply. *A. I. R. 1923 Mad. 331 and 33 Mad. 90 Dist.* [P 508 C 2]

(b) Criminal P. C., S. 428 — Additional evidence taken—Reasons not recorded — No failure of justice—Proceedings not vitiated.

Where the omission of the appellate Court to record reasons for taking additional evidence under S. 428 does not cause a failure of justice the proceedings are not vitiated. [P 508 C 2]

S. Nagaraja Ayyar—for Petitioner.

K. Venkataragavashari — for Respondent.

Pandalai, J. — This is a petition to revise the order of the Sub-Divisional Magistrate of Chittoor dismissing the appeal to him from an order of the Stationary Sub-Magistrate of Chittoor whereby the petitioner who was the complainant in a case of assault before that Magistrate was ordered to pay under S. 250, Criminal P. C., Rs. 100 by way of compensation to the accused as, in his opinion, the complaint was false and vexatious.

Two points are taken in this petition, viz., (1) that the appellate Magistrate

acted without jurisdiction in taking further evidence purporting to act under S. 428, Criminal P. C., because, according to the appellant's advocate, the appeal was not one under Chap. 31, Criminal P. C., to which alone S. 428 applies and (2) that the appellate Magistrate acted illegally in omitting to record reasons for taking further evidence as he was required to do under S. 428.

As to the first objection reliance is placed upon the decision of Devadoss, J. in *Sami Vannia Nainar v. Penaswami Naidu* (1), in which that learned Judge held that in an appeal under S. 476 (b), Criminal P. C., the appellate Court has no jurisdiction to take additional evidence whether the party objected to the reception of such evidence or not. I do not think that that decision is applicable to this case. The ground of that decision was that an appeal under S. 476(b), Criminal P. C., was not one under Chap. 31 of that Code. That decision was itself based upon an earlier decision in *Krishna Reddi v. Emperor* (2) to the same effect. The reason of that decision is seen from the terms of S. 476(b) itself which says that any person on whose application a Court has refused to make a complaint under S. 476 or against whom such a complaint has been made may appeal to the Court to which such Court is subordinate. Upon the terms of that section it is clear that not only the right of appeal but the forum to which the appeal should be preferred are clearly prescribed. That section is in other words self-sufficient and any appeal under that section is not one under Chap. 31.

In this case, however, that is not so. S. 250 (3) says that a complainant or informant who has been ordered by a Magistrate of the second or third class to pay compensation or has been so ordered by any other Magistrate to pay compensation exceeding Rs. 50 may appeal from that order as if such complainant or informant had been convicted on a trial held by such Magistrate. Now it is contended on those words that the appeal is under that section on the analogy of the decision above referred to. But the analogy is not complete because all that S. 250 (3) says is that a complainant

against whom an order for compensation is made is, so far as the right to appeal is concerned, put on the same footing as if he had been convicted and sentenced to pay a fine, by that Magistrate. To find out to what Court the appeal is to be filed, we have to resort to the general chapter on appeals and that is Chap. 31 and the section applicable to this case is S. 407. It follows, therefore, that it is incomplete to say that an appeal from an order under S. 250 is an appeal under that section; for, to make the statement complete it must be said that the appeal is by virtue of Ss. 250 and 407. I am, therefore, of the opinion that this particular appeal was none the less under Chap. 31, Criminal P. C., because the right of appeal was generally conferred by an earlier section not within that chapter. If the appeal was in the terms of S. 428 "under this chapter," all the powers conferred by that section were immediately attracted to this appeal and the Sub-Divisional Magistrate had ample power to take additional evidence. That disposes of the first contention.

The second objection is also not supportable. It is no doubt the case that the Sub-Divisional Magistrate omitted to record reasons as he ought to have done when he thought it necessary to take further evidence but that by no means invalidates his proceedings because by S. 537, Criminal P. C., an omission of that character will invalidate the proceedings only if the omission has occasioned a failure of justice. There is nothing to show that any failure of justice was caused in this case by the omission to record reasons by the Sub-Divisional Magistrate.

Both the objections in this petition, therefore, fail and the petition must be dismissed.

Beasley, C. J.—I agree.

P.R.S./J.M.

Petition dismissed.

(1) A.I.R. 1923 Mad. 391=51 Mad. 603.

(2) [1910] 33 Mad. 90=5 I.C. 881=20 M.L.J. 102.

1930 Cr. Cases 509

(Patna)

COURTNEY-TERRELL, C. J., AND**JAMES, J.****Narayan Maharana—Petitioner.****v.****Emperor—Opposite Party.**

Criminal Revn. No. 10 of 1929, Decided on 22nd April 1929, from order of Dist. Magistrate, Cuttack, D/- 19th January 1929.

(a) **Criminal Trial — Sentence — Trivial offence—Prosecution started by malice and not out of pursuits of justice—Magistrate should impose nominal penalty.**

Where the offence is utterly trivial and the prosecution is inspired by motives other than pursuits of justice and the Magistrate is convinced of the commission of offence from evidence on record, Magistrate should give effect to his opinion by convicting the accused and imposing a purely nominal penalty. [P 510 C 2]

(b) **Criminal P. C., S. 439—Intention is not gratification of private malice.**

The powers of the High Court in criminal revision are not intended for the gratification of private malice, nor are they to be used to vindicate the position of a private prosecutor where a merely technical offence has been committed, however clearly that technical offence may have been proved. [P 510 C 2]

(c) **Criminal P. C., S. 344—Adjournments should be deprecated.**

Magistrate should refrain from granting adjournments save in cases where they are clearly necessitated for the purpose of justice. [P 511 C 1]

(d) **Criminal P. C., S. 344—Petty criminal case—Parties should appear at first hearing for completion—Criminal Trial.**

In a petty criminal case both parties should appear on the first day of hearing ready for the completion of the entire trial at a single hearing. [P 511 C 1]

M. Subha Rao—for Petitioner.

P. K. Sen with S. N. Ray—for Opposite Party.

Courtney-Terrell, C. J.—This is an application by the complainant Narayan Maharana for the revision by this Court of a judgment of acquittal passed by the District Magistrate of Cuttack in a charge brought by Narayan Maharana against Mr. S. C. Ghosh, the Principal of the Orissa School of Engineering, under S. 342, I. P. C., and it serves to illustrate an important principle which should govern the exercise of the power of revision.

The subject matter of the charge may be briefly stated. Mr. Ghosh succeeded on 15th March 1928, as Principal of the School of Engineering at Mr. Parkinson the former Principal, who had been suspended on charges of misappropriation

of Government property. An auditor had been appointed to investigate Mr. Parkinson's accounts and on 16th March that audit had begun. The complainant Narayan Maharana and three other men were mistris who had been employed under Mr. Parkinson. Mr. Ghosh had been ordered to take stock of the furniture in Mr. Parkinson's bungalow and to enquire what part of it was Government property. On 27th April Mr. Parkinson was to have gone to the school to answer some audit objections but he saw the four workmen mentioned outside his bungalow and called them in to question them concerning some of the charges, which it appears were to be made against him, in which some one or more of these workmen were said to have been implicated. He elicited from the workmen some information which he considered important and sent for the auditor. The auditor reduced the statements of the four workmen into writing and then took them with him to the school to interview Mr. Ghosh. The nature of Mr. Ghosh's conversation with the workmen is of no importance to this case but what they told him set him upon the making of further enquiries. He sent for two other persons and questioned them. Being anxious to prevent the four workmen from being tampered with by Mr. Parkinson or anyone under his influence Mr. Ghosh asked the durwan of the school to keep the four men in the science room in front of his office and to keep them under observation while further enquiries were made. This took place between 4 and 5 o'clock in the afternoon and it is said that on the order of Mr. Ghosh the durwan locked up the science room and confined the four men there until some time considerably later in the afternoon. Mr. Ghosh is charged with having kept these men under unlawful detention for the period during which they are said to have been in the science room.

At 11 p.m. on the same night the first information report was lodged. This was investigated by the police and Mr. Ghosh was questioned. The police on 2nd May made the report "mistake of law" apparently meaning that the facts did not constitute an offence in law. On 6th May the matter came before the Sub-Divisional Officer who dismissed the charge under S. 203, Criminal P. C. On

15th May the four men lodged a complaint, but this was dismissed on the following day as defective by reason of the fact that there were four complainants. There was then a second complaint by Narayan Maharana and this was dismissed on 22nd May by the Sub-Divisional Officer. On 22nd June Narayan Maharana made an application to the Sessions Judge for a further enquiry into the matter and on 25th July the Sessions Judge made an order for a further enquiry. For some reason the enquiry did not begin until 2nd November, and on 17th November a report was made by Mr. Smith, Deputy Magistrate, recommending the prosecution of Mr. Ghosh. The District Magistrate on 10th December 1928 ordered the prosecution. The trial was begun on 4th January 1929, and after no less than 11 sittings (including four at which the accused was present but the proceedings were adjourned), the judgment of acquittal, the subject of this application, was delivered on 19th January 1929.

It is not necessary to go further into the facts of the alleged offence, but it is sufficient for the purposes of this judgment to state that the reasoning of the District Magistrate is thoroughly defective. The case was an extremely simple one and I will merely state that upon the evidence it is abundantly clear that Mr. Ghosh should have been convicted of a technical offence and a nominal penalty should have been inflicted, such for example as a fine of Rs. 4 half of which might have been distributed amongst the four men who were unlawfully detained, and this sum would have amply compensated them for any damage which they could possibly have claimed in a civil Court. The Magistrate, however, acquitted Mr. Ghosh, coming to the conclusion that the extent of the detention proved to his satisfaction did not amount to unlawful confinement, and that Mr. Ghosh had no "criminal intent" in what he did; he seems to have thought that "criminal intent" means in law intention to act criminally. It is very unusual for this Court to interfere with a finding of fact but in a case of greater magnitude interference with such a defective judgment would have been necessary. The Magistrate no doubt properly inclined to the view that the

offence was utterly trivial and that the prosecution was inspired by motives other than the pursuit of justice. But he could and should have given effect to this opinion by convicting the accused and imposing a purely nominal penalty. Instead of doing so he strained the evidence to show that no offence had been committed and his own finding of the facts and his own reasoning demonstrate that his conclusion that no legal offence was committed is impossible to justify.

Having briefly stated this view I shall now explain the principle upon which the Court should nevertheless decline to interfere. Firstly, although in my view the offence was undoubtedly committed it is of a ridiculously trivial character and had the Magistrate convicted, any penalty greater than that which I have indicated would clearly have been improper. The sum which I have suggested might have been awarded by way of compensation to the four men detained, would have been entirely in the discretion of the Court, and it is quite probable in the circumstances that the Magistrate would have refused to allow any part of the fine to pass into their hands. It must be remembered that the object of criminal proceedings is not the compensation of private parties but the vindication of the laws of the State. The Magistrate states his conclusion, for which I think there are very good grounds, that Mr. Ghosh was honestly endeavouring to do his duty and that this prosecution, however justified, it may be on technical grounds, is inspired by malice. Now it cannot be doubted that by having to defend this case Mr. Ghosh has been put to an extraordinary amount of expense and trouble which is far more than adequate punishment for the technical offence which in my opinion he has committed, and to ask this Court to send the case back for a retrial is in the circumstances a gross abuse of legal process. The powers of the High Court in criminal revision are not intended for the gratification of private malice, nor are they to be used to vindicate the position of a private prosecutor where a merely technical offence has been committed, however clearly that technical offence may have been proved.

I desire to call attention to the scandalous waste of time and money disclosed by these proceedings. The numerous adjournments allowed by Magistrates in petty criminal cases and the great time which elapses between the original offence and the ultimate judgment indicate the need of a very drastic revision of the practice. The trivial offence committed in this case took place nearly a year ago and the legal costs incurred must have been enormous. Magistrates should refrain from granting adjournments save in cases where they are clearly necessitated for the purpose of justice. In a petty criminal case both parties should appear on the first day of hearing ready for the completion of the entire trial at a single hearing. If this case had been investigated on these lines the hearing should not have taken more than an hour and a half at the outset. The application for revision is rejected.

James, J.—I agree.

v.S./R.K. *Application dismissed.*

• 1930 Cr. Cases 511
(Patna).

MACPHERSON AND DHAVLÉ, JJ.
Dhanpat Tiwari—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 290 of 1928, Decided on 13th May 1929, from decision of the Asst. Sess. Judge, Saran, D/- 10th December 1928.

Criminal P. C., S. 297—Record of charge containing sections without details—There is sufficient compliance.

Session Judge's note on the point of heads of charge, giving sections without details as having been read and explained to the jurors is sufficient record so as to comply with the law at least where the law applicable to the facts of the case is not complicated: *A. I. R. 1925 Pat. 797* and *A. I. R. 1928 Pat. 420*; *Pat. Cr. A. 94 of 1924, Ref.* [P 512 C 2]

B. P. Sinha—for Appellant.

B. P. Agarwala—for the Crown.

Dhavlé, J.—The appellant Dhanpat Tiwari has been sentenced by the Assistant Sessions Judge of Saran to five years' rigorous imprisonment under S. 366, I. P. C. The charge upon which he was tried, along with his sister Mt. Sanichara, was that on or about 6th May 1928 at village Sikandarpur, police station Maharajganj, they kidnapped Basumatia Chokri aged about eight years, from the lawful guardianship of

her father Rampati Mahto, with intent or knowing it to be likely that she would be compelled to marry Kuber Pandey of Karasghat, police station Baikunthpur, against her will.

Appellant Dhanpat is a neighbour of the complainant Pati or Rampati Mahto, a Nunia of Sikandarpur. The girl Basumatia is a daughter of Pati Nunia by a former wife. In Jyeth of last year Pati went to his mamhar (maternal uncle's house) at Banpura, with his present wife Mt. Tetri and two young children, to attend some weddings, Basumatia being left behind with Sitmi, a seven year old daughter of Mt. Tetri by a former husband, to look after Pati's buffalo. On 2nd Jyeth (6th May 1928) there was a marriage at the house of Dharamdeo Tiwari (D. W. 3) in Sikandarpur, and Basumatia and Sitmi went to see the barat. When they were coming back past the house of appellant Dhanpat Tiwari, Mt. Sanichara took Basumatia inside. Dhanpat and Sanichara then prevailed on Basumatia to go with them to a village Deokali, seven or eight kos away, with a basket of pakwan (sweets), on a promise of giving her a luga and a jhula (piece of cloth and a jacket). The party—which included Dhanpat's son Sribhagwan—actually left early the next morning and were met and accosted on the way by three witnesses in the case (P. Ws. 3, 7 and 8). About three days afterwards Basumatia was put through a form of marriage, against her will, with one Kuber Pandey of Karasghat, Dhanpat officiating as the priest. After the wedding, Dhanpat and Sanichara sent Basumatia with Kuber Pandey in a palki to Karasghat. Kuber's mother and elder brother Jagdish Pandey (P. W. 10) discovered at Karasghat that Basumatia was not a Brahmin but a Nunia. Jagdish thereupon had a panchayet held at Deokali and, getting no satisfaction, lodged an information at the thana of Baikunthpur on 17th May charging Sheoprasad Dube, son of Mt. Sanichara and father of the girl who it had been settled was to be married to Kuber, and one Pucha Kuer, with cheating by personation. While this case was under investigation, Pati Mahto learnt on his way back from Banpura that Basumatia has been missing, and lodged a sanha about it at the thana of Maharajganj on

20th May. The police submitted a charge-sheet in Jagdish Pandey's case under S. 419, I. P. C. against Sheoprasad Dube and Pucha Kuer, but the case was ultimately compromised on 27th June 1928, on the persons then accused paying Jagdish Rs. 200. On 2nd July Pati Mahto preferred a complaint under Ss. 363, 366 and 419, I. P. C. against Dhanpat, Mt. Sanichara and others before the Sub-Divisional Magistrate of Siwan, who committed Dhanpat and Sanichara to the Sessions on a charge under 366, I. P. C.

The case was tried by jury.

Mt. Sanichara's defence was that Basumatia had not been kidnapped but had carried sweets for them accompanied by her father Pati Mahto, and that it was not Basumatia but the daughter of her son Sheoprasad that had been married to Kuber Pandey. There was a quarrel at the time of the rukhsati, and in the confusion that followed Basumatia was forcibly taken away by the barat party of the bridegroom Kuber Pandey. Pati Nunia knew all the facts, though he had gone back from Deokali; and he had falsely brought the present case because he was disappointed that Jagdish Pandey's case had been compromised without his getting anything out of it.

Dhanpat Tiwari's defence was that the case had been brought on account of enmity; that he had nothing to do with Basumatia being kidnapped and did not even attend the wedding at Deokali; and that Pati Mahto had not gone away from Sikandarpur to Banpura at all.

By a majority of four to one the jury brought in a verdict of guilty against both Dhanpat and Sanichara. The Assistant Sessions Judge accepted the verdict and passed sentence as already stated.

Dhanpat alone appeals.

The first point raised on his behalf is that the Assistant Sessions Judge did not sufficiently explain the law to the jury, and the case of *Rupan Singh v. Emperor* (1) is relied on in support. The learned Assistant Sessions Judge's note on this point in the heads of charge is:

"Sections 361 and 366, I. P. C., read and explained to the jurors."

It has been held in several cases that

this is not a sufficient record of the charge on the questions of law but the convictions in *Rupan Singh's* case (1) were quashed on much more substantial grounds than a mere insufficiency of record in this respect. In an unreported decision of this Court, *Prabhu Singh v. Emperor* (2) where this part of the heads of charge merely ran "charges read and explained from the Code," Jwala Prasad, J., referred to several previous decisions and held (my learned brother concurring) that:

"there was no misdirection to the jury on the score that the law was not explained as is required by S. 297 of the Code,"

adding "Mr. Hasan Imam very frankly concedes this." The position was also examined in *Chotan Singh v. Emperor* (3) where it was held (to quote from the head-note):

"The failure of the Judge to record in the charge what actually his explanation of the law was did not necessarily involve the setting aside of the conviction if the omission had not occasioned a miscarriage of justice,"

and

"The High Court will not order a retrial when it is of opinion that, if the jury accepted the evidence which was put forward on behalf of the prosecution there was no doubt that they were entitled to convict the accused of the offence charged."

In the present case it cannot be pretended that the law applicable to the facts was all complicated. Basumatia, if taken away was taken away from her father's keeping and as to her age there was unchallenged evidence before the jury that she was eight or nine years old: the lady Doctor (P. W. 5) saying that her age did not exceed ten years. Following the ruling in *Chotan Singh's* case (3), I am not prepared to interfere on the ground that the record is not sufficient to show that the jury was adequately directed on the questions of law arising in the case.

It has next been urged that the delay of nearly two months in the lodging of the complaint has not been properly placed before the jury. I see no force in this contention at all. The learned Assistant Sessions Judge has pointedly referred to the relevant dates the 20th. May when Pati Nunia, lodged his sanaha, the 27th June when Jagdish Pandey's case was compromised and the 2nd July when

(2) Criminal Appeal No. 94 of 1924.

(3) A. I. R. 1928 Pat. 420=7 Pat. 311.

(1) A. I. R. 1925 Pat. 797=4 Pat. 626.

Pati Nunia filed his petition of complaint. He then proceeds:

"Now it would be for you gentlemen to consider whether under these circumstances the delay would be such as would go to the very root of the case of the prosecution and would destroy their whole story of kidnapping."

The heads of charge do not contain a specific reference to Ex. 6, the order-sheet in Jagdish Pandey's case, from which it appears that Pati Nunia objected more than once to the matter being compromised but the omission can obviously furnish the appellant with no ground of complaint.

The third point raised in the appeal is that sufficient stress was not laid on the fact that the name of appellant Dhanpat was not mentioned in the case under S. 419, I. P. C., brought by Jagdish Pandey. As to this the learned Assistant Sessions Judge records after dealing with the evidence of Basumatia:

"Here I would remind you gentlemen, that the case at Gopalganj was under S. 419, I. P. C. which was of cheating by personation, and therefore you will have to consider how far it would have been necessary in that case to give that part of the story there which was connected with kidnapping. You will have also to consider whether the omission in any particular statement there would go to show that those statements made in the kidnapping case have been falsely got up for the purposes of this case or not."

He again refers to the point when dealing with the evidence of the Sub-Inspector of Baikunthpur, and, after mentioning that the witness had sent up Basumatia and Rampati Nunia as witnesses in the case under S. 419, I. P. C., to prove that Basumatia was Pati's daughter and that she had been married to Kuber Pandey and went to his house as a Brahmin girl, he observes:

"It would be for you gentlemen to consider whether it was material for the Sub-Inspector to inquire and for the witnesses to depose to a cheating case under S. 419, I. P. C., about Dhanpat Tiwari who actually did not cheat Jagdish or Kuber. The cheating case was against the father of the girl Kosila and Rucha Kuer."

It seems to me clear that the non-mention of Dhanpat during the investigation of Jagdish Pandey's case was placed before the jury in a perfectly proper manner and that sufficient stress was laid on it by the learned Assistant Sessions Judge in charging the jury.

The only other question raised is that of the sentence. The offence of the appellant has been aggravated by the procuring of a large number of false defence witnesses but even so, the sentence does seem excessive. In my opinion a sentence of three years' rigorous imprisonment and a fine of Rs. 100, with nine months' rigorous imprisonment in default would be sufficient to meet the ends of justice and I would further under S. 545, Criminal P. C., direct that the fine if recovered be paid to Pati Nunia as compensation. Apart from this modification of the sentence I would dismiss the appeal.

Macpherson, J.—I agree. I desire to add that prior to the decision in *Ohhotan Singh v. King Emperor* (3) in the vacation of 1927 where somewhat different views are expressed though perhaps obiter it appeared to be settled law in this Court that in recording "the heads of the charge to the jury" as directed under S. 367, Criminal P. C., it was sufficient for the Sessions Court at least unless the case was extremely complicated to record as a head of the charge that the sections of the Penal Code relating to the offence charged had been read and explained to the jury. In *Prabhu Singh v. Emperor* (2) Bench and Bar regarded the matter as not open to dispute. In *Eknath Sahay v. Emperor* (4) the record of which I have examined, the head of charge to the jury "laying down the law by which the jury are to be guided" (S. 297) was not more extensive than in the present case when allowance is made for the difference in the nature and complexity of the two cases. Indeed it has been the normal practice to record this head of charge in the manner in which the Sessions Judge usually made a brief note of it for his own guidance. S. 367 expressly provides that in a trial by jury the Court need not write a judgment. Any suggestion to the Courts that in recording the heads of the charge to the jury they should practically write a judgment and indeed should write out to no purpose the elements of criminal law which the Court must explain to a jury but no experienced Judge sets out in a judgment is

(4) [1916] 1 Pat. L. J. 317=35 I. C. 657=2 Pat. L. W. 348.

in my opinion strongly to be deprecated. To my mind no exception can be taken to the record by the learned Assistant Sessions Judge of the head of the charge showing how he laid down the law to the jury.

V.B./R.K.

Order accordingly.

1930 Cr. Cases 514

(Patna)

ADAMI AND CHATTERJI, JJ.

Gobind Ram Marwari—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No 44 of 1929, Decided on 17th April 1929, from an order of Deputy Magistrate, First Class, Monghyr, D/- 24th November 1928.

Police Act (5 of 1861), S. 34 (3)—Cart kept in parti land by side of road with width of 40 feet—There is no presumption by implication of annoyance to public.

Although easing by a man on a public road may constitute an offence inasmuch as it causes annoyance to the residents or passengers, the mere fact that a cart was kept in the parti land by the side of the road with a width of 40 feet, cannot raise any presumption by implication that it caused annoyance to the public: 20 Cr. L. J. 452, *Rel. on.* [P 514 C 2]

N. C. Ghosh—for Petitioner.

C. M. Agarwala—for the Crown.

Chatterji, J.—This application is directed against an order passed in appeal convicting the petitioner under S. 34, Police Act, and sentencing him to a fine of Rs. 5.

It is urged in this Court that the act complained of does not, in view of the findings arrived at, come within the purview of S. 34, Cl. (3), Police Act.

It appears that a certain cart was kept by a cartman on the road in front of the petitioner's shop in Bari Bazar in the town of Monghyr for about two hours. The cartman was convicted on his plea of guilty and fined Re. 1.

The learned appellate Court refers to the evidence of the reporting constable that there is parti land between the road and the accused Gobind's shop and that conveyances stop in this parti. He also states that the road in front is some 40 feet wide and further that only one wheel of the cart was on the metalled portion of the road and that, owing to the road being sufficiently wide it did not actually cause any stoppage of traffic or obstruction; but all the same he considered that the case came within the purview of S. 34, because the need-

less keeping of a cart on the road for such a long time must necessarily cause annoyance to the public using that road. One can understand that in the circumstances of a particular case the keeping of a cart for a length of time may cause annoyance so as to constitute an offence under Cl. (3), S. 34. But in the circumstances of this particular case and having regard to the findings arrived at namely, that there was no stoppage of traffic or obstruction or annoyance actually caused, there is no justification for the conviction. It has been laid down by Das, J., in *Ramcharitar Kahar v. Emperor* (1) that before a person can be convicted under S. 34, it must be established that the act complained of was to the obstruction, inconvenience, annoyance, risk, danger or damage of the residents or passengers. Although the easing by a man on a public road may constitute an offence inasmuch as it causes annoyance to the residents or passengers, the mere fact that the cart was kept in parti land by the side of the road with a width of 40 feet cannot raise any presumption by implication that it caused annoyance to the public. In the circumstances the contention of the learned advocate for the petitioner must succeed.

The application is allowed, the conviction set aside, and the fine, if paid, is to be refunded.

Adami, J.—I would only add that in my opinion the proposition set out by Das, J., in *Ramcharitar Kahar v. Emperor* (1), is too wide. Wherever an obstruction or a nuisance must by its nature cause inconvenience or obstruction under the section, I would hold that there would be an offence under it. It is not necessary in every case to produce witnesses to say that they have been obstructed or annoyed: for instance the mere act of committing a nuisance on a road by way of easing oneself is sufficient to bring the person so acting within the section. In the same way if a cart is left on the middle of a road it must be held that it was causing an obstruction though it may be that no one comes forward to say that he was actually obstructed. In the present case the finding is that there was no obstruction and that there would be no obstruction by the placing of the

(1) [1919] 20 Cr. L. J. 452=51 I. C. 840.

cart on the spot where it was found. I therefore agree with my learned brother that the accused should be acquitted.

Furthermore there is a doubt in my mind whether the petitioner who was sitting at his shop could be held responsible for the keeping of the cart on the road outside his shop as the cart did not belong to him.

V.B./R.K.

Application allowed.

1930 Cr. Cases 515

(Patna)

COURTNEY-TERRELL, C. J. AND

DHAYLE, J.

Sohrai Sao and another—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 15 of 1929, Decided on 8th June 1929, against decision of Sess. Judge, Gaya, D/- 8th January 1929.

(a) **Criminal Trial—Evidence—Misreception of inadmissible evidence.**

Misreception of a piece of evidence which is inadmissible but which has very little weight and admission of which causes no substantial injustice, does not vitiate the trial. [P 519 C 1]

(b) **Evidence Act, S. 154—Purpose of cross-examination is to obtain admission on which party cross-examining may rely.**

A party is allowed to cross-examine its own witness because that witness displays hostility and not necessarily because he displays untruthfulness. The main purpose of such cross-examination is to obtain admissions and it would be ridiculous to assert that a party cross-examining a witness is thereby prevented from relying on admissions and to hold that the fact that the witness is being cross-examined implies an admission by the cross-examiner that all the witness's statements are falsehoods: *A. I. R. 1927 Bom. 501, Rel. on; Bradley v. Ricardo, (1891) 8 Bing. 57, Ref; Faulkner v. Irine (1858), 1 F. & F. 251; A. I. R. 1926 Cal. 193; A. I. R. 1928 Cal. 690, Diss. from.* [P 519 C 2]

(c) **Penal Code, S. 302—Extenuating circumstance—Reason for passing lesser sentence ought to be express and adequate—Wife murdered to save dishonour of family is no extenuating circumstance.**

The reason for passing a lesser sentence on conviction for murder ought to be express and adequate. Such reasons are sometimes to be found in the order of the mentality to which the person belongs. But the fact that a murder of his wife by a husband was inspired with a view to save his family from dishonour which would sooner or later have fallen upon them by reason of the habits of the wife does not constitute any extenuating circumstance, for lesser sentence of transportation. [P 520 C 1]

(d) **Criminal Trial—Evidence—Doubt—Feeling of doubt is matter for consideration before verdict and not after.**

The feeling of doubt as to the guilt of the accused is a matter to be considered by the

tribunal before but not after the verdict. It has no place in the determination of the sentence after conviction. If the evidence is not strong enough to justify an irrevocable sentence the accused is entitled to acquittal, for law does not recognize the right of a judicial tribunal to give effect to more than one degree of doubt. [P 520 C 1]

(e) **Criminal Trial—Duty of Court—Court must administer law and not grant mercy.**

Legislature has wisely not thought fit to entrust judicial tribunals with the prerogative of mercy and the Judges must remember that they are sworn to administer the law not as they wish it might be but as they find it. [P 520 C 2]

H. L. Nandkeolyar and B. P. Jamuar—for Appellants.

C. M. Agarwala—for the Crown.

Courtney-Terrell, C. J.—This is an appeal by Sohrai Sao and Sawki Sao, who are brothers, against their conviction by the Sessions Judge of Gaya, under S. 302, I. P. C. of the murder of Mt. Gauri, the wife of Sohrai Sao. The learned Sessions Judge sentenced both of the appellants to transportation for life and we issued a rule directing the appellants on the hearing of the appeal to show cause why the sentence should not be enhanced to death. The trial took place with the help of four assessors, one of whom was of opinion that both of the accused were guilty, and three that neither was guilty.

The appellants together with a third brother Kishun and an uncle Kasi Sao reside in a house in village Tarwan. On the night of the murder of Mt. Gauri the uncle, Kasi, was sleeping at the village kachery, and the youngest brother Kishun was sleeping at the shop owned by the three brothers at a short distance from the house. Neither Kasi nor Kishun is directly implicated in the crime. There were also in the house Mt. Dakhia, the mother of the appellants, Mt. Panhas Kuar, the sister of Kasi Sao, Mt. Balua, Kasi Sao's wife and the deceased woman Mt. Gauri. The deceased was about 22 years old and lived in purdah. There is some evidence that she was not on good terms with the other women who used to scold her because she sometimes went out of the house stealthily at night, and that the two brothers would also scold her for the same reason. It is true that the evidence on this point is slender and the relatives of the appellants, in their efforts to shield them and to dispose of any motive for their crime have one and all declared that

she was a woman of good character. But since the evidence of these relatives is false on many and material points I am disposed to give little credit to it. The mother of the appellants Mt. Dakhia died before the case reached the committing Magistrate's Court.

In the very early morning of 16th August a rumour spread through the village that Mt. Gauri had died on the previous night of cholera, and it is not disputed that this rumour was started by the appellants assisted by their third brother Kishun. The women were heard wailing inside the house and the two appellants were seen standing at the doorway of their house and were heard consulting about the cremation of the dead body. A number of villagers assembled outside the house. One of them Budhan Pasi who had met Kishun and had been told by him of the death from cholera, entered the angan of the house by the door leading from the angan on to the road. He there found the body covered with a piece of cloth lying partly on a veranda on the south side and partly in the angan. The ground of the angan and the verandah appeared to have been recently washed and smeared with ashes but blood stains were still apparent. Lying by the side of the body was a curved knife. He uncovered the body and found that the throat had been cut. He enquired of the appellants why they had alleged that she had died of cholera and the appellants replied that in fact she had committed suicide by cutting her throat. A number of other witnesses relate the same story, that is to say, the fact that the appellants were standing at their door and weeping, that on enquiry the appellants stated that Mt. Gauri had died of cholera and of the later discovery by the witnesses that the woman's throat had been cut.

It must soon have become clear to the appellants that the story of cholera could not be sustained and that having regard to the fact that the woman's throat had been cut the death must be explained on the basis of suicide. Accordingly shortly after sunrise the appellant Sohrai came to the village katchery where he spoke to Deonarain Lal the diwan of the landlord and stated that his wife had committed suicide by cutting her throat. The

diwan said that he ought to go to the thana and lodge an information. He refused to go stating that he was ill and in fact it would appear that he was suffering from acute toothache. The diwan then sent for Tilak Rajwar, one of the two choudidars of the village, and told him to lodge an information. Tilak stated that he must first see the body and went to the house. There he saw the body and noticed that it had been freshly washed and that the hair was still wet. He saw that an attempt had been made to wash the floor of the angan and the verandah of blood and ashes were scattered about and there were blood marks on the walls of the verandah. Mt. Dakhia and the other women were present and weeping by the side of the body. They said that they knew nothing as to how the deceased had come to her end. Tilak waited there about an hour until the second choudikar Bipat Dusadh arrived. This man had also heard at the house two hours after sunrise. He was left to watch the body while Tilak went to give the first information. Tilak left the house and met Sohrai a short distance away. He asked him to come to the thana. At first Sohrai said he would not on account of his toothache but ultimately he reluctantly consented. The appellant Sawkhi had by that time disappeared. At the thana, which was reached at about noon Sohrai lodged an information in which he stated that for the last 17 or 18 days he had been ill with fever and toothache, that his wife who had been attending him the night before when he had told her that his pain would end with his life had wept and said: "What should I do by remaining alive" that he had risen when about two gharis of the night were remaining to make water and had found his wife lying where she was in fact found with her throat cut the knife lying by her side. He adds:

"I raised an alarm and began to wail and weep when the other members of my house viz., my mother came up. My aunt opened the door of my house when the people of the mohalla and the village also began to come in."

The brother referred to is clearly his co-appellant Sawkhi. The story that the house had been opened to the village people immediately on raising

his alarm is clearly untrue for no one of the neighbours heard the wailing of the women until at or very shortly after dawn and the first that was heard of the matter was the story of the death of Gauri from cholera. The Sub-Inspector went at once from the thana to the house and called Shiva Prasad Lal, a patwari and the diwan Deonarain Lal to assist him in making an inquest report. He saw at once that it was not a case of suicide and he took a statement from the chaukidar Bipat Dusadh, which forms the first information in this case. He searched the house and found blood marks in the angan and in the verandah room immediately adjoining it. A great quantity of blood had clearly flowed on to the floor and an attempt had been made to clean this up with water and to conceal the blood with ashes. There were blood marks on the walls of the verandah room to a height of two feet. There were also blood marks on an earthen kothi which stood in an adjoining room and the appearance of the marks was such as to suggest that a person with blood stained hands had touched it.

On the following day he went to the back of the house where at a distance of about twenty paces there runs a pyne. In this pyne he found an earthen pot and in this was a nimastin or half sleeved shirt which the appellant Sohrai admits to be his. It bore blood stains. Concealed in some bushes immediately behind the house were two dhotis and a sari. These were wet and had evidently recently been washed. They had been wrapped up together and concealed behind some bushes. The Sub-Inspector noticed that they bore blood stains. One of the dhotis, the appellant Sohrai admits, belongs to him. As to the other there is a certain conflict of evidence. Kishun and the other relatives say it is his property but a dhobi who washes the clothes of the family says that it is the property of Sawkhis; the evidence is, I think inconclusive on this point. The sari was the property of the mother of the appellants. The report of the Chemical Examiner states that the nimastin was stained with blood as was the dhoti identified as belonging to Sohrai. No blood was detected on

the other dhoti whose ownership is doubtful or on the sari. It appeared, however, to the Sub-Inspector and the patwari that these garments were blood-stained. In any case they had been washed, had been wrapped together and were wet. The Chemical Examiner has also found stains of human blood on the knife which the Sub-Inspector found lying near the body and in the samples of earth which the Sub-Inspector scraped from the blood-stained ground and the earthen kothi. The Sub-Inspector sent off the body for post-mortem examination and the evidence of Col. Napier, the Civil Surgeon is to the effect that the wounds found on the deceased could not have been self-inflicted.

The appellant Sohrai was arrested on the following day. The appellant Sawkhi absconded and did not surrender until the case reached the committing Magistrate. The appellants called no evidence either before the committing Magistrate or at the trial. At the hearing of the appeal Mr Nandkeolyar, who has conducted the case for his clients with conspicuous ability and great earnestness, has offered the following argument. He admits that it is impossible to contend that the deceased committed suicide. He suggests that the story related in the first information by Sohrai is substantially true and that on awaking Sohrai found his wife dead in the angan and called the female relatives. Terrified by the embarrassing position in which they found themselves and fearing that they would be charged with the murder they first invented the story of the death from cholera. When it became apparent that this could no longer be maintained they fell back on the story of suicide. He suggests that although they may themselves have believed that it was a case of murder they had no one on whom they could fasten their suspicions, and accordingly made the most of the possibility of suicide. Indeed in the first information lodged by Sohrai at the thana he evidently sought a motive for the suicide in the grief of his wife at his painful illness and the additional fear that if he died she would be unable to remarry. Sohrai in addition to lodging a first information made a statement to the Sub-Inspector at the house

before his arrest. In this statement Sohrai had said that he had pledged some of his wife's ornaments and that on the night of the occurrence they had quarrelled over this fact and that the quarrel probably led her to commit suicide.

Mr. Nandkeolyar contends that these varying statements as to the motive for the suicide are mere exhibitions of the distracted mind of a man, who is trying to find a plausible explanation for what he very well knows to have been a murder, but believes himself in a desperate position because he has no adequate solution to offer to the question of the identity of the murderer. It is further pointed out that the house affords easy opportunity for the entrance and escape of a murderer. In the north wall of the angan there is an unclosed door-way which provides uninterrupted access and it is said that an assassin may very well have entered through this door-way in the night and have equally easily escaped. In view of the facts that no one can suggest a possible murderer with any adequate motive this suggestion is inherently improbable, and in view of the conduct of the inmates of the house it is altogether unbelievable. Had the accused really found his wife two hours before sunrise, as he says, he would have raised a commotion which could not have failed to attract the attention of the neighbours as well as that of the other females of the household. At a much later hour when the story of cholera had been invented, when the washing of the floors had been completed the females then began to wail in a manner which attracted the neighbours and the appellants also wept outside their house. The theory moreover does not account satisfactorily for the attempt to conceal the blood-stained clothes. It is probable that these clothes were disposed of in the pyne behind the house before it became light. It is moreover clear that the woman was killed while sleeping for no one heard a sound of a cry or a struggle and as the prosecution point out an assassin from outside would have had no motive for killing the sleeping woman or for moving her body to a position half in and half out of the verandah where it is clear that she had been sleeping. It has been suggested

that a silver necklace and a gold nose ring had vanished from the person of the deceased. Now the nose rings could not have been removed while she was awake. It could only have been removed after her death and the person who removed it after cutting her throat would necessarily have been drenched with blood and he would have been standing in a pool of blood while he performed the operation. In this condition he could not have slipped out of the northern door-way without leaving most conspicuous blood stains of which there is no trace whatever. In my opinion this theory of a murder by a stranger is quite impossible to believe and the suggested explanation of Sohrai's conduct therefore falls to the ground.

As to the accused Sawkhi it is suggested but with very little force that he was not present. He was seen by several witnesses at the door of the house weeping with Sohrai. He had been seen by the two chaukidars for the two days previously in the village and at the shop. Immediately after the event he fled to a village called Etawa where his father-in-law resides and took refuge with him. The whole family has attempted to shelter Sawkhi by saying that he had been absent from Tarwan for several days although they were unable to suggest where he had gone. But Kasi Sao, the uncle, is proved to have written a letter to Sawkhi and to have sent it to Etawa after Sawkhi had left for that place. In it he advised Sawkhi to get the people of Etawa to say that he had been there for several days. The letter was delivered to Sawkhi, but there is no evidence as to the nature of Sawkhi's action as a consequence of receiving the letter. It is therefore no evidence against Sawkhi but it serves to discredit Kasi Sao in his story that he did not know where Sawkhi had gone. The reference to "my brother" in Sohrai's first information which I have quoted above is clearly to Sawkhi and not to Kishun. Sawkhi moreover has not attempted to call any evidence as to his whereabouts at the time of the occurrence. *

A further point was taken by Mr. Nandkeolyar on behalf of the appellants based upon the matter of an alleged

reception before the Sessions Judge of inadmissible evidence. The youngest brother Kishun was examined as a prosecution witness and upon manifestation by him of hostility to the prosecution the learned Judge in his discretion gave to the prosecution leave to cross-examine him. He was asked whether he had not previously made a statement which had been recorded by the Deputy Magistrate which conflicted with the account given by him in the Sessions Court. That statement after mentioning his visit to the house and the finding of the woman with her throat cut runs as follows:

"I enquired from mother who had killed her. She said "Sohrai had cut the neck" Sohrai was also in the house but not within hearing distance from us. I did not ask him anything. For a month Sohrai and his wife were not pulling well with each other. I do not know why. I had not seen Sohrai ever beat her but I saw them quarrelling during the period of one month as mentioned above. I could not make out why they quarrelled among them"

Now it is conceded by the prosecution, and rightly that the quotation of the mother's statement, although the mother is now dead, was inadmissible. Had the mother herself made the statement in the witness-box as quoted by Kishun it would not have amounted to evidence at all but merely to a statement in usurpation of the functions of the Court. It would have been otherwise if she had been reported as having said: "I saw Sohrai cut her throat." This part of the defence objection is sound, but the misreception of this piece of evidence could, in my opinion, have had very little weight and no substantial injustice has been done. Moreover it would not appear that any objection was raised at the trial.

It is, however, further objected that the entire statement (and in particular that portion relating to quarrels between Sohrai and his wife) was inadmissible for the following reason: The witness had been declared hostile and according to the contention of Mr. Nandkeolyar this necessarily implies that the witness was wholly discredited and the prosecution having discredited their own witness are not entitled to rely upon any part of his evidence. I am aware that in India from time to time this curious view of the consequence of declaring a witness hostile has become

current. The whole idea has been allowed to grow out of an observation reported as having been made by Lord Campbell in an old Scottish case: *Faulkner v. Brine* (1). This was accepted by the Calcutta High Court in such cases as *Khijruddin v. Emperor* (2) and more recently by Cuming and Lort-Williams, JJ., in *Mokbul Khan v. Emperor* (3). In this latter case the learned Judges said:

"In other words a party cannot be allowed to say that his witness is a truthful witness so far as a part of his evidence is concerned but an untruthful witness so far as some other portion is concerned."

* The theory so stated is fallacious. A party is allowed to cross-examine his own witness because that witness displays hostility and not necessarily because he displays untruthfulness. The theory has gained currency owing perhaps to the common belief that the sole object of cross-examination is to discredit the witness whereas its main purpose is to obtain admissions, and it would be ridiculous to assert that a party cross-examining a witness is thereby prevented from relying on admission, and to hold that the fact that the witness is being cross-examined implies an admission by the cross-examiner that all the witness's statements are falsehoods. The correct view was, in my opinion, expressed in *Emperor v. Jehangir Cama* (4). Moreover the opinion of Lord Campbell has never been followed in England and the English Law upon which the Evidence Act is founded was clearly stated by Tindal, C. J., in *Bradley v. Ricardo* (5). Therefore that part of Kishun's statement which is contained in his statement to the Magistrate was clearly admissible.

In my opinion the guilt of both the appellants has been established on the clearest possible grounds and admits of no doubt whatever and the appeal should be dismissed. The learned Sessions Judge has come to the conclusion, upon what I think is very inadequate evidence, that the murder was committed by the appellants with a view to save their family from dishonour which would sooner or later have fallen upon

(1) [1858] 1 F. & F. 254.

(2) A. I. R. 1926 Cal. 139=53 Cal. 372.

(3) A. I. R. 1928 Cal. 690.

(4) A. I. R. 1927 Bom. 501.

(5) [1831] 8 Bing. 57.

them by reason of the habits of the deceased. But even if there had been adequate ground to believe that they were so inspired this would not constitute any reason for relieving these men of extreme penalty. It would establish a most dangerous and immoral principle to concede to any jealous husband the right to assassinate his wife and escape the gallows. The reason for passing the lesser sentence must be express and adequate. Such reasons are some times to be found in the order of mentality to which the person belongs. A simple-minded ignorant savage who slaughters a person whom he really believes to be a dangerous magician may well fall into this class. In this province moreover the position of women, deprived of contact with the world, of education and of all opportunity for mental development, would, save in very extreme cases, justify a Court in treating them as persons who should not be sentenced to death. Sometimes also an extenuating fact may be found in the circumstances of the crime itself, such, for example, as those which often occur in agrarian riots where a free and honest fight on equal terms results in death although the crime may nevertheless not fall within the exceptions to S. 300, I. P. C.

I must observe that a feeling of doubt as to the guilt of the accused is a matter to be considered by the tribunals before but not after the verdict. It has no place in the determination of the sentence after conviction. If the evidence is not strong enough to justify an irrevocable sentence the accused is entitled to acquittal, and our law does not recognize the right of a judicial tribunals to give effect to more than one degree of doubt. It is not permissible for a Judge to sentence a prisoner to transportation for life on the ground that he is sufficiently certain of the guilt for that purpose but not sufficiently certain to sentence him to death. I mention this matter because it may throw light on some of the reported decisions which are otherwise inexplicable on judicial grounds.

Finally it must be noted that those in whose hands is placed the exercise of the royal prerogative of mercy are not trammelled by any legal considerations whatever and may be trusted to exercise their powers. The legislature has

wisely not thought fit, to entrust judicial tribunals with the prerogative of mercy and Judges must remember that they are sworn to administer the law not as they wish it might be but as they find it. The case we are dealing with is one of brutal assassination of a sleeping and defenceless woman and I can see no reason why the murderers should not suffer the extreme penalty. I would, therefore, set aside the sentence of transportation for life and sentence the appellants Sohrai Sao and Sawkhi Sao to be hanged by the neck till they are dead.

Dhavlé, J.—I agree.

V.B./R.K. - *Sentence enhanced.*

1930 Cr. Cases 520

(Patna)

COURTNEY-TERRELL, C. J., AND
MACPHERSON, J.

Khudu Rajak—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 167 of 1929, Decided on 20th December 1929, from decision of Sess. Judge, Manbhum-Sambalpur, D/- 2nd September 1929.

(a) Penal Code, S. 302—Sentence.

Unless extenuating circumstances can be found, a murderer must be sentenced to death. [P 523 C 2]

(b) Penal Code, S. 302—Sentence of death must be imposed when Judge is sufficiently certain of guilt.

It is not permissible for a Judge to sentence a prisoner to transportation for life on the ground that he is sufficiently certain of the guilt for that purpose but not sufficiently certain to sentence him to death: *A. I. R. 1930 Pat. 515 Rel on.* [P 523 C 2]

J. Chatterji and *R. S. Chatterji*—for Appellant.

*C. M. Agrawal*a—for the Crown.

Courtney-Terrell, C. J.—This is an appeal from a decision of the Sessions Judge of Manbhum-Sambalpur convicting the appellant Khudu Rajak of the murder of his wife Puti Rajakin on 21st April last. He was sentenced to transportation for life and by direction of the Court notice was served upon him to show cause why the sentence should not be changed to one of death.

The accused is of the dhobi caste and is a resident of village Kana situated two miles from the Thana of Balarampur. He is aged about 27 years. His father died some four years ago and since then he has been master of his

own assets and affairs. He is fairly well off and has a pucca house. His deceased wife Puti Rajakin was the daughter of one Panu Rajak of a village called Nekra in the same district about two miles from village Kana. At the date of her death she was about 17 years old. She married the appellant at about 8 or 9 years of age and went at once to her husband's house. She attained puberty four or five years ago. The life of the married couple was not happy. The appellant used to beat his wife and on at least one occasion she ran away to her father's house and complained to him of the treatment she received. She also complained to her grandmother, the mother of her father. Her own mother is dead and her father has married again. She complained to them that the appellant had beaten and ill-treated her and showed the marks on her body and she told her grandmother that the treatment by her husband was due to the fact that he had entered into an intrigue with another woman named Nuni Baisnabi. This person is of about the same age as the appellant. She is separated from her husband and carries on a small grocer's shop at Kana where she lives with her mother. There is evidence that the appellant used to spend much of his time with this woman.

The house of the appellant is a single storeyed building with a flat pucca roof. It has a verandah facing south; and north of this verandah there are three rooms each with a door leading on to the verandah. In the westernmost room cows are kept. This room has a door in its western wall by which access is obtained to a staircase of two flights leading to the roof. The upper end of the staircase is surrounded by walls standing up from the main roof and the enclosed space is covered to protect the stairs. The southernmost enclosing wall has a door in it by which a person passing from the staircase may come out on to the roof. The roof of the house has a small parapet a few inches high on the north side. Adjacent to the house and south of the verandah is a courtyard which is shared by the appellant with his uncle Nayan Rajak whose house lies on the east and south-east of the appellant's house.

On the night of 21st May there were in the house of the appellant only four persons, the appellant himself, his wife, who died that night, the appellant's mother and a boy of about 13 or 14 named Hiru Rajak. He is a distant cousin of the appellant and about four or five days before had been engaged by the appellant as his cowherd.

At 8-30 a.m., there appeared at the Balarampur thana the uncle of the appellant, Nayan Rajak accompanied by some villagers. He lodged a first information, which was recorded by the writer head constable, the Sub-Inspector being absent that morning on other business. He stated that early that morning Khudu had called to him to come up to the roof and see his wife who was lying dead having committed suicide by cutting her throat with a sword; that he had gone up to the roof and found Khudu there and on the middle of three khatias, which were lying side by side east and west, with their heads close to the eastern wall surrounding the staircase exit he saw the body of Khudu's wife. Her throat was cut, there was much blood about and a bloodstained sword was lying on the ground close to the khatia. He said that the other cots had been occupied, that on the north by the boy Hiru and that on the south by Khudu. He said that the sword belonged to Khudu, and that it together with a bow and arrows had been kept on the roof. He said that Khudu's mother slept in the courtyard downstairs. He further said that Khudu was weeping and that when he had been asked by Nayan and fellow villagers, who had been called to the scene, to come to the police station to give information Khudu had said: "Proceed, I am coming" and had set out before them. They had not, however, found him on the way.

The head-constable went to the spot at 10-30 a.m., and held an inquest on the body and subsequently sent it to the hospital for a post-mortem report. He found and took charge of the sword and its sheath and also found a bow and arrows close by. The deceased was lying on her right side and had two gaping wounds on the left side of the neck severing the spinal cord. They must have been inflicted with great force by a heavy sharp weapon and there can

be no doubt that they were inflicted with the sword which was found.

Naya Rajak gave his evidence before the Sessions Judge and a particularly foolish cross-examination by Babu Chandi Charan Chatterji, who appeared for the defence, established beyond doubt that the sword was Khudu's property. The witness, however, somewhat altered the story that he had given in first information and this alteration is undoubtedly due to his desire to shield his nephew. He stated that the appellant had said that "some one had cut the woman's neck" and when reminded by the Court that he had stated in the first information that Khudu's mother slept that night in the courtyard he replied :

"I did not see her sleeping there. I said so but it was a mistake. I only saw the khatia."

He, however, admitted that he himself had slept in his own angan and from there he admitted that the courtyard was visible. It is very clear not only that Khudu's mother had in fact slept in the courtyard downstairs as stated in the first information but that Nayan had actually seen her sleeping there. The mother Sukhada Rajakin and the boy Hiru have both given evidence. The mother says that she and Hiru and the deceased woman were the persons who slept on the roof. She says that Khudu went out after the evening meal and that she does not know when he returned home. She says that the doorway leading from the bottom of the staircase into the cow room had been bolted and that no one can have got on to the roof by means of the staircase. She says that she had slept soundly through the night and when she had waked up she had found her daughter-in-law lying dead covered with blood and the sword on the ground and that she had then gone down the stairs and opened the door and found her son sleeping on the verandah. This is a very natural and very pitiful effort to shield her son and to my mind the story is entirely incredible. It will be remembered that three khatias were found on the roof by Nayan when he went up there. The northernmost one bore no blood stains. On the middle one Puti was lying but the southernmost one was conspicuously blood-stained.

It is to my mind certain that the husband and the wife both slept on the

roof as stated by Nayan in the first information. Whether or not the boy slept on the roof is not certain but he is of an age when such a proceeding would seem very unlikely. The probability is that the third and northernmost khatia was placed upon the roof after the murder had been committed and it was probably placed there by the appellant assisted by his mother. It is true that in the first information Nayan says that the boy slept on the roof but he was not called to the scene until after the third cot was in position and I think it likely that at that time it had not been decided between Khudu and his mother to say that she (the mother) had slept on the roof. It is quite incredible that the mother could have slept on the roof or that she was the first to discover the crime for in that case Nayan would have been told of this fact the moment he appeared on the scene and neither in the first information nor in his evidence in Court does he make any mention of having been told that it was the mother who had first discovered the dead body. Moreover had she been the first to discover the murder she would undoubtedly have raised an outcry.

Indeed Rai Bahadur Jyotirmoy Chatterji who presented the case for the appellant with the greatest skill and energy, was constrained to admit that the story of the mother having slept on the roof was too incredible to have any chance of success. He, however, boldly advanced a very ingenious hypothesis to account for the death of the deceased. He admitted that the situation and structure of the buildings rendered it almost impossible that the murderer can have approached the roof otherwise than by the stairs and he offered the theory that the woman Nuni Baisnabi, who was the appellant's mistress, instigated the murder. He suggested that she may have previously arranged with some other person that on the night of 21st May, she should lure the appellant to an assignation at her own house and that in his absence and while the door to the staircase was left unguarded the assassin should come to the house and murder the wife who might be expected at that time to be asleep. It being pointed out to the learned advocate that in that case a murderer would probably bring his own weapon, he quickly and ingeniously

replied that such a murderer if he found the sword which was admittedly on the roof would prefer to use such a convenient weapon and leave it behind him to divert suspicion. He admitted that this hypothesis was supported by no evidence whatsoever but urged that it was consistent with the facts and ought to be treated as a possibility. Ingenious however as the theory is, it must in my opinion fail as an explanation. In the first place it is extremely improbable that a woman in the position of Nuni Baisnabi can have possessed the means to purchase the services of such an assassin. Secondly the risk to be run by the assassin was such as would deter any sane man from the attempt. Thirdly there was no financial inducement in the actual commission of the crime for no robbery was committed. Fourthly it is quite impossible that Nuni Baisnabi could have induced a lover to undertake such an enterprise for the benefit of a rival lover. Lastly, if Nuni Baisnabi had been the instigator of the murderer the appellant is the one person who would have been selected by her as the assassin.

As against the appellant there is first of all the evidence of motive. He had relations with a mistress and it was on account of this relationship that he quarrelled with his wife and beat her. This fact was amply established by another piece of foolish cross-examination by Babu Chandi Charan Chatterji. Secondly the blood-stained weapon with which the murder must undoubtedly have been committed was the property of the appellant. Thirdly, we have the conduct of the appellant himself. He was afraid to go to the thana with his uncle. The murder must have been committed by a man and he was the only man in the house. The murder clearly could not have been committed by a chance robber for he would have had no motive for attacking this one woman out of two or three sleeping persons. To my mind the evidence establishes beyond all reasonable doubt the guilt of the appellant and the learned Judge quite rightly convicted him.

I pass now to a consideration of the sentence which has been passed upon the appellant. The learned Sessions Judge said :

"I find the accused guilty and convict him under S. 302, I. P. C. As, however, no adequate

motive for the crime has been made out, I would not be justified in imposing on him the extreme penalty of the law."

In this matter the learned Judge has made a very grave mistake. It has long been well established law that unless extenuating circumstances can be found a murderer must be sentenced to death. It is a most painful duty which we are obliged to perform but it is our duty to insist that the Sessions Courts shall carry out the obligations imposed upon them by law. The question whether or not the death sentence is imposed should not depend upon the particular Judge who happens to try the case and in the interests of accused persons it is right that they should be able to expect the same results, no matter by what Judge they happen to be tried. I have been at pains to point this out in an earlier case *Sohrai Sao v. Emperor* (1). That also was a case in which the Court was obliged to enhance the sentence of transportation for life to one of death. In that case (1) decided on 8th June 1929 I said:

"The reason for passing the lesser sentence must be express and adequate. Such reasons are sometimes to be found in the order of mentality to which the person belongs. A simple-minded ignorant savage, who slaughters a person whom he really believes to be a dangerous magician, may well fall into this class. In this province moreover the position of women, deprived of contact with the world, of education and of all opportunity for mental development would, save in very extreme cases justify a Court in treating them as persons who should not be sentenced to death. Sometimes also an extenuating fact may be found in the circumstances of the crime itself, such, for example, as those which often occur in agrarian riots where a free and honest fight on equal terms results in death although the crime may nevertheless not fall within the exceptions to S. 300, I. P. C. I must observe that a feeling of doubt as to the guilt of the accused is a matter to be considered by the tribunal before but not after the verdict. It has no place in the determination of the sentence after conviction. If the evidence is not strong enough to justify an irrevocable sentence the accused is entitled to acquittal, and our law does not recognize the right of a judicial tribunal to give effect to more than one degree of doubt. It is not permissible for a Judge to sentence a prisoner to transportation for life on the ground that he is sufficiently certain of the guilt for that purpose but not sufficiently certain to sentence him to death. I mention this matter because it may throw light on some of the reported decisions which are otherwise inexplicable on judicial grounds. Finally it must be noted that those in whose hands is placed the exercise of the royal prerogative of mercy are not trammelled by any legal considerations whatever and may

(1) A. I. R. 1930 Pat. 515.

be trusted to exercise their powers. The legislature has wisely not thought fit to entrust judicial tribunals with the prerogative of mercy and Judges must remember that they are sworn to administer the law not as they wish it might be but as they find it. The case we are dealing with is one of brutal assassination of a sleeping and defenceless woman and I can see no reason why the murderers should not suffer the extreme penalty."

In this particular case the reasoning of the learned Judge for not passing the sentence of death means either that he is not certain of the guilt of the appellant or that a person who murders his wife without reason is less blameworthy than one who does so in order to get rid of her in favour of a mistress. I have no desire whatever to make any observation which might be taken as a reflection upon the mental integrity of so experienced a Judge. The statement of his reason merely exhibits a confusion of mind. For the reasons I have stated I would dismiss this appeal, set aside the sentence of transportation for life and sentence the appellant Khudu Rajak to be hanged by the neck till he is dead.

Macpherson, J.—I agree.

v.B./R.K. *Sentence enhanced.*

1930 Cr. Cases 524 (1)

(Oudh)

STUART, C. J., and RAZA, J.

Emperor

v.

Chiraunji Lal—Accused.

Criminal Ref. No. 1 of 1930, Decided on 31st January 1930.

Criminal P. C., S. 307—Charge good—Verdict of jury unanimous but Judge disagreeing—Jury's view not bad or impossible—High Court is unable to reverse verdict of jury.

Where the charge is good and verdict of the jury unanimous but Judge disagrees, provided the jury's view is neither bad nor impossible one, High Court should not reverse the verdict. [P 524 C 2]

H. K. Ghose—for the Crown.

J. Jackson—for Accused.

Raza, J.—This is a reference from the learned third. Additional Sessions Judge of Lucknow against a jury verdict acquitting a certain Chiraunji Lal. The case was tried by the learned Judge and a jury who unanimously acquitted Chiraunji Lal. We have been through the record. The learned Judge tried the case very carefully and very fairly. The charge to the jury was a good charge. The jury unanimously acquitted Chiraunji Lal. This is a case in which a great deal

could be said on both sides. The Sessions Judge's view is a good view and a possible view but we cannot go so far as to say that the jury's view was a bad view or an impossible view. The case was undoubtedly not free from difficulty and the evidence of the complainant Chhotey Lal was open to considerable criticism. The jury took the view that the evidence was unreliable. We do not say that they were right but we certainly cannot say that they were wrong and in these circumstances we are unable to reverse their verdict. The result is that we acquit Chiraunji Lal and direct him to be set at liberty.

v.B./R.K.

Accused acquitted.

1930 Cr. Cases 524 (2)

(Lahore.)

DALIP SINGH, J.

Mangha Ram—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1568 of 1929, Decided on 14th February 1930.

Criminal P. C., S. 239—Two persons abducting girl—Third person not taking part in abduction—Cheating third person by false representation as to caste of girl—Transactions cannot be said to be same.

A transaction of abduction for which two persons have been convicted cannot be said to be part of the same transaction when a third person not alleged to have taken part in the abduction proceeds to cheat, by false representation as to caste etc. of the girl, a person who buys the girl, there being no continuity of purpose, nor any contiguity of time. [P 524 C 2]

B. R. Puri—for Petitioner.

S. L. Puri for Govt. Advocate—for the Crown.

Judgment.—The joint trial of all these persons has not been justified by counsel for the Crown. He refers only to S. 239 (d) and contends that the transaction was one. I am unable to see how the transaction of abduction for which two persons have been convicted is part of the same transaction when a third person not alleged to have taken part in the abduction proceeded to cheat by false representation as to the caste etc. of the girl, a person who bought the girl. There does not seem any continuity of purpose or any contiguity of time. I, therefore, accept the revision and quash the conviction and the sentences as the trial was wholly illegal.

R.M./R.K.

Conviction quashed.

1930 Cr. Cases 525

(Alfhabad)

YOUNG, J.

Jhangtoo Barai and another—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 579 of 1929, Decided on 28th October 1929, against order of Sess. Judge, Ghazipur, D/- 23rd May 1929.

(a) Criminal P. C., S. 345—Compoundable offence compounded by document signed by all parties present in Court — Magistrate ought to pronounce acquittal without delay.

Where the offence is compoundable by parties without consent of Court, and it is so compounded and a deed of composition filed by all parties present in Court, inasmuch as only verification necessary is whether parties signed it and understood contents, the Magistrate should not adjourn case for verification but do it without unnecessary delay acquitting the accused. [P 525 C 2]

(b) Criminal P. C., S. 345 (b) — Composition — "Withdrawal."

Composition once effected cannot be withdrawn: 3 C. W. N. 322; 3 C. W. N. 548; 31 *Mal.* 916; 21 *Cal.* 103; 41 *Mal.* 685 and *A.I.R.* 1925 *Lah.* 159, *Rel. on.* [P 526 C 1]

K. D. Malaviya—for Applicants.

M. Waliullah—for the Crown.

G. S. Pathak—for Opposite Party.

Judgment.—This is an application in revision from an order of the Sessions Judge of Ghazipur refusing to convert an order of discharge into an order of acquittal. The facts are these: One Jagardeo brought a complaint against the two applicants under S. 498, I. P. C. On 28th January 1929, the day appointed for the hearing of the case, the Magistrate was informed that the complainant and the applicants wished to compound the offence, and at the same time a written petition signed by all the parties was filed, praying the Court to pass the appropriate order. On that document itself appeared in the handwriting of the complainant the words "the compromise which is written here is correct." The Magistrate passed an order that the composition was to be verified and appointed 13th February for the first hearing. The applicants take objection to this order. They contend that when the composition was filed and the offence compounded the Magistrate's duty was, under S. 345, sub-S. (6), Criminal P. C., to acquit the accused. On 13th February, the complainant told the Court that he wished to withdraw from the composition, and

the case was further postponed until 23rd March 1929. On that day the complainant did not appear to prosecute, and the Magistrate dismissed the complaint and discharged the applicants under S. 259, Criminal P. C. Subsequently the complainant brought a fresh complaint based upon precisely the same allegations as in the former complaint against the applicants. On this the applicants filed a revision against the order of the Magistrate of 23rd March 1929, by which the applicants were discharged.

The applicants contend that the order of the Magistrate should have been that of acquittal.

Section 345 makes it clear that an offence under S. 498 is compoundable by the husband of the woman without the permission of the Court. Sub-S. (6) enacts that the composition of an offence under this section shall have the effect of an acquittal of the accused. The only question, therefore, for the Magistrate on 28th January, was whether there was in fact a composition of the offence or not. The best evidence he could possibly have was before him, namely, a document signed by the parties in the handwriting of the complainant himself that the composition was correct. It seems to me that it was entirely unnecessary, when the parties were all present in Court, for any verification of the composition. The complainant was literate. He signed the document in his own writing. It must be presumed, unless it is proved to the contrary, that the complainant well understood the one small paragraph that appeared in the document. In any case, the only verification that was required was a simple question to the parties whether they signed the document and whether they understood its contents. There can be no doubt that on that day there was a valid composition within the meaning of S. 345, Criminal P. C., before the Court. It was, therefore, the duty of the Magistrate upon that day, and without any unnecessary delay, to have pronounced an acquittal. I am clear that it is incompetent for any person once having entered into a valid composition to withdraw from it. In criminal matters it is of the highest importance that there should be finality. It has been

suggested in this case that the terms of the composition were not carried out, and that is why the complainant wished to withdraw from it. It is entirely immaterial whether the terms of the composition were carried out or not. The sole question is whether there was a composition on 28th January. A breach of the agreement might give rise to other remedies. I am confirmed in my view of the law in this matter by an overwhelming number of authorities in the other High Courts of India. They are unanimous that a composition once effected cannot be withdrawn: see *Kusum Bewa v. Bechu Bewa* (1); *Mahomed Ismail v. Faizuddin* (2); *Mahomed Kanni Rowther v. Inayathulla Sahib* (3); *Murray v. Queen Empress* (4); *Kumaraswami Chetty v. Kuppuswami Chetty* (5); *Ram Rup Pal v. Mata Din* (6). The revision is accepted, the order of 23rd March 1929, discharging the applicants is cancelled and an order of acquittal substituted.

V.B./R.K. Revision allowed.

- (1) [1893] 3 C.W.N. 322.
- (2) [1899] 3 C.W.N. 548.
- (3) [1916] 39 Mad. 946=31 I. C. 819=2 M.L.W. 1200.
- (4) [1894] 21 Cal. 103.
- (5) [1918] 41 Mad. 685=31 M. L. J. 217=7 M.L.W. 274=44 I. C. 533=(1913) M. W. N. 493.
- (6) A. I. R. 1925 Lah. 159.

1930 Cr. Cases 526

(Patna)

ADAMI AND CHATTERJI, JJ.

Mangal Chand Marwari

v.

Makhan Goala

Criminal Ref. No. 91 of 1929, Decided on 17th April 1929, made by Sess. Judge, Manbhum-Sambalpur, on 22nd December 1928.

Criminal P. C., S. 250 (1)—Order to show cause practically simultaneous with judgment—There is sufficient compliance with provision of S. 250.

Where the order to show cause is practically simultaneous with the order of acquittal or discharge, order can be taken to be part of the same proceeding and continuation of it and the provisions of the section can be said to have been substantially complied with: *A. I. R. 1927 Lah. 515*; *8 Bom. L. R. 847* and *A. I. R. 1926 All. 165, Foll.* [P 526 C 2; P 527 C 1]

C. M. Agarwala—for the Crown.

Adami, J.—This is a reference by the Sessions Judge of Manbhum-Sambalpur under S. 438, Criminal P. C.

One Mangal Chand Marwari gave

information against Makhan Goala to the effect that he had stolen an umbrella and that there had been an assault. The learned Deputy Magistrate, after a full trial of the case, came to the conclusion that the defence story was true and he acquitted the accused under S. 253 on 8th September 1928. In the order-sheet under O. 5, dated 8th September 1928, the order passed was:

"The accused is acquitted under S. 253, Criminal P. C. Enter false-S. 390, I. P. C."

Then in Order 6 on the same date the order is recorded:

"The information given to the police by the complainant appears to be frivolous and vexatious. The complainant is absent. Summon him to show cause why he should not be ordered to pay Rs. 50 as compensation to the accused under S. 250, Criminal P. C., on 15th September 1928."

The complainant showed cause on 15th September 1928, and on 19th the order directing compensation to be paid was signed by the Deputy Magistrate.

The learned Sessions Judge has referred this case on the point that the order directing cause to be shown not having been passed before the judgment was signed acquitting the accused, the provision of S. 250, sub-S. (1), has not been complied with, and that therefore, the order is ultra vires. S. 250, sub-S. (1), has been amended and requires that:

"The Magistrate may, by his order of discharge or acquittal, if the person upon whose complaint or information the accusation was made is present, call upon him forthwith to show cause why he should not pay compensation to such accused."

The learned Sessions Judge is of opinion that the provision is mandatory and that unless the order to show cause is included within the actual judgment the order is ultra vires. There have been many cases on the point both under the old section and under the section as amended. In the present case we have the assurance of the trying Magistrate that he passed the order on the order-sheet acquitting the accused and the order calling upon him to show cause simultaneously though the two orders in the order-sheet have two separate numbers. We must accept the statement of the trying Magistrate. The question is whether when the order to show cause is, though not a part of the judgment, signed immediately after the judgment, the order can be taken to be part of the same proceeding and continuation of it. In my mind, there is no

doubt that had the order to show cause been made on a subsequent date or after some interval, the provisions of the law must have been held not to have been complied with. But here in the present case it is obvious, on the statement of the Magistrate, that the two orders were really passed at one and the same time and were a part of the same proceeding. In the case of *Ghulam Muhammad v. Vir Bhan* (1) the learned Chief Justice of the Lahore High Court finding that both the orders were passed on the same day and one followed the other, was of opinion that there had been a substantial compliance with the requirements of S. 250, sub-S. (1), Criminal P. C. He followed the case of *Emperor v. Punamchand Hirachand* (2). The decision in the case of *Jairaj Singh v. Ransi* (3) is to the same effect. There have also been decisions which are to the same effect under the section before its amendment.

I would, therefore, hold that where the order to show cause is practically simultaneous with the order of acquittal or discharge the provisions of the section have been substantially complied with.

I think, therefore, that the reference must be rejected and the order of the Deputy Magistrate must stand.

Chatterji, J.—I agree.

V.R./R.K. *Reference rejected.*

(1) A. I. R. 1927 Lah. 515.

(2) [1906] 8 Bom. L. R. 847.

(3) A. I. R. 1926 All. 165.

1930 Cr. Cases 527

(Sind)

PERCIVAL, J. C., AND WILD, A.J.C.

Karachi Municipality

v.

Mukhtiarkar of Karachi

Criminal Ref. No. 299 of 1929, Decided on 12th February 1930.

Criminal P. C., S. 197—Failure of Mukhtiarkar to keep office compound in sanitary condition is failure in discharge of his official duty—Sanction of Commissioner is necessary for prosecution.

It being the duty of Mukhtiarkar to keep his office compound in a sanitary condition, he fails in his duty as a Mukhtiarkar if he does not do so and his action purports to be in the discharge of his official duty. In a criminal complaint against him sanction of Commissioner is necessary. (1916) 1 M. W. N. 384 and A. I. R. 1929 Mad. 172, Dist; 25 Mad. 15, Not Appl. [P528, C 1]

Kundan Mal Dayaram—for Karachi Municipality.

C. M. Lobo—for the Crown.

Percival, J.C.—This is a reference by the District Magistrate of Karachi who asks that this Court should quash the order of the Honorary Magistrates entertaining a complaint and issuing process against the Mukhtiarkar of Karachi. The reference is made on the ground that the complaint has been filed without the previous sanction of the Commissioner in Sind, as required by S. 197, Criminal P. C. In this case the Karachi Municipality had issued a notice under S. 131, Bombay District Municipal Act. (Bombay 3 of 1901,) to the Mukhtiarkar of Karachi on the ground that the compound of the old Small Cause Court in Karachi, which is the office of the Mukhtiarkar, was in insanitary condition.

The only point that arises in this reference is whether, assuming that the Mukhtiarkar kept the compound in an insanitary condition, he was acting or purporting to act in the discharge of his official duty. There have been a number of rulings cited on S. 197, Criminal P. C. but it is to be noted that most of the rulings, especially *Municipal Commrs. Mad. v. Major Bell* (1) cited by the learned pleader for the Municipality, was decided under the old S. 197, before it was amended in 1923. Under the old S. 197 the words were "as such Judge or public servant," but this has been changed and the wording now is "acting or purporting to act in the discharge of his official duty." Before referring to the cases we may just consider the facts of the present case. It is clear that the Mukhtiarkar was in charge of the building in question as an official. The notice was given to him as Mukhtiarkar, the name of the Mukhtiarkar is not mentioned in the proceeding at all. All the proceedings in question were official. He was occupying the building as Mukhtiarkar. The sweeper appointed to keep the compound in a sanitary condition must have been a sweeper paid by the Government. It appears therefore prima facie that this is a case in which the Mukhtiarkar was acting or purporting to act in the discharge of his official duty. A distinction is made in the various cases cited between the cases in which an official is acting within the scope of his duty and the cases in which he has not done the act as an

(1) 1902 25 Mad. 15.

official but has taken certain action which is outside the scope of his duty. For example, the case most favourable to the Municipality seems to be *Abdul Khader Sahib, In re* (2) in which it was held by the learned Chief Justice of the Madras High Court that the offence of criminal breach of trust is not an offence which is committed by an official in his capacity of public servant as such, his capacity of public servant being only that which puts him, so to speak, in a position in which such an offence can be committed. Here, however, the case is a little different. It is a distinct part of the duty of the Mukhtiarkar to keep the office in a sanitary condition, and if he fails in his duty, he has failed in it as Mukhtiarkar. It cannot be said that, if it is proved that he kept the compound in an insanitary condition, the action was outside the scope of the Mukhtiarkar. The most recent case on the subject is *A. I. R. 1929 Madras 172*, which is referred to by the learned pleader for the Municipality but even that case, it seems to me, does not really support the Municipality. In that instance as a matter of fact, the learned Judge held that sanction was necessary, because it was held that, if a Judge fabricates a record, the alleged offence is committed by him while he is purporting to act in the discharge of his official duty. There are other cases on the boundary line, but I am of opinion that S. 197, as it stands at present, is rather wider than it was, before the section was amended in 1923. The wording now is "acting or purporting to act in the discharge of his official duty," and I am clearly of opinion that the Mukhtiarkar in this case was so acting.

We accordingly quash the order of the Honorary Magistrate and set it aside.

J.M./R.K.

Order quashed.

(2) [1916] 1 M W N 834=33 I. C. 649=17
Cr. L. J. 168.

1930 Cr. Cases 528

(Sind)

PERCIVAL, J. C.

Emperor

v.

Allahdad—Accused.

Criminal Ref. No. 294 of 1929, Decided on 21st December 1929,

Criminal P. C., S. 215 — Offence not serious though death of person involved—Magistrate should not commit case to Sessions.

There is no reason to commit to the Sessions, cases where the Magistrate can adequately deal with the offence himself and no overriding reason exists for committal to the higher Court, even if the death of person is involved therein : 11 S. L. R. 79; *A. I. R. 1924 Sind 61* and 15 *Bom. L. R. 978, Rel. on.* [P 528 C 2, P 523 C 1]

Hatim B. Tyebji—for the Crown.

Judgment.—This is a reference by the Additional Sessions Judge, Sukkur, proposing that this Court should quash the commitment to the Sessions Court of Sukkur of one Allahdad, son of Khair Mahomed, who has been committed to that Court for trial under Ss. 279, 337 and 304-A, I. P. C., by the Resident Magistrate, Rorhi.

The learned Additional Sessions Judge points out in his reference that the maximum sentence of imprisonment for any of the offences in question is only two years, a sentence which could have been passed by the learned Committing Magistrate himself. Moreover the offence under S. 304-A as well as the other offences are triable by a First Class Magistrate. The learned Additional Sessions Judge observes further that it has been held by this Court in *Imperator v. Ismail* (1) and in other cases that it is a point of law under S. 215, Criminal P. C., if the Magistrate without adequate reason commits a case to the Sessions in which he can adequately punish the accused himself: vide in particular *Utlilbai v. Emperor* (2). The learned Additional Sessions Judge correctly points out that there may be cases in which a committal is desirable even apart from the question of punishment. He observes :

"It is true that good cause for commitment is not limited to this reason of inadequacy of punishment. For there may be other good reasons, such as difficult or intricate questions of law, the desirability of trial by jury or assessors, or there being some connected matter already before the Court of Sessions. None of the above grounds exists in the present case."

The committal proceedings show that this was a case of a person being killed by a motor car colliding with stone-carrying truck, the accused being the driver of the car. It does not appear that there is any overriding reason or matter

(1) [1917] 11 S. L. R. 79=44 I. C. 335=19
Cr. L. J. 319.

(2) *A. I. R. 1924 Sind 61*=17 S. L. R. 183.

of such importance as to require commitment to the Sessions on grounds other than the question of the adequacy of the sentence. The learned Resident Magistrate in his committal proceedings has observed that it was a question in which the death of one person and injury to another person were involved, and that he considers, therefore, the matter to be serious and a proper one for commitment.

There, no doubt, has been at least one ruling in which it has been held that, when an offence ends in the death of a person, it is suitable that it should be committed to the Sessions. However, on the other hand there have been rulings to the contrary effect, namely that there is no reason to commit to the Sessions cases where the Magistrate can adequately deal with the offence himself, even if the death of person is involved therein. The rulings of this Court appear to be particularly in favour of the latter view: vide *Imperator v. Ismail* (1) mentioned above. The learned Additional Sessions Judge in the course of his order has also drawn attention to the case of *Emperor v. Asha Byathi* (3) in which their Lordships, while directing the Magistrate to conclude the trial himself, made the following remarks:

"In so doing we take occasion to observe that it is for many reasons undesirable in practice that our already overburdened Courts of Sessions should be still further burdened with the weight of cases committed to them by Magistrates, where such Magistrates are themselves competent to decide the cases and no overriding reasons exist for committal to the higher Courts."

I quite agree with the view there expressed and, accordingly, quash the commitment and direct the Resident Magistrate to proceed with and dispose of the case himself.

J.M./R.K. *Commitment quashed.*

(3) [1918] 15 Bom. L. R. 998=21 I. C. 897—14 Cr. L. J. 557.

1930 Cr. Cases 529 (Sind)

PERCIVAL J. C., AND RUPCHAND A.J.C.
Shidu—Accused—Applicant.

v.

Emperor—Opposite party.

Criminal Revn. Appln. No. 1 of 1930,
Decided on 10th February 1930, from
order of first Class Magistrate, Karachi.

Criminal P. C. S. 256—Warrant case—
Summary trial in—S.256 applies and accused

is entitled to further time for producing his evidence,

Even if a warrant case is tried summarily, the provisions of S. 256 apply and after the prosecution case is closed, the accused is entitled to have further time for producing his evidence. [P 529, C 2]

Hassomal M. Gurbuzani for Applicant.

C. M. Lobo—for the Crown.

Percival, J. C.—This is a revision application against the order of the First Class Magistrate, Karachi Taluka, who convicted the applicant under S. 448 I. P. C. and sentenced him to pay a fine of Rs. 40/- or in default to suffer rigorous imprisonment for one month.

The applicant contends that he should have been allowed to produce the defence witnesses. It appears that the case was heard on the 28th September and the accused was informed that, as the trial would be summary, he should appear at the next hearing with his witnesses. However, on the next hearing, namely, the 15th of October, he did not appear with the witnesses; but some of the prosecution witnesses were examined on that day, and the learned Magistrate refused to postpone the hearing any further for the defence witnesses. He also, as the judgment shows, did not examine two of the prosecution witnesses because they were absent and were "given up as the accused had no defence at hand."

The learned pleader for the applicant relies on S. 256, Criminal P.C. which he contends applies even in the case of summary trials if the case is a warrant case. The learned Public Prosecutor accepts this contention and I agree that the provisions of S. 256 should have been followed in this case, and the accused should have been allotted further time to produce his evidence in accordance with the provisions of that section. I agree that the provisions of S. 256 apply in warrant cases even if they are tried summarily. For this reason, the order of the learned First Class Magistrate is open to objection, and it is accordingly set aside. The fine, if paid, to be refunded.

I, however, do not see any reason why the case should not be remanded for a further hearing.

The case is accordingly remanded to the First Class Magistrate to enable the accused to call his witnesses in accor-

dance with the provisions of S. 256 Criminal P. C. It will also be open to the prosecution, if so disposed, to call the two prosecution witnesses, Mohamed and Adam who were absent and given up because the accused had no defence at hand.

It may be observed that it seems to be a common opinion amongst Magistrates that, if cases are tried summarily, then S. 256, Criminal P. C. does not apply if the cases are warrant cases. I am, however, of opinion that S. 256 applies in such cases even if the proceedings are summary.

After the above order was passed it was suggested on behalf of the applicant that, as the case was decided as long ago as 15th October 1929 it would be preferable that the whole case should be tried de novo. We are of opinion that that is the best plan, having regard to all the facts of the case. The case should, therefore, be heard de novo by the learned Magistrate from its commencement.

J.M/R.K.

Case remanded

1930 Cr. Cases 530

(Lahore)

TEK CHAND, J.

Mehtab—Complainant—Petitioner.

v.

Nathu—Accused—Respondent.

Criminal Revn. Petn. No. 1811 of 1929, Decided on 7th February 1930, against order of Addl. Sess. Judge, Lahore, D/- 30th September 1929.

Criminal P. C., S. 253 (2) — Complaint prima facie disclosing offence—Magistrate cannot hold charge groundless unless he ascertains from complainant nature of evidence — Case of alleged breach of trust — Mere fact that matter is one of rendition of accounts does not justify discharge under S. 253 (2).

The mere fact that the matter is one of rendition of accounts and must be referred to the civil Court is obviously insufficient to justify an order of discharge under S. 253 (2) in a case of alleged breach of trust. To say that no case has been made out is not tantamount to saying the charge is 'groundless.' Where a complaint prima facie discloses an offence, a Magistrate cannot hold the charge to be groundless unless he knows what is the sort of evidence that is going to be adduced to prove it; and he can only judicially come to such a conclusion when he has at least ascertained from the complainant what is the nature of the evidence his witnesses are going to give: *A. I. R. 1928 Mad. 149, Foll.* [P 581, C 1]

Ram Lal Anand—for Petitioner.

Niamat Rai—for Respondent.

Order.—On 22nd May 1929, the petitioner filed a complaint under S. 406, I. P. C., against the respondent. This was made over to Lala Mathra Das Puri, Magistrate, Second Class, for disposal. The learned Magistrate after holding an enquiry under S. 202, Criminal P. C., issued a bailable warrant against the accused. On the date fixed the accused appeared, but the Magistrate, Lala Mathra Das, was on leave. The case was accordingly made over to another Magistrate Mr. Alamgir. Before him the accused objected that the complaint was incompetent, as a similar complaint filed by the same complainant had already been dismissed under S. 203, Criminal P. C., by Mr. Mahamood, Magistrate, on 15th May 1929. Mr. Alamgir overruled the objection on 17th July 1929, and holding that he had jurisdiction to try the case adjourned the hearing to certain date, when the complainant was to be heard and his witnesses examined. In the meantime, the accused preferred a petition for revision to the Additional District Magistrate, repeating the objection that the dismissal of the former complaint under S. 203, barred the second complaint. The Additional District Magistrate heard this revision on 10th August 1929, and held that there was no force in the objection raised by the accused and that the second complaint was competent. But instead of dismissing the petition, he passed an order transferring the case to his file; proceeded there and then to examine the complainant who was present in Court, and forthwith passed an order discharging the accused under S. 253, Criminal P. C., remarking that :

"the matter was one of rendition of accounts and must be referred to the civil Courts."

The complainant has preferred a petition for revision to this Court and after hearing both counsel I am of opinion that the petition must succeed.

There is no doubt that the learned Additional District Magistrate had full power to transfer the case to his own file, but after such transfer he was bound to follow the procedure laid down in Ss. 252 and 253 of the Code.

It was open to Mr. Alamgir to hold an enquiry under S. 202 and to dismiss the complaint under S. 203. But after he had decided to summon the accused, the complainant should have been heard

and his witnesses examined. In this case, neither Mr. Alangir before the transfer of the case, nor the Additional District Magistrate after the transfer, afforded the complainant any opportunity to produce his evidence. Under Cl. 2, S. 253, the Magistrate had no doubt a discretion to discharge the accused without taking all the evidence that the complainant wished to produce if he thought that the charge was groundless. But this does not mean that he could cut short the proceedings by refusing to summon any of the witnesses which the complainant wanted to examine. Moreover there is no clear finding by the learned Additional District Magistrate that he considered the charge to be "groundless." The mere fact that the :
"matter was one of rendition of accounts and must be referred to the civil Court"

is obviously insufficient to justify an order of discharge under S. 253 (2) in a case of alleged breach of trust. As remarked in *Sheriff Sahib v. Abdul Karim* (1) :

"to say that no case has been made out is not tantamount to saying the charge is 'groundless.' Where a complaint prima facie discloses an offence, a Magistrate cannot hold the charge to be groundless unless he knows what is the sort of evidence that is going to be adduced to prove it; and he can only judicially come to such a conclusion when he has at least ascertained from the complainant what is the nature of the evidence his witnesses are going to give."

I set aside the order of the learned Additional District Magistrate, and send back the case for disposal to Lala Mathra Das Puri, Magistrate who had passed the order summoning the accused and who will now proceed to deal with the case in accordance with law. If, however, that Magistrate is not available, the District Magistrate may make over the case to the City Magistrate.

V.S./R.K. Order set aside.

(1) A.I.R. 1928 Mad. 123=51 Mad. 185.

1930 Cr. Cases 531 (1)

(Lahore)

DALIP SINGH, J.

Motan Ram—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1347 of 1929, Decided on 8th February 1930, from order of Sess. Judge, Dera Ghazi Khan, D/- 24th August 1929.

Penal Code, S. 304-A—Person killing

another in act of unloading pistol he knows to be loaded is guilty of negligence.

P knowing that a pistol was loaded, tried to unload it and while doing so acted so negligently that the pistol went off, killing C's son.

Held: that the act had been negligent on P's part and came within the purview of S. 304-A, and that the sentence of six months' simple imprisonment and Rs. 250 fine or three months more imprisonment in default was sufficient. [P 531 C 2]

B. R. Puri—for Petitioner.

M. L. Batra for Govt. Advocate—for the Crown.

Judgment.—The evidence led in the case shows clearly that the facts of the case are as follows: The petitioner knowing that the pistol in question was loaded, was trying to unload it and while doing so, acted so negligently that the pistol went off and as a result the complainant's son was killed. In my opinion there is no doubt that this was a negligent act on the part of the petitioner and falls within the purview of S. 304-A, I. P. C. The only question therefore is of sentence. He has been given six month's simple imprisonment and Rs. 250 fine or three months' more simple imprisonment in default. The learned Sessions Judge has recommended enhancement to two years' rigorous imprisonment. The only case which I have been able to find which comes near this case in its facts is 12 Cox. 623. The sentence awarded was two months' imprisonment. I would have been inclined to leave matters as they stood but taking the above authority into account and the fact that the petitioner has been released on bail by an order of this Court, I consider that the petitioner may be let off with the sentence already undergone and the fine ordered. The application for enhancement is accordingly dismissed. The petition is accepted to the extent indicated.

R.M./R.K. Order accordingly.

1930 Cr. Cases 531 (2)

(Lahore)

JAI LAL, J.

Sher Sing and another — Accused — Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1535 of 1929, Decided on 21st February 1930.

Penal Code, S. 366-A — Persons selling girl with knowledge or intention that she would be subjected to illicit intercourse are

guilty—it is not necessary that accused should know that girl is married.

D having quarrelled with her husband left her house with the idea of going to her grandfather. She met *S* and *N* on the way who offered to escort her. Instead of doing so, they tried to sell her and being unsuccessful concealed her in the house of *S* where she was later on traced by her relations. It was contended that *S* did not know that *D* was a married girl.

Held: that even assuming that *S* did not know that *D* was a married girl, his attempt to sell her clearly made him liable under S. 366A. The manner in which *S* tried to dispose of *D* was clear indication of his intention or knowledge that the girl would be subjected to illicit intercourse. The conduct of *N* also showed his guilty knowledge and intention. *A. I. R. 1927 Lah. 727. Dist.* [P 532 C 2]

Dev Raj Sawhney—for Petitioners.

Khurshid Ahmad. for Government Advocate—for the Crown.

Judgment.—Sher Singh and Nathu petitioners have been convicted under S. 366-A, I. P. C., and have been sentenced to two years' rigorous imprisonment each.

The facts found by the learned Sessions Judge on appeal are that Mt. Daulate, aged about 16 years, having quarrelled with her husband, left his house with the idea of going to her maternal grandfather's house; and in doing so she had to pass through the village to which the two petitioners belong. In that village she first met Sher Singh petitioner and then Nathu. Nathu, it appears, is some sort of a distant relation of her maternal grandfather. She told him her story and he invited her to take her meal at his house and promised to take her to her maternal grandfather thereafter. She accepted this invitation and was given food by Nathu petitioner. During the night, however, Nathu instead of taking her to her maternal grandfather, took her to the house of Sher Singh who at about midnight put her on a mare and took her to a neighbouring village and attempted to sell her. He kept her there for some days. Being unsuccessful in disposing her off, Sher Singh brought her back to his own village and kept her concealed in his house. One of his neighbours who was inimically disposed towards him, having got scent of the affair reported the matter; the consequence was that a number of persons including the relations of the girl went to the house of Sher Singh and asked him to hand her over to them.

He, however, denied that she was in his house but later when pressed produced her from inside his house.

On these facts the two petitioners were convicted by the Magistrate under S. 366-A, I. P. C., and were sentenced to four years' rigorous imprisonment each. The Sessions Judge on appeal has maintained the conviction but has reduced the sentence to two years' rigorous imprisonment.

The facts found by the learned Sessions Judge are supported by the evidence on the record and I do not consider that any good ground has been shown to enable me to examine such evidence on this petition for revision. The petitioners' counsel has contended that the petitioners specially Sher Singh had no knowledge that Mt. Daulate was a married woman and he could not, therefore, be convicted under S. 366-A, I. P. C. In support of this contention he cites *Rati Ram v. Emperor* (1) but this case, in my opinion, does not help him at all. The facts are quite distinguishable. In that case it was held that the accused gave shelter to the girl who was alleged to have been abducted by them and that they did not know that she was a married girl. In the present case, even assuming that Sher Singh did not know that Mt. Daulate was a married girl, his attempt to sell her clearly makes him liable under S. 366-A, I. P. C. He was not the legal guardian of the girl and the manner in which he tried to dispose her off is a clear indication of his intention or at least his knowledge that the girl would be subjected to illicit intercourse. It is not correct to say that a married woman alone can legally be subjected to illicit intercourse. So far as Nathu is concerned, the fact that by deceitful means he induced the girl to stay at his house and then instead of taking her to her grandfather took her to Sher Singh clearly shows his guilty knowledge and intention. In fact the circumstances of this case indicate a conspiracy between the two petitioners. I do not consider that the sentence is excessive at all.

In my opinion, the petitioners have been rightly convicted and I dismiss their petition.

R.M./R.K.

Petition dismissed.

(1) A. I. R. 1927 Lah. 727.

1930 Cr. Cases 533 (1)

(Lahore)

SHADI LAL, C. J.

Said Bibi—Petitioner.

v.

Umar Din—Respondent.

Criminal Revn. No. 5 of 1930, Decided on 14th February 1930, reported by Dist. Magistrate, Gujranwala, D/-21st December 1929.

Criminal P. C., S. 488-(3)—Wife refusing to live with husband should be given chance to substantiate reasons for refusal by evidence—Court should consider grounds of refusal and pass order for maintenance in case of just grounds.

Where a wife lodges an application under S. 488 against her husband and is not willing to live with him, she should be given a chance by the Magistrate to substantiate her reasons for refusal to live with him by such evidence as she can produce. According to proviso 1 to S. 488 (3) it is desirable for the Magistrate to consider the grounds of refusal stated by the wife and in case he finds that there is just ground for her living apart from her husband he should pass an order of maintenance in spite of her not agreeing to live with her husband. [P 533 C 1]

Reference Order.—The facts of this case are as follows. Mt. Said Bibi lodged an application under S. 488, Criminal P. C., against her husband Umar Din. The trying Court Lala Mulkh Raj, Magistrate, 1st Class, Gujranwala, summoned the respondent, who offered to maintain his wife if she lived with him. She on being examined, stated that she was not willing to live with her husband, as he has another woman living with him since previous to his marriage with herself (applicant) and that he wanted either to kill her or to sell her. Thereupon the Magistrate dismissed the application without giving any chance to the applicant to prove her contention. The proceedings are submitted for revision on the following grounds:

The applicant Mt. Said Bibi should have been given a chance by the Magistrate to substantiate her reasons for refusal to live with her husband by such evidence as she could produce. According to the first proviso of S. 488 (3) Criminal P. C., it was desirable for the Magistrate to consider the grounds of refusal stated by her, and in case he found there was just ground for her living apart from her husband, he could have passed an order of maintenance in spite of her not agreeing to live with him.

As I cannot myself remand the case
1930 Cr. C. 67 b/4.

to the Magistrate, First Class, I submit it to the High Court with a recommendation that the order of the Magistrate dated 25th September 1929 be quashed and he be directed to hear the evidence put in by the parties before passing proper orders.

Order.—For the reasons recorded by the learned District Magistrate I quash the order of the trial Magistrate and direct him to decide the case after hearing the evidence for both the parties.

R.M./R.K.

Order accordingly

*1930 Cr. Cases 533 (2)

(Lahore)

SHADI LAL, C. J. AND BROADWAY, J.

Emperor—Complainant—Petitioner.

v.

Sukh Dev and others—Accused—Respondents.

Criminal Misc. Petn. No. 290 of 1929, Decided on 31st January 1930.

Criminal P. C., S. 561-A—Special jurisdiction under S. 561-A can only be invoked in cases for which no provision is made in Code and to grant immediate relief—It must be exercised with due care—High Court should not exercise its inherent power for making pronouncement upon questions of law in order to guide Magistrate in conducting preliminary inquiry.

The special jurisdiction recognized by S. 561-A can be invoked only in exceptional cases for which no express provision has been made by the Code, and to redress only such grievance as calls for an immediate relief, which can be granted only by the High Court. The inherent jurisdiction should be exercised with due care and caution and must conform to sound general principles and precedents. It was never contemplated by the legislature that the High Court should exercise its inherent power for making pronouncements upon questions of law in order to guide a Magistrate in conducting a preliminary enquiry: *A. I. R. 1928 Lah. 462 and 31 Cal. 927, Ref. [P 536 C 1]*

Carden Noad—for Petitioner.

Amar Das, Sant Singh, Malik Mohammad Amin for *Surindra Nath Pandey, J. N. Sanjay, A. K. Ghosh, Des Raj* and *Prem Nath*—for Respondents.

Shadi Lal, C. J.—This is an application, under S. 561-A, Criminal P. C., made by the Government Advocate on behalf of the Crown in a case which is pending before a Magistrate. The circumstances under which the application has been made, do not admit of any dispute. Seventeen persons are being prosecuted for several serious crimes, such as murder, dacoity, offences against the State and under the Explosive Substances Act, and also for criminal cons-

piracy. The Magistrate, who is conducting the preliminary enquiry, has already recorded the depositions of about 145 witnesses for the prosecution, and it is proposed to produce before him further evidence in support of the charges brought against the accused. But, as stated in the application there are many other witnesses:

"probably about 400 in number, who will be called in the Sessions Court (if the case is committed), whose evidence merely corroborates and supplements the evidence of the approvers and other principal witnesses," or is of a formal character.

It appears that two of the prisoners were arrested after the commencement of the enquiry, one of whom appeared before the Magistrate after 29 witnesses and the other after 84 witnesses, had been examined. The learned Government Advocate also states that another accused was arrested only a few days ago, after this application had been presented to the High Court.

To prevent delay at the preliminary stage of the case the prosecution do not desire to re-examine the witnesses whose evidence had been recorded before the appearance of the three absconding accused in Court. Nor do they wish to produce the witnesses, about 400 in number, who are expected to give corroborative or formal evidence. They, however, apprehend that the instructions contained in Chap. 9, para. 16, Vol. 2 of the rules and orders of the High Court, which require a Committing Magistrate to make his record complete, might prevent the Magistrate in the present case from complying with their request. They accordingly ask this Court to grant the following prayers :

"That directions may be given to the Magistrate that the above mentioned instructions contained in para. 16 at p. 74 of the High Court Rules and Orders, Vol. 2, should be relaxed so as to enable the Magistrate, if at any time he considers that a prima facie case has been established by the evidence led, to exercise the discretion given by S. 209 (3), Criminal P. C., and to refuse to issue process for the examination of further witnesses during the enquiry if he deems it unnecessary to do so.

(2) That directions may also be issued to the Magistrate that in spite of the said instructions above referred to, he is at liberty, if he considers it proper so to do, to pass an order under S. 512, Criminal P. C., dispensing with the attendance of the witnesses called prior to the appearance of any individual accused in his Court. The Magistrate may be further directed, if this Hon'ble Court deems fit, that these two accused be supplied with copies of

the evidence of all witnesses recorded prior to their production in Court."

Mr. Amar Das, who appears for five prisoners, raises a preliminary objection that the law governing both the matters mentioned in the application is laid down in explicit terms in the Criminal Procedure Code and that the inherent jurisdiction of the High Court cannot be invoked for the purpose of guiding the Magistrate on points of law for which provision has been made by the legislature. Mr. Carden Noad, however, retorts that, though the Code states the law on the subject the instructions referred to above fetter the discretion of the Magistrate and that he would probably follow them, unless the High Court give directions to the effect that he is not bound to record all the evidence and that after he has taken all such evidence as may be produced in support of the prosecution or on behalf of the accused or as may be called for by himself he may refuse to issue process to compell the attendance of any witness at the instance of the prosecution or the defence, if, for, reasons to be recorded by him, he deems it unnecessary to do so. The determination of the question depends upon the interpretation to be placed upon S. 561-A, which is in these terms :

"Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

The reason for enacting this section, which, it is to be observed, was recently added to the Code by the Criminal Procedure Code (Amendment) Act 18 of 1923, does not require any elaborate discussion. No legislative enactment dealing with procedure can provide for all the cases that may possibly arise, and it is an established principle that Courts must possess inherent powers, apart from the express provisions of the law, which are necessary to their existence and the proper discharge of the duties imposed upon by law : vide "Courts and their jurisdiction" by J. D. Works 27, p. 170. This doctrine finds expression in S. 561-A, which as rightly pointed out by the learned Government Advocate, does not confer any new powers on the High Court, but merely recognizes and preserves the inherent powers previously possessed by it.

The section, as its language shows, embraces three classes of orders, namely, orders which may be necessary (1) to give effect to any order passed under the Code; (2) to prevent abuse of the process of any Court; and (3) to secure the ends of justice. The first two classes need not detain us long. It is an obvious proposition that when a Court has authority to make an order, it must also have power to carry that order into effect. If an order can lawfully be made, it must be carried out; otherwise it would be useless to make it. The power to enforce obedience to the mandates of the Court necessarily springs from the very existence of the authority to issue the mandates; and, if that power is not expressly given by the statute, it must be deemed to be inherent in the Court.

It is also clear that the authority of the Court exists for the advancement of justice, and if any attempt is made to abuse that authority, so as to produce injustice, the Court must have power to prevent that abuse. In the absence of such power the administration of law would fail to serve the purpose for which alone the Court exists, namely, to promote justice and to prevent injustice.

It is not, however, suggested that the present application has been made in order to enable the Magistrate to enforce any order made by him or to prevent abuse of the process of his Court. The object of the prosecution in making the application is to shorten the period of enquiry by dispensing with the production of evidence which may be deemed to be unnecessary at the present stage. It is no doubt open to the prosecution not to produce evidence which they consider unnecessary, but the trial Judge or the High Court may take objection to the legality of the order of commitment based upon an incomplete enquiry. The learned Government Advocate is naturally anxious to avoid such adverse finding, and asks this Court to make a pronouncement that the Code gives the Magistrate a discretion to curtail the proceedings in the manner specified in the application, and that he is not bound to follow the instructions requiring him to make his record complete by examining all the witnesses for the prosecution.

The matter is then narrowed down to

the point whether these circumstances warrant the exercise by the High Court of its inherent jurisdiction on the ground that, in order to secure the ends of justice, it is necessary to make an order directing the Magistrate to conduct the enquiry in accordance with the suggestion made by the prosecution. Now, the rule is firmly established that the High Court does not possess nor did it ever possess, an unrestricted and undefined power to make any order which it might please to consider was in the interests of justice; vide, inter alia, *Raju v. Emperor* (1). The inherent power cannot be capriciously or arbitrarily exercised, but as observed by Woodroffe, J., in *Hukum Chand v. Kamalanand Singh* (2) the Court in the exercise of its inherent power must be careful to see that its decision is based on sound general principles and is not in conflict with them or the intentions of the legislature. That the inherent jurisdiction must be exercised with care is further emphasized, in so far as criminal cases are concerned, by the fact that, while S. 151 Civil P. C., which governs the exercise of the inherent power in civil cases recognizes the existence of this jurisdiction in all the civil Courts, superior as well as inferior, S. 561-A, Criminal P. C. expressly confines its operation to the High Court.

The jurisdiction to act *ex debito justitiæ* should be sparingly and cautiously exercised and only in those cases in which no other remedy is available. The application before us proceeds on the ground that the instructions quoted above are at variance with the law enacted by the legislature; and that, even when a conflict between the two is established, the Magistrate is likely to follow those instructions in preference to the statute law. To avoid this contingency we are asked to enter into a discussion upon the admissibility or otherwise of the depositions recorded in the absence of the absconding accused, and also to expound the law as to whether a Magistrate should or should not take all the available evidence before making an order of commitment. It must be remembered that the Magistrate has not determined these questions, and it is clear that any opinion

(1) A. I. R. 1928 Lah. 462=10 Lah. 1.

(2) [1903] 33 Cal. 927=3 C. L. J. 67.

which we may express at this initial stage, would be no more than a mere obiter dictum. That opinion may be followed by the subordinate Courts, but there can be little doubt that it would not be binding upon another Division Bench of this Court before whom the case may come up on appeal for final decision.

I am not aware of any judgment, and certainly none has been cited before us, in which a High Court has ever exercised its inherent jurisdiction to discuss questions of law which might arise, on the happening of a certain event, in a case pending in a subordinate Court. If we once decide to extend our inherent jurisdiction to a case of this description our decision would certainly be availed of by other persons interested in cases pending in the subordinate Courts; and we would be called upon to adjudicate upon all sorts of hypothetical questions. The High Court would then be required to perform the function of a legal adviser to the litigant and the subordinate Magistrate.

I have bestowed my anxious and earnest consideration upon the matter and reached the conclusion that the special jurisdiction recognized by S. 561-A can be invoked only in exceptional cases for which no express provision has been made by the Code, and to redress only such grievance as calls for an immediate relief, which can be granted only by the High Court. The inherent jurisdiction should be exercised with due care and caution and must conform to sound general principles and precedents. It was never contemplated by the legislature that the High Court should exercise its inherent power for making pronouncements upon questions of law in order to guide a Magistrate in conducting a preliminary enquiry. I would accordingly dismiss the application.

Broadway, J.—While it is possible that the rules of this Court might need consideration I am in complete agreement with my Lord the Chief Justice in the view that any opinion we might express would be a mere obiter dictum which would not have any binding force.

Indeed I consider that any such opinion might even be open to misconception by the subordinate Courts. I

therefore concur in dismissing the application and in the reasons for so doing.

R.M./R.K. *Application dismissed.*

1930 Cr. Cases 536

(Madras)

JACKSON, J.

Sadayan Chetti and others—Accused
—Petitioners.

v.

Emperor

Criminal Revn. Case No. 718 of 1929, and Criminal Revn. Petn. No. 650 of 1929, Decided on 13th December 1929, from judgment of Sub-Div. First Class Magistrate, Salem, in Criminal Appeal No. 15 of 1929.

Criminal P. C., S. 257 — Discretionary powers of Magistrate in allowing witnesses to be cross-examined explained.

A Magistrate has a large discretion under S. 257. When, however, the accused clearly explains that he wanted an adjournment because his vakil was ill and if the witnesses are subsequently present there is no reason for not letting them be cross-examined.

[P 536 C 2]

S. Ranganatha Ayyar — for Petitioners.

Public Prosecutor—for the Crown.

Order—A Magistrate has a large discretion under S. 257, Criminal P. C., and if *Lakshmayya v. Emperor* (1) goes so far as to hold that once a Magistrate has summoned witnesses under S. 257, he is bound to compel their attendance although he is satisfied that it is unnecessary for the purposes of justice, I respectfully disagree.

However, in the present case the accused clearly explained that they wanted an adjournment because their vakil was ill, and as the witnesses were subsequently present there is no apparent reason for not letting them be cross-examined. The sentence is cancelled and the case ordered to be taken up as from when the cross-examination was refused. Fines will be refunded.

P.R.S./V.S.

Case remanded.

CRIMINAL CASES

JOURNAL SECTION

1930]

[JUNE

THE PLEA OF INSANITY IN CRIMINAL CASES

By

AMOLAK RAM KAPUR, B.A. (HONS.) LL.B., *Vakil High Court, Lahore.*

(Continued from *Journal*, p. 20.)

unless it appears to have been committed during derangement (13).

Every person is responsible for his acts although he may be suffering from mental derangement in cases where that mental derangement falls short of the unsoundness of mind described in S. 84, Penal Code, (14) and this unsoundness of mind should have reference to the time when the act was committed. The fact that a person subject to insane impulses or fits at some time before (15), or after, (16) the occurrence does not exempt him from responsibility.

If, however, a fit of madness had existed only shortly before the act, the presumption of sanity would be greatly weakened, or might absolutely disappear (17); but a plea of insanity at the time of trial will not avail the accused (18), although in such a case he will be tried in accordance with the procedure laid down in Chap. 34, Criminal P. C.

WHO IS ENTITLED TO EXEMPTION.

A mass of case law has clustered round S. 84, Penal Code and provides an exhaustive commentary on the rule of exemption embodied in that section.

(13) 1 Hale, P.C. 84; *Mayne, The Criminal Law of India*, 3rd Edition P. 419, *Reg. v. Mc.Naghten*, 1 Qar. & K. 180=10 C. and F. 200, *Queen Empress v. Balu, Ratanlal's Unrep. Cr. Cases*, P. 172=21 A. W.N. 132=20 W.R. 70=13 B.L.R. App. 20.

(14) *Nga Khan Hla v. Emperor*, U.B.R. (1914) II, 28=15 Cr. L.J. 95=26 I.C. 1007.

(15) The third question and answer in the *Mc. Naghten* case, *Queen v. Jugo Mohan Malo*, 24 W. R. 5, Cr. Muthuswami Asari, 10 L.W. 377=1919) M.W.N. 796=26 M. L.T. 861=20 Cr. L.J. 828=53 I.C. 828.

(16) *Golla Chinna Venkadu v. Emperor*, 38 Mad. 550=15 Cr. L.J. 161=22 I.C. 787.

(17) *Mayne, The Criminal Law of India*, 3rd Edition, P. 419.

(18) *Nota Ram v. The Queen*, 56 P. R. 1866, Cr.

The cases decided by the various superior Courts of this country have laid down numerous precedents which serve a helpful guide for the present and the future.

A leading Indian case, *Queen-Empress v. Kader Nasyer* (19) has elucidated the law embodied in S. 84, I. P. C. In this case the appellant was tried on a charge of murder for causing the death of a boy. In defence the plea of insanity was urged. It appeared from the evidence that since his house was burnt the accused neglected house and field work, and frequently complained of pain in the head and spoke to himself; when pain was particularly severe he did not answer when spoken to; on one occasion he was seen eating rotsherd; he played and went about with children much more than was to be expected from a man of his age; the murder was committed without any sane motive; the accused was fond of the boy and he had no quarrel with the father of the boy; when the enquiry preliminary to the commitment was taken up, he was found not to be in a fit state of mind to be able to make his defence and the enquiry was not resumed until somewhat more than a year after.

On the other hand, the accused observed some secrecy in committing the murder: he tried to conceal the corpse and hid himself in a jungle; his recollection of the act was full and clear. The two assessors were for acquitting the accused on the ground of unsoundness of mind. The Sessions Judge disagreeing with them convicted him of murder and sentenced him to transportation for life.

(19) 23 Cal. 604.

The question before the High Court was, whether the circumstances were sufficient to exempt the accused from responsibility for the crime?

On the facts briefly narrated above the Judges arrived at the conclusion that the circumstances attending the murder showed that the accused could not have been devoid of such knowledge, though they also showed that he must, at the time, have been suffering from mental derangement of some sort. It was held that it is only unsoundness of mind which materially impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility, the nature and the extent of the unsoundness of mind required being such as would make the offender incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law.

In this case the observations of the Judges on the question of the applicability of S. 84, I. P. C., in cases where insanity affects the offender's will and emotions are worthy of note.

"It might be said of our law, as it has been said of the law of England by Sir J. Stephen (20), that even, as it stands, the law extends the exemption as well to cases where, insanity affects the offender's will and emotions as to those where it affects his cognitive faculties, because where the will and emotions are affected by the offender being subjected to insane impulses, it is difficult to say that his cognitive faculties are not affected. In extreme cases that may be true; but we are not prepared to accept the view as generally correct that a person is entitled to exemption from criminal liability under our law in cases in which it is only shown that he is only a subject of insane impulses, notwithstanding that it may appear clear that his cognitive faculties, so far as we can judge from his acts and words, are left unimpaired."

The view expressed in this case have been generally and repeatedly fol-

lowed by all the High Courts of this country (22).

The circumstances of a person having acted under the irresistible influence to the commission of homicide, is no defence, if at the time he committed the act he knew he was doing what was wrong (23), for a mere uncontrollable impulse of the mind co-existing with the full possession of the reasoning powers, will not warrant an acquittal on the ground of insanity; the question for decision being, whether the prisoner, at the time he committed the act, knew the character and nature of the act and that it was a wrongful one, (24); if he was not conscious that the effect of his act would be to injure any other person he must be held not guilty (25). Where a person is in a state of mind in which he is liable to fits of madness, it is for the jury to consider whether the act done was during such a fit, though there is nothing before or after the act to indicate it, and though there is, some evidence of design or malice (26).

DELUSION — ITS EXISTENCE AND EXTENT:

In Courts of law insanity has been looked upon as implying the existence of delusion, and the terms, "delusion" and "insanity" have been regarded as practically synonymous.

A delusion is an incorrigible false belief — a false belief which no evidence however, plain, no authority, however paramount, can overcome. In anything connected with the delusion the reasoning is vitiated, the judgment is unsound; and this vitiation and unsoundness spread beyond the delusion and the things connected with it, to an

(22) *Chajju Mal v. King Emperor* 94 P.L.R. 1907=6 M.L.T. 101=4 I. C. 985; *Dhami Bux v. The Crown*, 9 S. L. R. 171=17 Cr. L.J. 79=32 I. C. 671; *Ram Sander Das v. Emperor*, 29 C. L. J. 209=23 C. W. N. 621=20 Cr. L. J. 383=50 I. C. 991; *Ramsan v. The Crown*, 30 P. R. 1913 Cr. =20 Cr. L. J. 1=48 I. C. 432; *Muthusawami Asari, In re*, 26 M. L. T. 361=(1919) M. W. N. 796=10 L. W. 377=20 Cr. L. J. 328=53 I. C. 828, *Mantanjali v. Emperor*, 21 Cr. L. J. 317=55 I. C. 477; *Bhagwati Prasad v. Emperor*, A. I. R. 1924 Oudh 190=See also the following English Cases; *Reg v. Offord*, 5 Carr and K. 168; *Reg. v. Higginson*, 1 Carr and K. 129; *Reg. v. Townley*, 3 F. & F. 339.

(23) *Reg. v. Hoynes*, 1 F. & F. 666.

(24) *Reg. v. Bartin*, 8 Cox. C. C. 275.

(25) *Reg. v. Davis*, 1 F. & F. 69.

(26) *Reg. v. Richards*, 1 F. & F. 87.

(20) *History of the Criminal Law of England*, Vol. II Chapter XIX P. 167.

(21) *Kader Nasyer v. Emperor*, 28 Cal. 604 Pp. 603-609; See also *Queen Empress v. Lakhman Dagdu*, 10 Bom. 512; *Queen Empress v. Venkatasami* 12 Mad. 459; and *Queen Empress v. Raza Mia* 22 Cal. 317, followed.

extent which we can never ascertain or define. The intellect of a person affected with delusion is like a plot of ground into which a brick of mushroom spawn has been inserted. We can never tell how far now in what direction the mycelium spread, nor in what quarter it will next evidence its presence by a fungus growth (27).

The law respecting the effect of the existence of a partial delusion at the time of the commission of an act is contained in the answer of the Judges to question 4 in the *McNaghten Case*. The question put by the House of Lords was as follows:

"If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?"

The Judges replied: The answer must of course depend on the nature of the delusion, but making the same assumption as we did before, namely that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same position as to responsibility as the facts with respect to which the delusion exists were real. For example if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment."

It will be seen that the assumption upon which this answer proceeds is that the supposed offender's disease consists exclusively in the fact that he is under a mistaken belief that something exists which, if it did exist, might or might not justify his conduct, but that he has the same power of controlling his conduct and regulating his feelings of appreciating and reasoning about the facts which he mistakeably believes in, "as a sane man." "But the difficulty which these questions and answers suggest," says Sir Fitz James Stephen, "and leave untouched is this. How would it be if the medical witnesses were to say (as Dr. Griesinger says, and as the witness

in *McNaghten's case* said in substance) that a delusion of the kind never or hardly ever stands alone, but is in all cases the result of a disease of the brain, which interferes more or less with every function of the mind, which falsifies all the emotions, alters in an unaccountable way the natural weight of motives, of conduct, weakens the will."

But it will be noticed that the Judges themselves never claimed that their answer was exhaustive; on the other hand in the opening words of their answer they say that they are making the assumption that the accused labours under such partial delusion only, and is not in other respects insane! In examining the criticism of Sir James Stephen, a distinguished authority (28) says: "I do not see how the Judges, or any one else, could give any other answer to the question, in the limited sense in which they understood it. If an act is prompted by delusion, and if the deluded actor is not in any other respect insane, then the only logical course to take is the course taken by the Judges."

Referring to the comment of Sir Fitz James Stephen, the same authority at another place (29) remarks that the learned Judge seems scarcely to appreciate the impossibility of arriving at any other answer, that was imposed upon the Judges by their reading of the question; and further that "the Judges assume that a limitation is implied in the question, and they give their answer subject to this limitation. If there is any error, as Sir Fitz James Stephen appears to think there is, the error is surely in applying this answer to a class of cases which was formally and expressly excluded from the scope of the answer by the terms in which it was given."

Section 84, I. P. C., does not confine itself within the four corners of the answers of the Judges in the *McNaghten case*. The question regarding the existence of a delusion, partial or complete, would depend on medical evidence and other circumstances of each case. Of course, in such cases the duty of the Judge and the jury is very deli-

(28) *Mercier, Criminal Responsibility*, Page 171.

(29) *Mercier, Criminal Responsibility*, Page 172.

(27) *Mercier, Criminal Responsibility*, P. 162.

cate, as all the questions arising in them have to be approached in a very careful manner.

In *Ghinua Uraon v. Emperor* (30), a Full Bench case of the Patna High Court, it was held that if a person, otherwise sane, but labouring under the influence of an insane delusion commits an act of revenge for some supposed grievance or injury, he will be punishable according to the nature of the crime committed, if at the time he understood that he was committing a wrong and unlawful act; in other words he must be considered in the same situation as to responsibility as a sane person would be if the facts with regard to which the delusion exists were true. This is in perfect accord with the rule laid down in the answer of the Judges to question 4.

The delusions which indicate a defect of sanity such as will relieve a person from criminal responsibility, are delusions of the senses, or such as relate to facts or objects—not mere wrong notions or impressions, or of a moral nature; and the aberration must be mental, not moral, to affect the intellect of the individual. It is not enough that they show a deceased or depraved state of mind, or an aberration of the moral feelings, the sense of right and wrong being still, although it may be perverted yet not destroyed: and the theory of a moral insanity or insanity of the moral feelings, while the sense of right or wrong remains, is not to be reconciled with the legal doctrine on the subject (31).

Thus the fact that the accused while committing the crime was under some insane delusion is not per se sufficient to exempt him from criminal liability for his wrongful act, unless the impulse was such as to render him unconscious of what he was doing, or to make him ignorant of the fact that the act which he was about to commit was wrong (32).

(30) *Ghinua Uraon*, (1918) Pat. 57=4 Pat. L. W. 14=3 Pat. L. J. 291=43 I. C. 423=19 Cr. L. J. 185 (F.B.), See also *Ghatu Pramanik v. Emperor*, 28 Cal. 618 *Siat Ali v. Emperor*, 3 Pat. L. W. 356=41 I. C. 122=18 Cr. L. J. 766 *Queen Empress v. Nepal, Ratanlal's Unrep. Cr. Case 229*.

(31) *Reg. v. Burton*, 3 F. & F. 772.

(32) *Siat Ali v. Emperor*, 3 Pat. L. W. 356=41 I. C. 122=18 Cr. L. J. 766.

CONDUCT, MOTIVE AND OTHER CIRCUMSTANCES DETERMINING THE QUESTION OF INSANITY.

In a trial for an offence, when a plea of insanity is raised by the prisoner his conduct in the transaction and his motive are essential points to be carefully gone into and investigated. In such a case the Court can judge only by inference to be derived from the prior and subsequent conduct of the prisoner as to the state of his mind at the time of the commission of the offence (33). In the undermentioned case (34), the prisoner who was charged with committing murder, was a young man of weak intellect and the motive actuating the offence was trivial and inadequate. As soon as he had killed his uncle by hacking him on the head and neck with a sword, the prisoner rushed out brandishing his weapon and shouting "Victory to Kali." He attempted to strike other persons, including his own father. When the paroxysm had passed off, during the police inquiry, the prisoner appeared to be rational, but immediately afterwards he developed aphasia, attempted to commit suicide, and was undoubtedly insane from that time for a period of five years. These signs were held the signs and indicia of insanity and the prisoner was held to have been suffering from a fit of melancholic homicidal mania at the time he hacked the deceased with the sword.

In some cases no suspicion of insanity rests upon the prisoner, apart from the crime. From the character of the crime itself, its suddenness, violence, cruelty and atrocity, its apparent absence of motive or purpose, a suggestion is raised that the offender must have been insane at the time of its commission. Mayne says (9) that a defence of this sort is generally set up, when the facts admit of no other, and it is usually eked out with evidence of previous outbursts of eccentricity or violence, and suggestions of hereditary insanity or of former diseases, which might possibly have affected his brain; and adds that it would be utterly unsafe to admit a

(33) *Bagwati Prasad v. Emperor*, A. I. R. 1924 Oudh 190.

(34) *The Criminal Law of India*, 3rd Edition P. 422.

*** 1930 Cr. Cases 537**
(Calcutta)

SUHRWARDY AND JACK, JJ.

Lal Ma'ammal and others — Petitioners.

v.

Deputy Inspector General of Police, of C. I. D., Bengal—Opposite Party.

Criminal Revn. No. 5 of 1929, Decided on 29th July 1929, from an order of Addl. Sess. Judge, Dinajpur, D/- 17th January 1929.

*** Criminal P. C., S. 476-B** — District Judge hearing appeal under S. 476-B has power to transfer appeal to competent Court and transferee Court can make necessary complaint.

An appeal to District Judge under S. 476-B preferred over an order of a subordinate Court refusing sanction for prosecution, can be transferred by the District Judge to any competent Court. The latter Court, on such transfer, has authority to make the necessary complaint under S. 476-B: 30 Cal. 771, *Ref.*; A. I. R. 1929 Cal. 172, *Dist.* [P 593 C 1]

Suresh Chandra Talukdar and Surojit Chandra Lahiri—for Petitioners.

Satindra Nath Mukherji — for Opposite Party.

Suhrawardy, J.—This rule was issued on ground No. 9 which is to this effect: For that the learned Additional Sessions Judge had no jurisdiction to hear the appeal or to lodge the complaint. The facts are that the petitioner sued the defendants upon a *hatchita* in the Court of the Munsiff at Raigunje in the District of Dinajpore, and on behalf of the defendants the suit was contested by the opposite party D. I. G., C. I. D., Bengal. The suit was transferred by the order of the District Judge from Raigunje to the Munsiff at Dinajpore. The petitioner applied to the Munsiff for leave to withdraw from the suit with liberty to bring a fresh suit on the same cause of action. It was refused and the suit was dismissed for non-prosecution. Thereafter the opposite party applied to the Munsiff for sanction to prosecute the petitioner under S. 476, Criminal P. C. on charges under Ss. 120-B, 109, 209, 471, I. P. C., etc. The application was refused by the Munsiff and the opposite party preferred an appeal from the order of the Munsiff to the District Judge of Dinajpore under S. 476-B, Criminal P. C. The District Judge allowed the appeal and made a complaint under S. 476-B. Against that order there was an application for revision in this Court. This

Court set aside the order of the District Judge and sent the matter back to the Munsiff with certain directions. The Munsiff again rejected the petition of the opposite party for sanction. The opposite party preferred an appeal to the District Judge against the order of the Munsiff, who transferred the case to the Additional District Judge to deal with it. The latter officer allowed the appeal by his judgment dated 17th January 1929. The petitioner objects to this order on the ground that the Additional District Judge had no authority to make the complaint under S. 476-B, Criminal P. C. The matter is not free from doubt and I have given my best consideration to it. Under S. 476-B any person whose application under S. 476 has been refused or against whom such a complaint has been made may appeal to the Court to which such former Court is subordinate within the meaning of S. 195, sub-S. (3). Under S. 195 sub-S. (3) the Court to which the primary Court is subordinate shall be deemed to be the Court to which appeal ordinarily lies from the appealable decree or sentence from the former Court. Section 476-B then lays down that on such appeal being made the superior Court may thereupon pass necessary order.

Now, there can be no doubt that an appeal under S. 476-B lies to the Court to which the trial Court is subordinate, and in this instance the District Judge's Court is the Court to which appeal lies. So that so far as the filing of the appeal is concerned, there is no irregularity. The next question is whether the District Judge having received the appeal has authority to transfer it to the Additional District Judge. This question does not seem to have been finally settled under the Code as amended in 1923. But we may refer to a case under the old code, namely, the case of *Ram Charan Chandra v. Taripulla* (1). There the learned Judges in interpreting the relevant clauses of the old S. 195 held that no one except the District Judge has power to hear an appeal under Ss. 195 (6) and 195 (7) of the old code. The ratio of that decision as given by N. R. Chatterjee, J. is that a District Judge is competent to dispose of any appeal or

(1) [1912] 39 Cal. 774=13 I. C. 1007=10 G. W. N. 645.

proceeding himself or to transfer it to a Subordinate Judge. But under S. 195 (6) Criminal P. C. 1898, the power of revoking or granting any sanction given or refused is given to the authority to which the authority giving or refusing it is subordinate. The judgment of D. Chatterjee, J. also deals with the powers of a District Judge to transfer appeals pending in his file to an Additional District Judge. Now, these clauses of S. 195 have been repealed and the new Ss. 476-A and 476-B have been substituted. S. 476-B lays down that an appeal must be preferred to the Court to which the primary Court is subordinate in the sense that appeals ordinarily lie to the former Court from the decisions of the latter Court, but the final orders may be passed by the superior Court. The Court of the Additional Judge may be said to be a superior Court in relation to a Munsiff's Court. Reference may also be made to S. 8, Civil Courts' Act 1887 which empowers an Additional District Judge to discharge all the functions of a District Judge which may have been assigned to him. Section 24 (a), Civil P. C., gives unfettered jurisdiction to the District Judge to transfer an appeal or any proceeding pending before him to any competent Court subordinate to him. Now, it has been held that an appeal under S. 476-B is an appeal under the Criminal Procedure Code and has to be governed by the provisions of that Act: *Rajani Kanta Kayal v. Bissoo Moni Dassi* (2), *Chunder Kumar Sen v. Mathura Debya* (3) and *Hamid Ali v. Madhusudan Das* (4). If it is an appeal under the Criminal Procedure Code it is governed by S. 409, Criminal P. C. which says that an appeal to the Sessions Judge shall be heard by the Sessions Judge or by an Additional Sessions Judge. But an appeal under S. 476 in a civil matter is not preferred to the Sessions Judge but to the District Judge, the same officer who combines in him both the functions and power is given to District Judge under the Civil Procedure Code and the Civil Court's Act to regulate the procedure of an appeal.

I have been pressed for the view I have taken in this matter by considerations of reasonableness in the procedure

laid down by the Code. Under S. 476-A the power under S. 476 may be exercised by a Court to which the trial Court is subordinate within the meaning of S. 195 (3). To give a strict interpretation that only the Court to which the primary Court is subordinate can make a complaint under S. 476 is to deprive Subordinate Judges and Judges other than District Judges, who ordinarily hear most of the appeals from the Munsiffs of the power of making any complaint under S. 476. It often happens and such cases frequently come before us, that when an appellate Court forms an opinion in connexion with any proceeding in a civil Court it does act under S. 476 and make a complaint before the proper Court. It is never intended to deprive Judge other than the District Judges, who hear ninety per cent of the appeals, of the power of making a complaint where they find that an offence has been committed.

Reference in this connexion has also been made on behalf of the petitioner to the decision in the case of *Mohim Chandra Nath v. Emperor* (5). That case does not discuss the question raised before us. There the appeal was not preferred to the District Magistrate to whom the trial Court was subordinate but to an officer specially empowered to hear appeals from Second Class Magistrates. In the view I have taken of this matter this rule should be discharged.

Jack, J.—I agree; but I would simply base my decision on the fact that the District Judge is empowered under S. 24 (a), Civil P. C. to transfer any proceedings to the Additional District Judge.

V.S./R.K.

Rule discharged.

(5) A. I. R. 1929 Cal. 172=56 Cal. 824.

1930 Cr. Cases 538

(Calcutta)

SUHWARDEY AND PAGE, JJ.

Muktal Hossein and another—Accused
—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 334 of 1929, Decided on 2nd December 1929.

Criminal P. C., S. 216—In case of serious offences like those under Ss. 363 and 367 Penal Code, every opportunity should be given to accused to adduce evidence on be-

(2) A. I. R. 1927 Cal. 718.

(3) A. I. R. 1925 Cal. 1228=52 Cal. 1003.

(4) A. I. R. 1927 Cal. 284=54 Cal. 355.

half of defence—If evidence is inadmissible or irrelevant it may be refused.

Where the accused are tried for offences under Ss. 363 and 367, I. P. C. every opportunity should be given to them to adduce evidence on behalf of the defence either oral or documentary and in refusing such evidence the Judge does not exercise proper discretion. If the Judge is of opinion that the evidence adduced by the accused is inadmissible or irrelevant or that such evidence is adduced for the purpose of vexation or delay or to defeat the ends of justice he can refuse to receive such evidence. [P 539 C 2]

Shyama Prasanno Deb — for Appellants.

Lalit Mohan Sanyal—for the Crown.

Suhrawardy, J. — In this case the accused have been convicted under Ss. 363 and 367, I. P. C. and sentenced to long terms of imprisonment. It is not necessary to consider the various points which have been urged before us in appeal by the learned advocate appearing for them, as we think it enough if we refer to one objection which is to the effect that the learned Addl. Sessions Judge did not give sufficient opportunity to the accused to examine the witnesses for the defence. It appears from the record that before the Magistrate the accused had submitted presumably under S. 211, Criminal P. C. a list of 19 witnesses to be examined at the trial on their behalf. Before the prosecution case was closed the defence pleader on 19th March 1929 prayed for calling for certain records from the District Magistrate's room and for summoning three defence witnesses for the following day. The learned Judge ordered that the records should be called for and directed the District Magistrate to summon the witnesses for the following day. On the following day, that is, 19th March, apparently the witnesses did not come and the defence pleader put in a petition for adjournment of the case for a day to produce certain defence witnesses. The learned Judge dismissed the application on the ground that those witnesses would not prove relevant matters or any matter admissible in evidence under the law, without allowing the accused to produce their witnesses and then deciding about the relevancy of their evidence. We think that the learned Judge should have in a serious case like the present allowed the accused an opportunity of adducing such evidence as they chose. If at the examination of the witnesses for the defence

the learned Judge was of opinion that the statements made by them were not admissible or were not relevant in evidence he could rule them out. He did not exercise a proper discretion in refusing to examine the witnesses for the defence. Under S. 216, Criminal P.C., the Magistrate was bound to summon all the witnesses named by the accused for appearance before the Court of the Sessions Judge except those whose evidence was taken by the Magistrate himself or whom the Magistrate considers to have been included in the list for the purpose of delaying or defeating the ends of justice. We think that in this particular case the accused have a just grievance that they were not allowed to adduce evidence on their behalf.

We accordingly set aside the convictions and sentences passed by the learned Addl. Sessions Judge and direct that the accused be retried according to law. Every opportunity should be given to them to adduce evidence on behalf of the defence either oral or documentary. If the learned Judge is of opinion that the evidence adduced by the accused is inadmissible or irrelevant, or that such evidence was adduced for the purpose of vexation or delay or to defeat the ends of justice, he can refuse to receive such evidence.

We direct that the accused be retried according to law. It will be in the discretion of the Sessions Judge to allow bail to the accused pending their retrial.

Objection has been taken to the propriety of the charge framed on the authority of the decision in *Mafizaddi v. Emperor* (1). If it were necessary to decide the point, we would have had to examine the case, but as the case is to be retried, the Sessions Judge will do well to frame separate charges for kidnapping and abducting.

R.M./R.K. *Case remanded.*

(1) A. I. R. 1927 Cal. 644.

1930 Cr. Cases 539

(Calcutta)

PEARSON AND PATTERSON, JJ.

Jnananjan Niyogi—Accused — Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 909 of 1929, Decided on 6th February 1930.

Penal Code, S. 124-A — Person vilifying the British by contrast, by holding up admired character as pattern is guilty, under S. 124-A.

It is one thing to hold up an admired character as a pattern in a speech and quite another to vilify the British by contrast; but a speaker cannot be allowed to use the former as a cloak for the latter if the result of what he says in fact be to inspire his audience with hatred and disaffection towards Government. Where the speaker, in his speech, oversteps the boundary line, he is guilty under S. 124-A. [P 510 C 2]

Mrityunjay Chattopadhyaya, Manindra Nath Banerjee, Debabrata Mulherjee and Bholanath Roy—for Appellant.

Debendra Narain Bhattacharjee—for the Crown.

Pearson, J.—The accused Jnananjan Niyogi has been charged under S. 124-A, I. P. C., in regard to a speech made by him on 16th June last at Hazra Park, Bhowanipur. He has been convicted and sentenced to rigorous imprisonment for one year, and against that he now appeals.

As stated by the learned Magistrate the evidence shows that the meeting lasted from about 6-30 to 9 p. m., that about 4000 persons attended composed mostly of young men and students, and about 100 volunteers dressed in a khaki uniform also attended. The occasion was a gathering in memory of the late Mr. C. R. Das.

The speaker begins by reminding his audience of the faith that Mr. Das had had in the nation, and his belief in its future, his desire to build up its strength; that the people of this country would be able to bring about a revolution on the face of the earth; that possessed with a new idea the Bengalis would be able to create that revolution. At first, he goes on, no one would accept him

"but the force of revolution latent in Bengali danced a mad dance in his heart, roared and having crowned with success the new revolution showed the world that the Bengali could think on new lines, see in a new light and again tread the path of creation. What has he left for us to-day? that force of revolution."

Then again:

"Just now Nripendra remarked that today we were not merely desirous of destroying dyarchy. Why? Because the immense force which lies in the soul of Deshbandhu can create a new path".

Shortly afterwards we get this:

"We do not still believe that the whole world has really admitted that the English are carrying on the administration of our

country against our consent. We want to convince the world that the English carry us along against our consent. We want to convince it that we do not accept their unfair administration and ordinance. We know that we do not accept."

Then there is a call to tell the English that Government cannot be carried on in this country by neglecting public opinion. Then attention is directed to the misery and poverty of the country, and how Mr. Das offered his life "to crown with success the independent rule", destroying and ending the subjection of the country. The revolutionary force envisaged by Mr. Das is then put forward as a cure for the "agony of subjection."

"So, with our creed of revolution in our hearts we say that we shall build up the country, we shall build up the nation, we shall not look expectantly towards the English. After 150 years of English administration we have thoroughly realized that the French are not our enemies, Germany is not our enemy. Italy is not our enemy, our only enemy is the English. It is our right to curtail their strength and their talent."

Of this last passage it has been argued on behalf of the appellant that the contradistinction of French and Germans goes to show that the economic feature is that on which the speaker is insisting. From the above passages cited, and reading the article as a whole, we note that the learned Magistrate has come to the conclusion that although in one way the speech was an exhortation to his audience to emulate the example of Mr. C. R. Das, the whole tenor is a tirade against the present Government of the land and for its complete overthrow. The speech, he says, is delivered with a venom which is sure to excite feeling of hostility and hatred to Government. Naturally it is one thing to hold up an admired character as a pattern, and quite another to vilify the British by contrast; but a speaker cannot be allowed to use the former as a cloak for the latter if the result of what he says in fact be to inspire his audience with hatred and disaffection towards Government. Our duty is only to say whether we consider he has brought himself within the terms of S. 124-A, and although we are not prepared to say that we are at one with the Magistrate in his wholesale condemnation, we think that at certain points in his speech the boundary line is undoubtedly overstepped, particularly having regard

to the nature of his audience. Especially is this so even upon a fair, free and liberal construction when he refers to the unfair administration and ordinance of the English, and again when he speaks of the English being our only enemy.

Mention must be made of the written statement filed by the accused. It does not affect the intention of the accused, which is to be derived from a construction of the speech itself. Nevertheless it is a matter to be taken into consideration, and shows how the accused is minded. It does him no good; at any rate. He impugns the good faith of even the highest judicial tribunals; he makes the statement that England and England alone has driven Bengal from literacy into dismal illiteracy, and, in a later passage, that England has strangled the commerce and manufactures of India. We cannot agree that the speech was calculated primarily to emphasise, as the written statement suggests, the economic adversity of India with a view to appeal to his hearers to emulate the sacrifice and self-reliance of Mr. Das. The language goes far beyond that. We think that the conviction was right and must be upheld. The sentence we think is more than is demanded by the circumstances.

We reduce the sentence from one year's to three months' rigorous imprisonment.

The appellant will surrender to his bail forthwith and serve out the remaining portion of the sentence.

R.M./R.K. *Order accordingly.*

1930 Cr. Cases 541

(Calcutta)

MUKERJI, J.

Gangadas Banerjee and others—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 686 of 1929, Decided on 4th September 1929, from order of Sess. Judge, 24-Perganas, D/- 26th April 1929.

Bengal Public Gambling Act, Ss. 3, 4, 5 and 6—Presumption under S. 6 arises only under peculiar circumstances mentioned by statute itself—Magistrate not satisfied that premises are used as common gaming house, —No presumption under S. 6 arises.

The presumption of law under S. 6 arises only in the peculiar circumstances mentioned by the statute itself, i. e., if the warrant

authorises a search on the footing of the premises being a common gaming house and when the search results in a find of instruments of gaming.

When the requirements of S. 5 are not strictly complied with inasmuch as the Magistrate does not say anywhere in the proceedings that the premises were used for a common gaming house, the presumption under S. 6 does not arise, and if there is no evidence showing that the premises had been kept for the profit or gain of the accused, they cannot be convicted under S. 3 or S. 4. [P 542 C 1, 2]

Hiralal Ganguli—for Petitioners.

Birlhusan Dutt—for the Crown.

Judgment.—The petitioners have been convicted under S. 3 and 4, Bengal Public Gambling Act (Act 3 B. C. of 1867), petitioner 1 under S. 3 and all the other petitioners under S. 4 of the said Act. The question for consideration in this rule is whether the convictions are supportable in so far as they are based upon finding that the place where gambling used to go on was a common gaming house within the meaning of the Act. Offences under Ss. 3 and 4 have for their foundation as one of the ingredients the fact that the place where gaming goes on is a common gaming house within the meaning of the definition given in S. 1.

As regards this matter the learned Sessions Judge held in the first instance that :

"petitioner 1 or those who were interested in the venture along with him have not been proved by any evidence to have either drawn commission or worked so as to ensure more or less certain profits."

He found, however, that instruments of gaming were found in the premises which were in the occupation of petitioner 1, who is said to be the lessee of the premises; and as those instruments were found on a search purporting to have been carried out under the provisions of S. 5 of the Act, he applied to the case the presumption provided for in S. 6 thereof. The said presumption is to the effect that when instruments of gaming are found in a place searched in accordance with a warrant issued under S. 5, the place is to be regarded as a common gaming house until the contrary is proved. The question therefore, is whether the presumption upon which the learned Judge has relied really arises in the present case.

The search warrant that was issued under the provisions of S. 5 of the Act did not state that the premises were

used as a common gaming house; but it was stated therein that the user of the premises was for unauthorized race-gambling. The learned Sessions Judge held that user for unauthorized race-gambling and user as a common gaming house mean one and the same thing. The reasoning upon which the learned Sessions Judge came to that conclusion is that unless the premises were a common gaming house the Magistrate could not issue the search warrant; or, in other words, that if the premises were used merely for unauthorized race-gambling without it being shown that they constituted a common gaming house the learned Magistrate could not have very well issued the search warrant. The learned Sessions Judge has observed further that it must be assumed that the Magistrate was aware of the law. On an assumption of this character the learned Sessions Judge came to the conclusion that the search warrant must have been issued because the Magistrate was satisfied that the premises were a common gaming house as defined in S. 1 of the Act.

I am clearly of opinion that in the process of reasoning that the learned Sessions Judge has adopted he has begged the very question he had to determine. The question is whether the presumption under S. 6 arises in the case. The law says that it will arise if the warrant authorized the search on the footing of the premises being a common gaming house, and when the search held under warrant has resulted in a find of instruments of gaming. The reason of the presumption is that where the Magistrate is satisfied on the material before him that the premises constitute a common gaming house, and there is the find, there is a *prima facie* case. The argument that because there is a find and because the search was in execution of a warrant it should be taken that the Magistrate must have been satisfied that the premises were a common gaming house, and that therefore the Court which tries the case will also take it that they were a common gaming house, is to ignore the reason of the presumption which is a statutory presumption and to proceed on a wholly different line and create a new rule of evidence altogether.

The presumption of law arises only in

the peculiar circumstances that are mentioned by the statute itself. In the present case the requirements of S. 5 of the Act have not been strictly complied with, and the Magistrate has not said anywhere in the proceedings that in issuing the search warrant he was satisfied that the premises were used as a common gaming house. In circumstances such as these, the presumption mentioned in S. 6 of the Act, in my opinion, does not arise. If this presumption does not arise, as I hold that it does not, and as there is no evidence showing that the premises were kept for the profit or gain of petitioner 1 or his confederates, as the learned Sessions Judge has himself observed in his judgment, it must be held that it has not been established that the premises were a common gaming house. The petitioners' convictions therefore fail.

The rule is, accordingly, made absolute.

The convictions of and sentences passed upon the petitioners are set aside and it is ordered that the fines if paid be refunded.

R.M./R.K.

Rule made absolute.

1930 Cr. Cases 542

(Calcutta)

RANKIN, C. J., AND PATTERSON, J.
Prabhat Chandra Adhikari and another—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 247 of 1929, Decided on 30th August 1929.

Penal Code S. 228—No direction by Local Government as regards Sub-Registrar being civil Court. Offence committed before him under S. 228 cannot be dealt with under Criminal P. C., Ss. 480 and 482.

In the absence of a direction by the Local Government as regards the Sub-Registrar being a civil Court within the meaning of Ss. 480 and 482, Criminal P. C., an offence under S. 228 Penal Code, if committed before a Sub-Registrar cannot be dealt with under Ss. 480 and 482, Criminal P. C. [P 541-C 1]

Mrityunjay Chattopadhyaya, Manindra Nath Banerji and Susil Kumar Banerjee—for Petitioners.

Amiruddin Ahmed for Debendra Narain Bhattacharjee—for the Crown.

Rankin, C. J.—In this case it appears that while the Sadar Sub-Registrar of Pabna was sitting on a judicial proceeding certain persons who were deed-

writers finding fault with a certain ruling which he had given about the alteration of a figure in a deed came into his room and insulted him and caused interruption to his duty. The Sub-Registrar made a complaint to this effect to the District Registrar who happened also to be the District Magistrate and at the end of his recital of the circumstances he says that the accused persons may be prosecuted under S. 228, I. P. C. The District Magistrate apparently in his double capacity sent the case to the Sub-Divisional Officer for disposal and the Sub-Divisional Officer apparently summoned the accused under S. 228. In the meantime at the earliest possible moment the accused made an application to the Additional Sessions Judge taking several objections to the proceedings and this application was rejected. Thereupon the accused obtained a rule from this Court calling upon the prosecution to show cause why proceedings against the accused should not be quashed or why such other order should not be made as to this Court may seem fit and proper the ground upon which the rule was issued being that the Sub-Divisional Officer had no jurisdiction to issue process and that S. 476, Criminal P. C., is not applicable to the case. It would appear that throughout the proceedings the case has been assumed to be one under S. 228, I. P. C.

Mr. Chatterjee on behalf of the accused person calls our attention to the fact that S. 228 deals with an offence which by Sch. 2, Criminal P. C., may be tried by the Court in which the offence is committed subject to the provisions of Ch. 35 of the Code and this provision in Col. 8, contrasts with the provision made in respect of an offence (which also comes under S. 480, Criminal P. C.) under S. 175. In that case the Court by which the offence is triable is said to be the Court in which the offence is committed subject to the provisions of Ch. 35 or the Court of the Presidency Magistrate or a Magistrate of the First and Second Class. Beginning with the assumption that the Court by which the offence is triable is the Court in which the offence is committed, we are taken to S. 480, Criminal P. C. We find in that section refers first of all to a case where an

offence is committed in the view of or presence of any civil, criminal or revenue Court and in such a case a summary procedure is prescribed and the Judicial Officer who is insulted and interrupted in his duty may cause the offender to be detained in custody and then sentence the offender to fine not exceeding Rs. 200 and he is required to record the facts constituting the offence with the statement, if any, made by the offender. In default of payment of fine he may pass a sentence up to one month's rigorous imprisonment. If, however, the Court considers in such a case that this punishment is insufficient, S. 482 empowers the Court to record the facts constituting the offence with the statement of the accused if any and to forward the case to a Magistrate having jurisdiction to try the same and also empowers the Court to take security from the offender and in default of giving sufficient security to forward such person in custody to such Magistrate. Having regard to the fact that an offence under S. 228 is made triable by the Court in which the offence is committed subject to the provisions of Chap. 35 it appears to me that *prima facie* the intention of the legislature was that such a case should be dealt with under Ss. 480 and 482.

In this case the offence was committed before the Sub-Registrar and S. 84, Registration Act, makes it clear that the registering officer is a public servant and that a proceeding under the Registration Act is a judicial proceeding for the purposes of S. 228. As Col. 8, Sch. 2, assumes that the offence is committed in a Court it may well be argued that there is no difficulty in holding that the Sub Registrar is a Court for the purposes of Col. 8, Sch. 2. It would appear that under the Registration Act of 1877 there was a clause in addition to what is now repeated in S. 84, Registration Act of 1908, to the effect that the Registrar should be and the Sub-Registrar should not be a Court within the meaning of the section which corresponds to Ss. 480 and 482. It is, therefore, somewhat difficult to lay it down that by virtue of the Criminal Procedure Code the Sub Registrar is a Court for the purposes of Ss. 480 and 482 and we find that S. 483 appears to leave the matter to the directions of the

Local Government. In this case it appears that the Local Government has made no direction as regards the Registrar or the Sub-Registrar being a civil Court within the meaning of Ss. 480 and 482 and the result of that is that the offence under S. 228 if committed before a Sub-Registrar cannot be dealt with under Ss. 480 and 482, that is to say, in the first instance by the Court in which the offence was committed. On my part there is a grave difficulty in saying that such an offence can be dealt with outside the provision made in S. 480 or 482 or in the absence of any directions by the Local Government in saying that it can be dealt with by himself under S. 480.

After examinng the matter it appears to me that it is almost hopeless to suppose that in the proceeding now started any final result can possibly be arrived at under S. 228. To my mind the intention of the legislature is that a charge under S. 228 as distinct from a charge under S. 175 should be dealt with in a summary manner under S. 480 or else in a rather more elaborate manner provided by S. 482 and the latter section is confined to a case where the Court against whom the offence is committed has applied its mind on the question to decide if a fine of Rs. 200 will not be adequate. It has, however, been pressed upon us that in this case the Magistrate to whom the matter had been sent has tried it as a complaint in a summons case. But it does by no means follow that he will find in the end that S. 228 is the only section which can be applied. It will be open to him if he thinks fit to find that the accused is guilty of another offence triable as a summons case and S. 186, I. P. C., is suggested as a possible alternative. In the circumstances it is said that we should not quash the proceeding but let the Magistrate go on with it. In my judgment that contention must prevail. We think we ought to give direction in this case to the effect that under S. 228 proceedings should not be further continued but that the Magistrate's proceedings should not be quashed because it is open to the Magistrate to consider the facts and come to a conclusion whether under any other section he should proceed. With this direction the rule is discharged.

Patterson, J.—*I agree.*

V.B./R.K.

Rule discharged.

1930 Cr. Cases 544

(Calcutta)

CUMING, J.

S. M. Choudhuri — Accused Petitioner.

Corporation of Calcutta — Opposite Party.

Criminal Revn. No. 1441 of 1929, Decided on 20th January 1930.

Calcutta Municipal Act, S. 175 and Sch. 6, Item 18—Even if person carries only passengers yet he is carrier within Sch. 6, item 18.

Even if a person carries only passengers for hire yet he is a carrier within the meaning of Sch. 6, item 18, for any person who carries goods or passengers for hire or gratuitously by land or water is a carrier. [P 514 C 2]

Mrityunjoy Chattopadhyay—for Petitioner.

Braja Lal Chakrabarti and Gopendra Krishna Banerji—for Opposite Party.

Cuming, J.—The petitioner in this case who is an advocate of this Court is also the owner of a motor bus and apparently carries on the trade of a motor bus owner. He was prosecuted at the instance of the Corporation of Calcutta and has been fined Rs. 50 on the ground that he is liable under S. 175, Calcutta Municipal Act 1923 read with Sch. 6, Item 18, to take out a license as a carrier.

The petitioner contends that he carries only passengers and not goods for hire. His case is that small cases such as suit cases are allowed on his bus but no hire is paid for the carriage of the goods and hire is only paid for passengers. His contention would seem shortly to be this that a person who carries only passengers for hire is not a carrier within the meaning of Sch. 6, item 18, Calcutta Municipal Act. The whole case depends upon the meaning of the expression "carrier." In Halsbury's Laws of England vol. 4, p. 2 we find the word "carrier" defined as

"Any person who carries goods or passengers for hire or gratuitously by land or water is a carrier."

Accepting this definition there can be no doubt but that the petitioner is a carrier within the meaning of S. 175 read with Sch. 6, item 18 and as such he is liable to pay the tax. The decision of the lower Court is therefore right. The rule is discharged.

V.S./R.K.

Rule discharged.

* 1930 Cr Cases 545

(Bombay)

MIRZA AND BROOMFIELD, JJ.

Dinkar Nhanu Mangaonkar—Accused
—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 408 of
1929, Decided on 29th January 1930.

* (a) Criminal P. C., S. 103 —Search—
Presence of Panchas—Panchas should actually
accompany person making search.

Both the letter and the spirit of S. 103, namely, the provisions that the panchas are to attend and witness the search, and that the search shall be made in their presence, require that the panchas should actually accompany the persons making the search and should be actual witnesses to the fact of the finding of the property. It is not a sufficient compliance with this section that the Panchas should merely be summoned and kept present outside a building while the search is being carried on within it, and then called in to see what has been found. [P 546 C 1]

(b) Criminal P. C., S. 103—Panchas not
witnessing every detail of search does not
vitate search if search carried on in pre-
sence of accused, provided possession of of-
fending object can be proved beyond doubt
from evidence—Bombay Abkari Act, S. 43
(1).

The mere fact that the Panchas are not present throughout a search under Bombay Abkari Act, S. 43 (1) (a), and do not witness every detail of it is not sufficient in itself to vitiate the conviction, especially where the accused is himself present at the search, and it is open to the Court to find the fact of possession of an offending article proved, provided that on a consideration of all the evidence in the case it is satisfied that the fact has been proved beyond reasonable doubt: 4 Cr. L. J. 390; 20 Cr. L. J. 742, Dist.; 41 Cal. 350; A. I. R. 1925 All. 484 and A. I. R. 1926 All. 188, Foll.

[P 547 C 1, 2]

(c) Criminal P. C., S. 103 — Search not
fulfilling requirements of S. 103 — If such
search leaves evidence in unsatisfactory
condition, conviction cannot be sustained.

Where the failure to comply with the provisions of S. 103 leave the evidence in an unsatisfactory condition, so that there is reasonable doubt as to whether the offending articles were really in the possession of the accused, the conviction ought not to be sustained. [P 548 C 1]

M. K. Gadgil and *B. G. Modak* — for
Applicant.

P. B. Shingne—for the Crown.

Broomfield, J. — The accused, on whose behalf this revision application has been presented, was convicted by the Second Class Magistrate, Vengurla, for an offence under S. 43 (1) (a), Abkari Act, the conviction being based on evidence to the effect that a bottle containing kaju liquor was found in a room of his house and two other bottles also

containing some liquor were found buried in a heap of ashes, under the roof of his padvi. The bottle of liquor alleged to have been found in the house contained one and a half drams and the two bottles found in the ash heap outside contained six drams and four drams respectively. The accused appealed against his conviction but his appeal was dismissed.

The only contention put forward in this revision application, which, in our opinion, has any substance is that the search of the accused's house was not carried out in the manner prescribed by S. 103, Criminal P. C. It is provided there that before making a search, the officer about to make it shall call upon two or more respectable inhabitants of the locality to attend and witness the search. It is further provided in Cl. (2) that the search shall be made in their presence. Now in this case, although Sub-Inspector Naik, who took part in the search, has stated at the beginning of his deposition that the house was searched in the presence of panchas, it appears that the three persons who were summoned as panchas did not actually witness the search of the house and finding of the bottle of liquor therein. Sub-Inspector Naik says that he was standing outside the house until the bottle of liquor was found, and then he went inside the room. Two of the panchas, according to him, were with him. The third pancha, he says had gone into the house, and he mentions that the pancha who went inside was probably Mahabaleshwar.

Mahabaleshwar, however, was examined as a witness and he has stated that neither he nor the other two panchas went inside until the bottle of liquor was found. Inspector Mondkar, who actually made the search, has stated that the Police Patil who was also one of the panchas went inside with him. But the Police Patil was also examined as a witness and has stated that he and the other two panchas went inside with Mr. Naik after the finding of the bottle of liquor and not before. This witness deposes that four persons went into the house to make the search. They were three excise peons and Inspector Mondkar. They were accompanied by the accused but not by any of the panchas. It is quite clear, therefore, that there were

not two of the panchas present inside the house while the search was being made and when the bottle was found, and it is doubtful on the evidence whether there was even one present inside the house at that time. We consider that both the letter and the spirit of S. 103, namely, the provisions that the panchas are to attend and witness the search, and that the search shall be made in their presence, require that the panchas should actually accompany the persons making the search and should be actual witnesses to the fact of the finding of the property. It is not, in our opinion a sufficient compliance with this section that the panchas should merely be summoned and kept present outside a building while the search is being carried on within it, and then called in to see what has been found.

The question then arises whether this irregularity in the search and the failure to comply with the clear provisions of S. 103 make it necessary that the conviction of the accused should be set aside. In connexion with this point we have been referred to a number of authorities but unfortunately the majority of them are not in any authorized report. The learned counsel for the applicant relies on *Ah Tuck v. Emperor* (1) and *Lachmi Narain v. Emperor* (2). The former case was a prosecution for gambling under the Burma Gambling Act. The irregularity there was that the persons called as panchas were not respectable persons of the locality within the meaning of S. 103. It was pointed out by the Court that the provisions in S. 103 were aimed against possible chicanery and unfair dealing on the part of the officers entrusted with search warrants and were made in order to ensure confidence in neighbours of the persons whose houses were searched and in the public generally that anything incriminating which may be found in premises searched shall be really found and shall not be what is called "planted." These remarks are apposite, but the actual decision in the case was that as the Burma Gambling Act requires that search shall have been made strictly in accordance with S. 103 in order that a certain presumption under S. 7 of that Act could be drawn, and as the provisions of S. 103

had not been complied with, therefore the presumptions could not legitimately be applied. That is a point somewhat different from the one with which we have to deal.

The case of *Lachmi Narain v. Emperor* (2) was a prosecution under the Opium Act and the irregularity was that the officer making the search entered the premises without search witnesses. Das, J., who tried the case, remarked as follows (p. 743):

"It is with some object that the legislature has provided the safeguards and when they are deliberately broken it is, in my opinion, not for the accused to show that they have been prejudiced. The prejudices is, in my opinion, on the face of the record. They should not have entered the premises without search witnesses, the object being that it may not be in their power to smuggle articles into the house and bolster up a false case against them."

The conviction, however, in that case was not set aside on this technical ground, but by reason of the cumulative effect of a number of irregularities affecting other matters besides the search.

The Government Pleader, who maintains the view that in spite of the irregularities in the search nevertheless the conviction ought to be sustained, relies mainly on *Ramesh Chandra Banerjee v. Emperor* (3). The search in that case was made in the presence of witnesses, but the accused were not allowed to be present as required by S. 103. It was held by Woodroffe, J. that the exclusion of the occupants of the place during the search was not a technical but a substantial violation of the law. The effect, however, of such irregularities, according to the learned Judge, is to necessitate a careful scrutiny of the evidence as to the search, but if, notwithstanding the irregularities, the Court holds that no advantage has or could have been taken of them, they have no further effect. Therefore, in spite of the irregularities in the search in the course of which certain incriminating articles were found, the Court accepted the evidence produced by the prosecution as proving that as a matter of fact those articles were found. To quote from the judgment (p. 370):

"However this be, the fact remains that the accused were not present at the search, and this is an irregularity which they are entitled to ask us to consider. The evidence must undoubtedly be carefully scrutinized on that ac-

(1) [1906] 4 Cr. L.J. 390.

(2) [1919] 20 Cr. L.J. 742=58 I.O. 150.

(3) [1913] 41 Cal. 550=23 I.C. 995=18 C.W. N. 493.

count. It is to be noted, however, that there were two search witnesses present. But after all if, upon a careful scrutiny of the evidence, we come to a conclusion that notwithstanding the absence of the accused, advantage was not, and could have been, taken of it, the irregularity, whilst serving to exact from the Court a careful scrutiny of the evidence relating to the search, has no further effect. It is not sufficient to suggest that articles might have been fraudulently introduced : we must see whether there are any reasons to suppose that this was done."

In the particular case the Court held that there were no such reasons.

The Government Pleader also referred to *Rutroo v. Emperor* (4) and *Abdul Hafiz Khan v. Emperor* (5). The first was a case under the Arms Act in which the irregularity was that the search did not take place :

"in the presence of some officer especially appointed,"

as required by S. 30, Arms Act. The decision was that in spite of the search not being lawful, there being sufficient evidence that the accused was in unlawful possession of the arms, the conviction was justified. In *Abdul Hafiz Khan v. Emperor* (5) which was a case under the U. P. Excise Act, it was also held that an irregularity in the search did not render illegal the conviction of a person who was found in possession of an excisable article on such search. The irregularity there was that the officer making the search did not obtain a warrant from the Collector, and that, though he had taken witnesses with him, these witnesses were not "respectable inhabitants of the locality." In the course of his judgment Kanhaiya Lal, J. said p. 266 (of 27 Cr. L. J.)

"It is undoubtedly important that an officer making a search should comply with these provisions, for the credibility of the story may in many cases depend on the support it might receive from the persons accompanying him in the search. But if for any reason the officer making the search is unable to get two or more respectable witnesses of the locality and the search is effected in the presence of one or more men available at the time, leading to the discovery of an excisable article, the accused who is found in possession of that article can all the same be convicted, if the Court is satisfied from the evidence that an offence has been committed."

After considering these authorities we are not prepared to hold that the mere fact that the panchas were not present throughout the search and did not witness every detail of it would be enough

in itself to justify setting aside the conviction. It would be open to us to find the fact of possession of the illicit liquor proved provided that on a consideration of all the evidence in the case we were satisfied that that fact had been proved beyond reasonable doubt. There are difficulties, however, in this case which arise directly from the fact that the provisions of S. 103 were not strictly complied with. As I have said the accused himself was present at the search and the evidence shows that before the search began the accused had searched the persons of the three excise peons and also the persons of the panchas. If, therefore, the circumstances had made it perfectly plain that the bottle of illicit liquor could not have been placed where it was by someone from outside then we might have been able to find the accused's possession of it proved, although the panchas had not actually witnessed the finding of it. This, however, is just where the difficulty comes in. The accused appears to have alleged from the beginning that this bottle of liquor had been placed in the house by some enemy of his. This is no doubt the sort of defence which is usually put forward in these cases, but the defence has more to support it in this case than it usually has owing to the fact of a paper being found tied to bottle with certain writing on it, the meaning of which even after the lengthy discussion of it by the trial Magistrate still remains somewhat mysterious.

The trial Magistrate has expressed himself as being satisfied that this bottle, which is alleged to have been found hanging in a basket suspended from the roof, could not have been inserted from outside. It is not very clear on what this opinion is based. One of the panchas who was examined has stated in his evidence that at the time the bottle was found the accused said that it had been placed there by somebody from outside, and so an empty bottle was given to him and he was asked to place it in the basket, but was unable to do so. The witness proceeds to state, however, that if some loose stones in the wall were removed the bottle could have been placed in the basket from outside. On the other hand the Police Patil has stated that at that time, that is at the time of the search, it was not ascertained

(4) A.I.R. 1925 All. 434=47 All. 576.

(5) A.I.R. 1926 All. 188.

whether the bottle could or could not have been put in from outside. At a subsequent stage it appears that the trial Magistrate himself went to the house in order to test the defence theory. This test, however, was abortive, because the exact position in which the basket had been hanging was disputed and could not be exactly determined. Now it is obvious that if the panch witnesses had been present at the time when the bottle was found in the basket, as the provisions of S. 103 clearly require that they should have been, there could have been no doubt or dispute upon this point. The exact position of the basket with reference to the holes in the wall could have been fixed, and the Court would have been in a position to test the probability of the accused's story.

As we consider that in this case the failure to comply with the provisions of the law relating to searches has left the evidence in an unsatisfactory condition, so that there is a reasonable doubt as to whether the bottle of liquor in the basket really was in the possession of the accused, we are of opinion that the conviction ought not to be sustained. I may state that as regards the bottles of liquor found in the ash heap it is not disputed that those could have been placed there by anybody, and apart from the bottle found in the basket, the conviction of the accused would admittedly not have been justified. The conviction and sentence are set aside and the accused is acquitted. The fine of Rs. 10, if paid, should be refunded to him. We see no reason to interfere with the order of the lower Court with regard to the property found.

Mirza, J.—I agree.

V.B./R.K.

Conviction set aside.

1930 Cr. Cases 548

(Bombay)

MIRZA AND BROOMFIELD, JJ.

IN RE, Venkatraman Rama Hedge.

v.

Emperor.

Criminal Revn. Appln. No. 400 of 1929, Decided on 29th January 1930.

(a) Criminal P. C., S. 145 — Dispute not between two, opposite parties having adverse rights but between persons having joint rights—Still S. 145 can apply.

Seeing that S. 145 merely contains the words "a dispute likely to cause a breach of the peace concerning any land or water or the boundaries thereof, and seeing that neither in S. 145 nor in S. 146 is there any provision which

clearly limits the dispute, which can be dealt with under Chap. 12, to a dispute by "two opposing parties having adverse rights to its exclusive possession it cannot be said that because the dispute was not one between two opposing parties having adverse rights to exclusive possession of the land but was a dispute between two parties having joint rights to the land in dispute, each of which was claiming exclusive possession, S. 145 cannot apply : 11 C.W.N. 512, *Diss. from.* [P 549 C 2]

(b) Criminal P. C., S. 146—Requirements for attachment under S. 146 is inability of Magistrate to satisfy as to who is in possession.

For a Magistrate to attach property in dispute under S. 146 all that S. 146 requires is that the Magistrate should be unable to satisfy himself as to which of the parties was in "such possession", that is actual possession of the subject in dispute. [P 549 C 2]

(c) Criminal P. C., S. 146—Dispute among Hindu brothers with regard to former joint family property — Elder brother in possession—Partition alleged—Magistrate, unable to come to conclusion as to partition or joint right and possession, passing order under S. 146—Such order held not proper—But order under S. 107 held would have been more appropriate.

A Magistrate took proceedings under S. 145 in respect of a dispute between three Hindu brothers and with regard to property which was formerly joint family property. The question in dispute was whether the three brothers were jointly entitled to the property in dispute or there had been partition in virtue of which the property in dispute had fallen to the share of the eldest brother who was in possession. The Magistrate could not make up his mind on the question and as he would not satisfy himself as to which of the parties was in exclusive possession of the land in dispute, he applied S. 146 and attached the land until the rights of the parties thereto were determined by a competent Court.

Held : that although it could not be said that the Magistrate's order under S. 146 was not competent it was an order which ought not to have been made under the circumstances of the case. It was clear that whether there had been partition or not the eldest brother was entitled to be in possession. If the alleged partition really took place then he was entitled to be in possession in his own right. If it did not take place he was entitled to be in possession as the eldest brother and the manager of the family. The order of attachment, therefore, was not reasonable and if there was any danger to the breach of the peace proper order would have been to take proceedings under S. 107 and bind the parties for such term as was necessary : A. I. R. 1926 Bom. 318, *Ref.* [P 550 C 1]

(d) P. Murdeshwar—for Applicant.

Broomfield, J.—The facts giving rise to this revision application are as follows : The First Class Magistrate, Honavar, took proceedings under S. 145, Criminal P. C., in respect of a dispute which was found to be likely to cause a breach of the peace relating to two

fields Survey Nos. 56 and 57 in the village of Kalkod. The dispute was between three brothers and the question in dispute was whether the three brothers were jointly entitled to these two fields or whether there had been a partition in virtue of which the two fields had fallen to the share of Venkatraman, the elder brother. Besides two survey numbers there were a number of lands in other villages belonging to the family, and as there was reason to believe that there might be a dispute leading to a breach of the peace in respect of those other lands also, proceedings under S. 145, Criminal P. C., were taken as regards those lands in the Court of the Magistrate, First Class, Sirsi. The latter Magistrate after holding an inquiry decided that the case was not one which ought to be dealt with under S. 145. The view he took was that the dispute was one of a purely civil nature between members of a Hindu joint family about property in the joint possession of all the three brothers. In the circumstances he held that the Court was not competent to pass any order under S. 145, and that if any breach of the peace was imminent the proper course would be to bind over the parties under S. 107 Criminal P. C. He, therefore, directed that the proceedings should be dropped and the parties referred to the civil Court. This order was passed on 5th September 1929.

In the meantime, however, the proceedings in the Court of the Magistrate, First Class, Honavar, had been continued. The learned Magistrate recorded evidence as to the question whether there had or had not been a partition and he found it impossible to make up his mind on the point. The order passed by him reads more like a judgment in a civil suit than in a magisterial proceeding. But he has finally come to the conclusion that it is doubtful whether Venkatraman, that is, the elder brother, alone or all the brothers together were in possession of S. Nos. 56 and 57 of Kalkod, and as he was unable to satisfy himself as to which of the parties was in exclusive possession of the lands in dispute, he applied S. 146, Criminal P. C., and attached the two fields until such time as a competent Court had determined the rights of the parties thereto. The patel of Kalkod was appointed as receiver. This order was passed on 11th

April 1929. Venkatraman now comes to this Court in revision and prays that the order of 11th April 1929, just referred to, should be set aside.

It is contended that the Magistrate was not competent to deal with this dispute under S. 145 and had no jurisdiction to make the order which he has made under S. 146. This contention has been supported by a reference to the case of *Makhan Lal Roy v. Barada Kanta Roy* (1). In that case it was decided that S. 145 did not apply because the dispute was not one between two opposing parties having adverse rights to exclusive possession of the land but was a dispute between two parties having joint rights to the land in dispute, each of which was claiming exclusive possession. That was the only reason given by the Court for holding that the matter could not be determined under S. 145. Seeing that S. 145 merely contains the words "a dispute likely to cause a breach of the peace concerning any land or water or the boundaries thereof," and seeing that neither in this section nor in S. 146 is there any provision which clearly limits the dispute, which can be dealt with under Chap. 12, to a dispute by "two opposing parties having adverse rights to its exclusive possession," we should hesitate about following this decision, even if it were clearly in point. The ruling, however, does not properly apply to the facts of the present case, for whereas in that case it was found as a fact that the dispute was between parties having joint rights to possession, in the present case the Magistrate has been unable to make up his mind on the question whether the dispute is one between parties having joint rights or between one party who has an exclusive right in virtue of the partition and the other members of what was formerly a joint family. All that S. 146 requires is that the Magistrate should be unable to satisfy himself as to which of the parties was in "such possession," that is, actual possession, of the subject of dispute. And although the Magistrate appears to have been mainly concerned with the question whether there had been a partition or not, it is also perfectly clear from his order that he was unable to

satisfy himself on this question of actual possession.

But although we are not prepared to hold that the Magistrate's order under S. 146 was not competent, we nevertheless take the view that it was an order which ought not to have been made in the circumstances of the case. It is clear that whether there has been a partition or not, the elder brother Venkatraman is entitled to be in possession. If the alleged partition really took place then he is entitled to be in possession in his own right. If it did not take place then he is entitled to be in possession as the elder brother and manager of the family. The order of attachment by which the two fields have been placed in the possession of the patel of the village does not, therefore, seem to be a reasonable one. Moreover, it is fairly obvious that the dispute between the parties must sooner or later be settled by civil litigation and it is possible that the necessary civil proceedings may be complicated by the fact that proceedings under Ss. 145 and 146 have been taken in respect of these two fields, whereas the proceedings have been dropped with regard to other lands belonging to the family. The remarks of Marten, J., (now Sir Amberson Marten, C.J.), in *In re, Mallappa* (2) as to the improper use of S. 145 are very apposite in this case. If there is any danger to the breach of the peace, proceedings can be taken under S. 107 and all the parties can be bound over on such terms as may be necessary. We think that is the course which ought to be followed in this case. We, therefore, set aside the order of attachment dated 11th April 1929, and direct that possession should be handed over to the petitioner Venkatraman Rama Hedge.

Mirza, J.—I agree.

V.B./R.K. *Rule made absolute.*

(2) A. I. R. 1926 Bom. 313.

1930 Cr. Cases 550

(Bombay)

MIRZA AND BROOMFIELD, JJ.

Emperor

v.

Sattegowda Satgowda Patil—Accused
—Respondent.

Criminal Appeal No. 441 of 1929, Decided on 6th March 1930.

Arms Act (11 of 1878), S. 13—Taking blunt spear, capable of being sharpened, to parade ground for gymnastic purposes is "going armed."

A spear would not cease to be a spear by reason of its points and edges becoming blunt if they are capable of being sharpened at any time; and taking of such spear to the parade ground for gymnastic purposes amounts to going armed within the meaning of S. 13."

[P 551 C 1, 27]

P. B. Shingne—for the Crown.

R. A. Jahagirdar—for Respondent.

Mirza, J.—The opponent is one of the founders and promoters of a gymnasium class started in Sankeshwar in July 1928. It is admitted that he either brought or ordered from Poona four spears and one dagger for the purpose of the gymnasium class where exercises with spears and daggers were being practised. Two of these spears had brass heads and the dagger also was of brass. The other two spears had iron heads.

The opponent was prosecuted before the Sub-Divisional Magistrate, First Class, Belgaum, for offences under Cls. (d) (e) and (f), S. 19, Arms Act, in respect of these five articles. The Magistrate held that the two brass spears and the brass dagger were not capable of inflicting injuries and were not arms within the meaning of S. 4, Arms Act, 1878. He held, however, that the two iron spears were dangerous weapons and could inflict injuries on human beings and cattle. He convicted the opponent in respect of the two iron spears of offences under Cls. (d), (e) and (f) of S. 19 and imposed a fine of Rs. 20 for each of the three offences, i. e., in all Rs. 60.

The opponent preferred an appeal to the Sessions Judge of Belgaum against his conviction and sentences. Before the Sessions Judge it was conceded by the prosecution that the conviction of the opponent under Cls. (d) and (f) of S. 19 could not be sustained. With regard to the conviction under Cl. (e) of S. 19, the Sessions Judge was of opinion that the two iron spears come under the category of theatrical property and were therefore exempt from the prohibitions in the Arms Act, including those contained in S. 13. He, therefore, reversed the conviction and sentences of the opponent. The Government of Bombay have appealed to this Court against the Sessions Judge's order of acquittal.

The learned Government Pleader does not question the correctness of the Sessions Judge's reversal of the conviction of the opponent or offences under Cls. (d) and (f), S. 19, but contends that the acquittal of the opponent for an offence under Cls. (e), S. 19, is not correct.

The question we have to determine in this appeal is whether the opponent can be said to have gone "armed" in contravention of the provisions of S. 13. S. 13 provides:

"No person shall go armed with any arms except under a license and to the extent and in the manner permitted thereby."

"Arms" are defined in S. 4 as including inter alia spears and spear-heads. The two iron spears have been produced before us in Court. The edges of one of these spears are blunt but its pointed end is sharp. With regard to the other spear the point at the end is broken and the edges as well as the pointed end of this spear are blunt. These two weapons can undoubtedly be regarded as spears in the ordinary sense of the word. The one with a sharp end could be used as it is with some effect both as a weapon of offence and of defence. To sharpen the edges of this weapon would present no serious difficulty and it could then be used with greater efficacy for offensive and defensive purposes. With regard to the second spear although its pointed end is broken and hence blunt and its edges too are blunt these are defects which could be easily remedied and the weapon used for offensive and defensive purposes. A spear, in my opinion, would not cease to be a spear by reason of its point and edges becoming blunt if they are capable of being re-sharpened at any time. The Sub-Inspector of Police who gave evidence in this case said that both these iron spears are dangerous weapons and are capable of inflicting injury on human beings and cattle. These two iron spears in our judgment would not come under Cl. (d) of Government Notification under S. 13, Arms Act. That notification excludes ornamental arms of an obsolete pattern and theatrical property being virtually useless for offensive and defensive purposes. We are unable to agree with the Sessions Judge that these two spears are weapons of that kind.

The next question is whether it is

satisfactorily proved that the opponent went armed with these two weapons. The evidence of Hasansab Imamsab, the Police Constable, shows that the opponent took part in the parades held under the auspices of the gymnasium and used the spear on these occasions. The witness has also stated that every day the spears and jambiyas were being brought and kept in the opponent's shop after the parades were over and were being taken from the shop of the opponent for the parades every morning and evening. The opponent in his statement before the Magistrate has denied that these spears were used on the occasion of the parades held under the auspices of the gymnasium; but having regard to the fact that these spears were either brought or ordered by the opponent for the purposes of the gymnasium and the further fact that the opponent was a founder and promoter of the gymnasium and was taking an active interest in its programme, it is not unlikely that the opponent did use these spears on the occasions when the parades were held. The learned Magistrate who tried the case was satisfied from the evidence that the opponent was taking the spears to the parade ground, was using them in person there, and was also giving them to the members of the gymnasium to be used by them on those occasions. We see no sufficient reason to differ from the Magistrate's appreciation of the evidence on this point.

It appears that the opponent was of the opinion that going about with these weapons did not require a license. It is clear from the evidence that it was not the opponent's purpose to use these weapons for any but gymnastic exercises. We are of opinion that the offence of the opponent does not call for any substantial sentence. We set aside the order of acquittal, convict the opponent of an offence under S. 19, Cl. (e), Arms Act (11 of 1878), and sentence him to pay a fine of Rs. 5. The iron spears in Court will be confiscated and the brass spears and the jambiya will be returned to the opponent.

Broomfield, J.—I agree.

V.B./R.K. Order of acquittal set aside.

1930 Cr. Cases 552

(Bombay)

MIRZA AND BROOMFIELD, JJ.

Emperor

v.

Mahadeo Govind Nagarkar—Accused.

Criminal Reference No. 8 of 1930, Decided on 27th January 1930.

Penal Code, S. 403, Illus. (a)—Accused picking up spanner on road not knowing owner thereof is not guilty.*A* was convicted on his plea of guilty under S. 403 (he having tried to sell a spanner which he found lying on a public road).*Held*: that it was not a case where the accused had reasonable means of discovering and giving notice to owner of the spanner of having found it. The spanner was not of any appreciable value. The accused's plea of guilty was merely his admission of the facts alleged against him. The case therefore fell under illustration of S. 403 and the accused therefore was not guilty. [P 552 C 2]**(b) Criminal P. C., S. 562—Accused already under probation—Order again putting him under probation for subsequent offence is illegal.**

Where an accused is already placed under probation of good conduct on an earlier conviction, a sentence again placing him under probation for a subsequent offence is illegal.

[P 552 C 1, 2]

Mirza, J.—This is a reference made by the District Magistrate, Poona, forwarding a report made to him by the City Magistrate, First Class, Poona, together with the record and proceedings in two cases, and recommending that the sentence passed by the President and Magistrate, First Class, Poona Bench, S. 3, in the second one of these cases being Cr. Case No. 430 of 1929 may be cancelled and some other lawful sentence as this Court may deem fit be substituted therefor.*It* appears that the accused had been previously convicted by the City Magistrate, First Class, Poona, on 4th September 1929, in the first one of these cases of an offence under S. 380, I. P. C. and released on probation of good conduct under S. 562, Criminal P. C., on his entering into a bond for Rs. 100 for one year. On 7th December 1929, the accused was convicted by the Bench Magistrate, Poona, in the second one of these cases of an offence under S. 403, I. P. C., and was again placed on probation of good conduct for a period of six months in his personal recognizance for Rs. 50. As the accused had already been placed on probation of good conduct on the earlier conviction, the sentence passed by the Bench Magistrate in

the latter case is clearly illegal and must be set aside.

Having set aside the sentence, we have now to consider whether the accused has been properly convicted of an offence under S. 403. The First Class City Magistrate, Poona, expresses a doubt whether the accused can be said to be guilty of an offence under S. 403, for which he has been convicted. The accused pleaded guilty before the Bench Magistrate but his plea of guilty, as the First Class City Magistrate points out, is really no more than an admission of the facts that were alleged against him. The accused had stated that he had found the spanner, the subject matter of the alleged misappropriation, in the public road leading to the Poona railway station and that he had attempted to sell it. The First Class City Magistrate states in his report that the accused did not know who the owner of the spanner was, that the owner of the spanner had not been traced, that the accused had no means of discovering the owner of the spanner, and that nobody had identified the spanner. In the opinion of the First Class City Magistrate this was not a case where it could be said the accused had reasonable means of discovering and giving notice to the owner of having found the spanner. The value of the spanner is nowhere stated in the record but it could not have been of appreciable value. The case, in our opinion, seems to fall under illustration (a) of the illustrations to S. 403, I. P. C. That illustration is:

"A finds a rupee on the high road, not knowing to whom the rupee belongs. *A* picks up the rupee. Here *A* has not committed the offence defined in this section."

Illustration (a), however, must be taken to be qualified by illustration (f) to the same section. Illustration (f) is:

"A finds a valuable ring, not knowing to whom it belongs. *A* sells it immediately without attempting to discover the owner. *A* is guilty of an offence under this section."

As the spanner found by the accused does not appear to be of any appreciable value we are of opinion that the present case is governed by illustration (a) and not by illustration (f). In our opinion the conviction under S. 403 should not be upheld. We set aside the conviction and sentence.

R.M./R.K.

Conviction set aside.

1930 Cr. Cases 553

(Lahore)

TEK CHAND AND AGHA HAIDAR, JJ.

Mt. Sabhai—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 508 of 1929, Decided on 26th June 1929, from order of Sess. Judge, Mianwali, D/- 28th April 1929.

Criminal P. C., S. 162—Only those portions of statements of witnesses to police as have been actually read under S. 162 to contradict witnesses are parts of judicial record and can be treated as evidence in a case—Evidence Act, S. 145.

Only those portions of statements made by witnesses before the police as have been actually used under S. 162, Criminal P. C., to contradict the witnesses in the manner provided in S. 145, Evidence Act, in the course of their cross examination or re-examination are parts of the judicial record and can be treated as evidence in a case. The other parts of the statements cannot be relied upon by the prosecution or the defence in determining the guilt or innocence of the accused and should not be referred to by the Judge. [P 554 C 2]

Chandar Gupta—for Appellant.*Des Raj Sawhney*—for the Crown.

Agha Haidar, J.—*Mt. Sabhai* has been convicted of the murder of her husband, Ghulaman, by poisoning him, and has been sentenced to death under S. 302, I. P. C., by the Sessions Judge of Mianwali. The appeal on her behalf has been argued by Mr. Chandar Gupta in this Court and the record is also before us under the provisions of S. 373, Criminal P. C., for the confirmation of the sentence.

Ghulaman, the deceased husband of the appellant, was taken ill late at night on 19th December 1928, and died on 21st December, at about 7 a. m. Before he died he vomitted and purged, and it was suspected that poison had been administered to him. The lambar-dar, Mohammad Akbar Khan sent a ruqqa to the police station, Bhakkar, at 5 p. m. on 21st December 1928, and this ruqqa constitutes the first information reprot. The ruqqa says that Ghulaman barber had died that day after being sick for one day and that his wife, who was of a loose character was suspected.

The police arrived at the spot and were accompanied by Khan Ghulam Sarwar Khan (P. W. No. 4) who is a zail-dar and also an Honorary Magistrate.

1930 Cr. C. 70 & 71

As a result of the police investigation *Mt. Sabhai* and one Muri Hussain Shah were committed to the Sessions: *Mt. Sabhai* to take her trial under S. 302, I. P. C., while Murid Hussain Shah was charged under Ss. 302/109. Murid Hussain Shah has been acquitted by the learned Sessions Judge and we are not concerned with him. The learned Sessions Judge has, as already stated, convicted *Mt. Sabhai*.

A number of prosecution witnesses have deposed that the deceased had stated in their presence that his wife *Mt. Sabhai* had poisoned him. These statements were rightly disbelieved by the learned Sessions Judge in view of the fact that, before the police, these witnesses had not made any such statements. Attempt was also made on behalf of the prosecution to prove that *Mt. Sabhai* had made a confession of the crime in the presence of Khan Ghulam Sarwar Khan (P. W. No. 4). The evidence of this witness has not been believed by the Court below on this point, and I entirely agree with the view of the learned Sessions Judge. He is a man who, according to his own admission had been "tackling" the appellant from time to time at the instance and in the presence, of the Police Officers. No reliance whatsoever can be placed upon the evidence of this witness.

The prosecution further relied upon the discovery of a certain packet containing a red powder which is alleged to have been produced by *Mt. Sabhai* on 26th December 1928. It may be mentioned here that the police reached the scene of the occurrence on 21st December and on 22nd December the house of *Mt. Sabhai* was searched. The discovery of this packet on 26th is a very belated one, and having regard to the persons who signed the discovery list, I am not prepared to hold that the discovery was fair and genuine. In my opinion the Sessions Judge was quite right in not accepting this alleged discovery as reliable.

The sole ground on which the learned Sessions Judge has based the conviction of *Mt. Sabhai* is that, on the night on which Ghulaman was taken ill, the last meal which he took was cooked and served by *Mt. Sabhai*. This meal consisted of Sag and Petha (pumpkin). Now, there is no evidence on the record to

show that Mt. Sabhai had procured any poison or that she was in possession of it. Furthermore, she stated in the course of her statement before the Court below and this statement seems to have been accepted by the learned Sessions Judge, that sometime after taking his evening meal consisting of the above-mentioned dishes, the deceased took some fresh buffalo's milk. There was nothing improbable in a man of Ghulaman's position taking some milk before going to bed. We know nothing at all as to what the milk which constituted the last item of food taken by the deceased before he fell ill, actually contained. Therefore, the possibility of something deleterious and injurious to human life being present in the milk is not entirely excluded, and it cannot be said with any degree of certainty that the Sag and Petha mentioned above and not the milk contained the poison which killed Ghulaman. I may mention that on the record of this case there is evidence that village quacks deal in preparations of mercury and arsenic etc., and that ignorant people take these drugs in the belief that they possess rejuvenating properties. It is well known that most of these drugs are taken with milk at bed time. It is quite possible that the deceased, who was an elderly man, took some such drug as an aphrodisiac for a tonic. The report of the Chemical Examiner shows that arsenic was present in the intestines of the deceased.

Under the circumstances it cannot, therefore, be said that Mt. Sabhai, the appellant, was responsible for administering the poison which was found in the contents of the deceased's stomach and in the other vitals and which proved fatal to him.

On the record, as it stands, the conviction of the appellant cannot be supported. I would, therefore, allow the appeal, set aside the conviction and sentence and order that the appellant Mt. Sabhai be released forthwith.

Tek Chand, J.—I agree in holding that the evidence on the record is insufficient to sustain the conviction of the appellant. The appeal must, therefore, be accepted and the appellant acquitted.

I wish to add that the learned Sessions Judge has erred in treating the statements made by some of the witnesses before the police as substantive evidence in

their entirety. Only those portions of such statements as had been actually used under S. 162, Criminal P.C., to contradict the witnesses in the manner provided for in S. 145, Evidence Act, in the course of their cross-examination or re-examination were parts of the judicial record and could be treated as evidence in the case. The other parts of these statements could not have been relied upon by the prosecution or the defence in determining the guilt or innocence of the appellant and ought not to have been referred to by the learned Judge. The attention of the learned Sessions Judge is drawn to the mandatory provision of the law on this point.

R.M./R.K.

Appeal allowed.

1930 Cr. Cases 554

(Lahore)

TEK CHAND AND JOHNSTONE, JJ.

Kapur Singh—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1117 of 1929, Decided on 20th December 1929, from order of Sess. Judge, Ludhiana, D/- 28th October 1929.

(a) Criminal Trial—Evidence — First information report is not substantive evidence and can be used only to corroborate or contradict maker thereof—It is, however, admissible under Evidence Act, S. 32 (1).

It is settled law that a first information report is not substantive evidence. It can be used only to corroborate or contradict the deposition of the maker thereof at the trial. It is, however, admissible under S. 32 (1), Evidence Act, as the statement of a person (since deceased) relating to the circumstances of the transaction which resulted in his death.

[P 553 C 1]

(b) Criminal Trial — Dying declaration — To prove dying declaration it is not necessary for witness to repeat words of deceased — If record of statement is proved it is sufficient.

To prove a dying declaration it is not necessary that the witness while giving evidence should repeat in his own words what the deceased had said; it is enough if he proves the record of that statement: *A. I. R. 1926 Lah. 310, Foll.*

[P 556 C.1]

Jai Gopal Sethi—for Appellant.

I. M. Mackay—for the Crown.

Tek Chand, J.—The appellant Kapur Singh, Jat, aged 32 years, of mauza Shahna in the Ludhiana district, has been convicted under S. 302, I. P. C., for having murdered Mt. Dhannon, a young Chamar woman of the same place, and has been sentenced to death.

The case for the prosecution is that some months before the occurrence the appellant had trespassed into the house of Mt. Dhannon with the intention of outraging her modesty. He was caught at the time and was severely beaten by the Chamars. Later on he was convicted under S. 451, I. P. C., and sentenced to undergo one day's imprisonment and pay a fine of Rs. 200. The appellant felt himself disgraced at his conviction by a criminal Court on the complaint of a Chamar woman and wanted to have his revenge on her. Accordingly on 3rd July 1929 at about 6 p. m. he armed himself with a tesha (adze) and went to the house where Mt. Dhannon lived at the time. She was standing near the tanur, ready to bake her bread, and two other Chamar women, Mt. Aso (P. W. 4) and Mt. Nandan (P. W. 5) were close by. He attacked her with the adze and inflicted a number of injuries on her, felling her to the ground. Ram Ditta sweeper (P. W. 3) and Bhanta Singh lambardar (P. W. 12) were near the spot and witnessed the assault. An alarm was raised but the appellant made good his escape. Mt. Dhannon was taken to the police station where she made a report. The police registered a case under S. 326, I. P. C., and started the investigation.

As Mt. Dhannon's injuries were of a serious nature she was taken to the hospital at Rai Kot where she was examined by Sub-Assistant Surgeon Chanda Singh (P. W. 2) on 5th July. He found eleven incised wounds on her body, of which four were on the right upper arm, one on the left forearm, four on the right thigh, one on the left thigh, a small superficial wound on the breast and one on the finger. There was also a contusion on one of the thighs.

In the opinion of this witness all the injuries were simple except the contusion, which he considered to be grievous. On the evening of the 8th July it was noticed that tetanus had set in in one of the wounds. Azizul Hassan (P. W. 9) Sub-Inspector of Police, was accordingly sent for and he recorded her dying declaration (Ex. P. B.). Medical treatment was continued in the hospital but Mt. Dhannon died on 9th July at 5 p. m. The dead body was taken to the mortuary at Jagraon and was examined by

Sub-Assistant Surgeon Dr. Lal Chand (P. W. 1) on 10th July 1929.

The learned Sessions Judge has accepted as true the evidence of the three eyewitnesses, Ram Ditta, Mt. Aso and Mt. Nandan, and has also relied on the so called first information report made by Mt. Dhannon at the police station shortly after the occurrence and her dying declaration recorded by the Sub-Inspector on 8th July 1929.

Mr. Sethi for the appellant has subjected to minute analysis the evidence of the eyewitnesses and has also argued that the statements of Mt. Dhannon mentioned above are inadmissible in evidence. But after hearing him at length and giving due weight to his arguments, I am of opinion, that they are devoid of force. The three eyewitnesses gave their evidence in a clear and straightforward manner and are agreed as to the main incidents of the occurrence. The discrepancies pointed out by Mr. Sethi are too meticulous and important to be noticed in detail. They relate to the order in which the blows were inflicted, the position in which the victim was at the time, and the person to whom the appellant addressed the query as to where Mt. Dhannon was. The learned counsel attempted to discredit these witnesses on the ground that they were sweepers and belonged to the same brotherhood as the deceased. He also adversely criticised the failure of the prosecution to produce any of the other persons who are stated by these witnesses to have come on the scene on hearing the uproar. It must, however, be borne in mind that the scene of the occurrence was in the part of the village which is inhabited by Chamars. It was, therefore, not surprising that the eyewitnesses are of that class. Further, as has been rightly pointed out by the learned Sessions Judge, there is no doubt that the Jat inhabitants of the locality were unwilling to take part in the investigation against a member of their own tribe, who was being prosecuted for having assaulted a Chamar woman. This is clear from the conduct of Bhanta Singh (P. W. 12) who admittedly arrived on the scene very shortly after the occurrence and saw the deceased wounded, but in spite of his being a lambardar, took no steps to report the matter to the police, nor did

he join the investigation. In these circumstances no importance can be attached to the circumstance that the prosecution rely merely on the evidence of Chamar witnesses. Ram Ditta, Mt. Aso, and Mt. Nandan, the three eye-witnesses were mentioned in the report made by Mt. Dhannon at the police station within two hours of the occurrence. They are not shown to have any enmity with the appellant and no reason has been urged to throw doubt on their veracity.

Equally devoid of force is the contention that the two statements of Mt. Dhannon are inadmissible in evidence. It is no doubt true that if Ex. P. R. were to be treated as a first information report strictly so called, it would not be admissible in this case. It is settled law that such a report is not substantive evidence. It can be used only to corroborate or contradict the deposition of the maker thereof at the trial. But this was not possible in this case as Mt. Dhannon had died before the matter came before the Court. It is, however, admissible under S. 32 (1), Evidence Act, as it is the statement of a person (since deceased) relating to the circumstances of the transaction which resulted in her death. Mr. Sethi eventually conceded that this was so, but contended that in that event, both this statement as well as the dying declaration (Ex. P. B.) recorded by the Sub-Inspector Azizul Hassan (P. W. 9) on 8th July were inadmissible, as that witness while giving evidence did not repeat in the witness-box in his own words what the deceased had said on each occasion, but had merely proved the records of those statements. This argument is, however, effectively disposed of by *Paratap Singh v. Emperor* (1), where a similar contention was raised and overruled. Mr. Sethi has not attacked the soundness of that ruling and I see no reason to differ from it. In both these statements Mt. Dhannon had stated that she was wounded by the appellant with a tesha and in my opinion they are valuable corroboration of the testimony of the eyewitnesses.

Lastly, Mr. Sethi laid great emphasis on the observations of the learned Sessions Judge that "it appeared that the

appellant liked Mt. Dhannon and she liked him" and there was intimacy between them. He also drew our attention to the remark of the learned Judge that Santa, the husband of the deceased, was known in the village by the nickname of Ghugi, which indicated that he was "not much of a man" and that the appellant is "the village beau," who was liked by, and had become friendly with Mt. Dhannon. On the assumptions underlying these remarks the learned counsel based an argument that in view of this intimacy it was most unlikely that the appellant should have killed Mt. Dhannon, and that it was highly probable that she had been killed by her husband and the other sweepers. We have, however, searched in vain the whole of the judicial record for any evidence, direct or circumstantial, which could justify these assumptions. Both counsel are agreed that there is not a tittle of evidence to suggest that there was intimacy between the deceased and the appellant, or that she was a consenting party to the trespass by the appellant in her house for which he was eventually convicted in November 1928. They also expressed their inability to point out the source from which the learned Judge had learnt that Santa was commonly described as Ghugi or that the appellant was the "beau" of the village. Santa was not questioned on the point when he appeared to give evidence for the prosecution, and no other witness has deposed to this effect. The learned Judge appears to have based his remarks on some extra-judicial information, which he was clearly not entitled to import into his judgment. Mr. Sethi conceded that if these observations of the learned Judge were excluded from consideration, there was nothing else to support his argument, except that there is evidence that the appellant had taken a house on mortgage in the mohalla where the deceased lived, and that from this it might be concluded that the deceased used to meet him in this house. This is, however, a very far fetched conclusion which I find myself unable to accept.

After a careful consideration of the evidence on the record I have no doubt that it was the appellant who assaulted the deceased with the tesha, on the

(1) A. I. R. 1926 Lah. 310—7 Lah. 91.

occasion and in the manner described above.

The next question for consideration is whether the act of the appellant amounts to murder. Now it is noticeable that nearly all the injuries were inflicted on the arms and the legs. The only injury on any vital part of the body was a superficial incised wound No. 8 on the breast. It is also significant that several of the wounds were flesh-deep and had healed to a large extent before her death. The only two grievous injuries noticed at the time of the post-mortem examination were, one on the thigh and the other on the left index finger. The weapon used was a heavy iron adze and the appellant could, if he had intended, inflict much more serious injuries on the deceased, who was quite unarmed at the time and was not in a position to offer any resistance. It seems to me that his intention was merely to wound her and not to put her to death. Nor can he, in the circumstances, be said to have the knowledge that he was causing such injuries as were likely to cause death. The learned Sessions Judge appears to have been influenced to a very great extent by the circumstances that tetanus had set in in one of the wounds and that death resulted therefrom. But having regard to the fact that the fatal result is not the usual and probable consequence of these injuries and the medical evidence is not very definite on the point the appellant cannot be held guilty of the offence of murder.

Mr. Mackay, who appeared for the prosecution, very fairly and properly conceded that it was doubtful whether the offence was one under S. 299 and that Explan. 2 to that section, on which the learned Sessions Judge had relied, was inapplicable.

In my opinion the act of the appellant falls within S. 326, I. P. C., and he must be convicted of that offence.

I would, therefore, accept the appeal, set aside the conviction and sentence under S. 302 and in lieu thereof convict the appellant under S. 326, I. P. C., and sentence him to rigorous imprisonment for seven years.

Johnstone, J.—I agree.

R.M./R.K.

Appeal allowed.

1930 Cr. Cases 557

(Lahore)

JAI LAL, J.

Mohri Ram—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1572 of 1929
Decided on 21st February 1930, from
order of Sess. Judge, Montgomery, D/-
9th July 1929.

Penal Code, Ss. 287 and 304-A—304-A
applies to rash and negligent acts, directly
causing death—Where accused are guilty of
negligence but death is not directly caused by
their acts, offence is under S. 287.

Section 304-A only applies to such acts of the
accused as are rash and negligent and are directly
the cause of death of another person.

F took lease of a flour mill with *M* as partner
who was to act as manager. *R* was employed to
act as Mistri. A shaft with a leather belting
was installed in the mill but part of the belting
protruded outside the building. Two girls playing
near by were caught in the belting, one
being killed and the other crippled.

Held; that the offence by *M* and *R* was under
S. 287 and not under S. 304-A. They had negligently
omitted to take care of the machinery as was
sufficient to guard against probable danger to human
life but they never intended to cause the injury. The
girls had no right to go to the mill compound. [P 558, C 2]

But *F* who had not taken any active part in
the management of the mill could not be held
liable even under S. 297. [P 553, C 1]

R. C. Marchanda—for Petitioner.

Judgment—This judgment will dispose of cases Nos. 1572 and 1573 of 1929 as both arise out of the same incident and the same judgment of the Sessions Judge of Montgomery. The facts as found by the Sessions Judge are these:

Fateh Chand, petitioner, took the lease of a flour mill in November 1927 and a month later he took Mohri Ram petitioner as his partner in the business of the flour mill. Mohri Ram was to act as the manager and Munshi Ram, petitioner, who also was employed at the same time, was to act as the mistri. Both had to be paid a salary in lieu of their services. In December 1927 a shaft with a leather belting was installed in the flour mill for water supply but part of the belting protruded outside the factory building. On the 30th December the same year two small girls who resided in a neighbouring house went into the compound of the flour mill to play and it seems that one of them went too near to the belting and was

caught therein and killed. The other girl attempted to save her and in doing so was injured and has become a cripple for life.

On these facts three petitioners, Fateh Chand, Mohri Ram and Munshi Ram, were convicted by a Magistrate under S. 304-A, I. P. C. and while Munshi Ram was sentenced to imprisonment and fine, the other two were sentenced to fine alone. On appeal the learned Sessions Judge has held that offence of Fateh Chand fell merely within the definition of S. 287 I. P. C. and has consequently altered his conviction accordingly. He, however, upheld the conviction of the other two convicts under S. 304-A but reduced the sentence of Munshi Ram by remitting the sentence of imprisonment altogether. The result was that Munshi Ram was sentenced to a fine of Rs. 500/- or in default to six months' rigorous imprisonment while Mohri Ram and Fateh Chand were sentenced to a fine of Rs. 500/- and Rs. 300/- respectively and in default to six months' and four months' rigorous imprisonment respectively. The three convicts have presented petitions for revision in this Court.

I have heard counsel on behalf of them all. Taking the case of Fateh Chand first, it has been found that after entering into the agreement of partnership with Mohri Ram this convict took up service elsewhere and apparently did not take any active interest in the management of the flour mill. The learned Sessions Judge is not able to agree with the conclusion of the Magistrate that "he must have taken some part in the working" of the factory, and it was for that reason that he altered his conviction to S. 287, I. P. C. because, according to the learned Judge:

"He shares with the others in negligent omission to take such care of machinery as was sufficient to guard against any probable danger to human life."

In my opinion Fateh Chand not having taken any active part either in erecting the shaft and the belting or in the management of the mill cannot be held liable even under S. 287 I. P. C. for the manner in which these had been erected or were worked. His petition, therefore, is accepted and conviction set aside. The fine, if realised from him, shall be refunded.

With regard to Munshi Ram and Mohri

Ram they were both in charge of the flour mill, one as its manager and the other as its mistri and were, therefore directly responsible for the condition of the shaft and the belting. At the same time I am unable to hold that they could be convicted, under the circumstances, of offence under S. 304-A, I.P.C. That section only applies to such acts of the accused as are rash and negligent and are directly the cause of the death of another person. In the present case it is to be noted in the first instance that the two girls had no right to go to the compound of the flour mill and it was never contemplated by these two petitioners that any injury would be caused to them, nor was it their intention to cause them any injury. Their convictions under S. 304-A must, therefore, be set aside. I am of opinion that both these petitioners are liable to be punished under S. 287 I. P. C. because they were in possession of and had the care of the flour mill and consequently of the belting which was the cause of this accident, and it is obvious that they omitted to take care of such machinery negligently as was sufficient to guard against probable danger to human life. They should have known that by leaving the belting protruding outside the building and without fencing, there was danger to persons who might be passing near the belting. I alter their conviction to S. 287, I. P. C. and reduce their sentences of fine to Rs. 250/- in the case of Mohri Ram and Rs. 150/- in the case of Munshi Ram; in default of payment of fine they will both suffer rigorous imprisonment for three monthss each.

R.M./R.K.

Order accordingly.

1930 Cr. Cases 558

(Lahore)

JAI LAL AND BHIDE, JJ.

Pahlwan—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 43 of 1930, Decided on 5th March 1930, from order of Sess. Judge, Multan, D/- 4th December 1929.

(a) Criminal P. C., S. 164—Magistrate cannot return challan to police after taking cognizance of case—Such course is illegal and unfair to accused.

The Police produced an accused under S. 302, I. P. C. before a Magistrate on 1st September with a view to his committal to Sessions.

The Magistrate adjourned the case to 2nd September in order to give opportunity to the accused to engage a counsel. On 2nd September, however, the case was not taken by the Magistrate and the police took back the challan alleging that it was incomplete but on the same day a statement under S. 164 was recorded by the Magistrate, in which the accused made full confession of his guilt. Later on at the close of the prosecution case the accused retracted his confession alleging that the same had been made under promise of pardon.

Held: that the confession could not be used against the prisoner. There was no law which authorized the Magistrate to return the challan after he had taken cognizance of the case. The course adopted by the police in taking back the challan was illegal as well as unfair to the accused and the confession could be ruled out for that reason alone. [P 560 C 1]

(b) Criminal P. C., S. 364—Questions to accused cannot be asked when no inquiry had been made against him in Court.

Section 364 authorizes a Magistrate to put questions to accused in order to enable him to explain any evidence that may have been produced against him during the inquiry or trial but where no inquiry had been made, the accused cannot be questioned.

A Magistrate before whom a person accused under S. 302, I. P. C. was produced and who had made a confession, after asking him the preliminary questions for satisfying himself that he was making the confession voluntarily, put him the following question, instead of allowing him to make any statement he liked, "Did you on 27th August at M, commit murder of S, deceased, intentionally causing injuries to him with a hatchet."

Held: that the question was not justified under the circumstances, as there were no facts before the Magistrate nor was there any evidence on which he could formulate such question. S. 364 had no application to a case like this. No inquiry having been made or commenced in the Court, the question could not be asked under S. 364. [P 560 C 2]

(c) Criminal P. C., S. 164—Quere—Confession under S. 164 after case sent to Magistrate for inquiry—Whether can be recorded.

It is a question whether a confession under S. 164 can be recorded by a Magistrate after a case has been sent to him for inquiry.

[P 560 C 1]

Sahib Dalal Suri—for Appellant.

Abdul Rashid—for the Crown.

Jai Lal, J.—Pahlwan alias Pahlu has been convicted of the murder of Salihon on 27th August 1929, and has been sentenced to death.

The facts, as alleged on behalf of the prosecution, are briefly these: Salihon originally belonged to Kamalia in the district of Multan, but about a year before his death he settled down at the village Ghasitwahn within the limits of the police station of Kabirwala. His wife

Mt. Nuran and his daughter Mt. Alam Khatun and probably his son also resided with him. It appears that about a month before his death Mt. Nuran contracted illicit connexion with the prisoner, and this fact having become known to the deceased, her husband, he protested and, in fact, beat her. In spite of this, however, the illicit connexion continued. The result was that the deceased decided to go back to his original home and a few days before his death he went to Kamalia in order to arrange for a lease of some land for cultivation. He returned a couple of days before 27th August and it seems that his intention to leave the village was made known to Pahlu who decided to put him out of the way by killing him and thus to secure Mt. Nuran to himself. Consequently, on 27th August about noon, when Mt. Nuran was absent from her house, he went to Salihon at his house and asked him to go with him to help him in cutting fodder. Salihon accompanied the appellant and never returned to his house.

Mt. Nuran, on return to her house, was informed, by her daughter Alam Khatun, that Salihon had gone to the field with the appellant and when she found that he had not returned as he should have done she made an enquiry from the prisoner as to the whereabouts of her husband. The prisoner first told her that he had gone to his son. She went to her son but did not find her husband there. Both the mother and the son then returned to the village and made further enquiry from the appellant, he told them that he had gone to another place. Finally, Nuran mentioned the matter to Pahlu lambardar who is a first cousin of the prisoner and both went to the field of Pahlu accused and found marks of struggle and some blood on the spot. This raised their suspicion of foul play and the matter was reported at the police station. Investigation was started and it appears that during the investigation Pahlu accused gave information as a result of which the body of the deceased was recovered from a well, and the next day, on further information given by him, a hatchet was recovered from another well.

On 1st September, the Sub-Inspector of Police produced the accused for en-

quiry before a Magistrate with a view to his committal to the Sessions Court, who, however, adjourned the case to 2nd September in order to give an opportunity to the accused to engage a counsel. On 2nd September, however, the case was not taken up by the Magistrate and the police took back the challan alleging that it was incomplete; but on the same day a statement of the accused was recorded by the Magistrate under S. 164, Criminal P. C. In that statement the prisoner made a full confession of his guilt. On 3rd the enquiry before the Magistrate commenced and the evidence for the prosecution was recorded.

After some adjournments and at the close of the prosecution case, the prisoner was examined by the Magistrate but he retracted his confession on that occasion alleging that the same had been made under promise of pardon and under pressure from the police. The prisoner, in fact, alleged that he had been beaten by the Sub-Inspector. At the trial also the accused made the same statement as he had made before the committing Magistrate.

So far as this confession is concerned, I am of opinion that it ought not to be used against the prisoner. In the first instance, it is a question whether a confession under S. 164, Criminal P. C., could be recorded by the Magistrate after the case had been sent up to him for enquiry. No doubt, it was an incomplete challan, but there is no law which authorized the Magistrate to return the challan after he had taken cognizance of the case on 1st September, and had fixed 2nd September for the hearing of the case. On that date, as I have already stated, the police took back the challan, alleging that the same was incomplete. Indications are that this was done as a pretext to enable the Magistrate to record the statement of the accused under S. 164, Criminal P. C., it apparently being realized by the prosecuting agency that so long as the case was pending in the Court of the Magistrate, a statement under S. 164, could not be recorded. In my opinion this course in addition to being illegal was unfair to the accused and for that reason alone, I would rule out the confession.

Further there are circumstances which materially affect the value of this con-

fession, if they do not make it inadmissible.

As soon as the prisoner was produced before the Magistrate, the latter, after asking him the preliminary questions for satisfying himself that the prisoner was making the confession voluntarily and understood the consequences of making such a confession, instead of allowing the prisoner to make whatever statement he liked, put the following question to him:

"Did you, on 27th August 1929, at Mauza Ghasitwahn commit murder of Salihon, deceased intentionally by causing injuries to him with a hatchet?"

To this question the prisoner gave a reply in the affirmative. The question, in my opinion, was not justified under the circumstances of the case, as there were no facts before the Magistrate nor was there any evidence on which he could formulate such a question.

The whole of the statement of the prisoner was recorded in the same manner. Questions were asked from the accused and answers were given by him practically in the affirmative. It is no doubt true that S. 364, Criminal P. C., provides that, in recording the statement of the accused, the Magistrate should act in the manner provided in S. 364, Criminal P. C. But I do not think that S. 364 has any application to a case like this where the very first question asked by the Magistrate is in the form already described by me above. That section authorizes a Magistrate to put questions to the accused in order to enable him to explain any evidence that may have been produced against him during the enquiry or the trial. In the present case no such enquiry had been made or even commenced in the Court of the Magistrate and therefore the first question, at any rate, could not have been asked under the provisions of S. 364, Criminal P. C.

The learned Additional Government Advocate contended that even if the record of the confession be ruled out on the ground that it was not properly recorded under S. 164, still the confession could be used on behalf of the prosecution, provided it is otherwise properly proved.

In view of what I have stated above as to the value of the confession in this case, I do not think it is necessary to

consider that question. In my opinion, therefore, the confession in the present case must be excluded from consideration against the accused.

The facts, as alleged by the prosecution have been sufficiently established by the testimony of Mt. Nuran, Mt. Alam Khatun and Pallu lambardar. Mt. Nuran gives evidence as to her illicit connexion with the accused and as to her having been beaten by her husband on that account and also as to the intention of the deceased to leave the village. She also gives evidence as to her having gone to fetch water and on her return as to having found her husband absent from the house and as to being told on enquiry by Mt. Alam Khatun that the deceased had accompanied the accused. She further gives evidence as to the various statements made by the accused to her about the whereabouts of her husband two of which have been proved to be false. Mt. Alam Khatun states that the deceased was at his house when her mother had gone to fetch water and that the accused came and asked him to accompany him in order to cut fodder and that the deceased went with the accused but never returned.

Pallu lambardar states that seeing the deceased and the accused going towards the field of the accused he made an enquiry and was told that they were going to cut fodder in the fields. Pallu lambardar further gives evidence and so does Mt. Nuran of having seen marks of struggle in the field of the accused having pointed out the well where the dead body of Salihon was found. Pallu lambardar also proves the fact that a hatchet was recovered on information given by the accused, so do Ahmed Yar Khan and Sub-Inspector Qutab Khan.

In my opinion there is ample evidence on the record from which the prosecution case, as described above, has been fully established. Excluding the confession, therefore, from consideration, it appears that there are the following facts against the accused :

(1) That he had motive to kill the deceased.

(2) That he took the deceased with him on 27th August 1929, to his field.

(3) That the deceased did not return to his house thereafter.

(4) That on being questioned the accused gave explanations about the

whereabouts of the deceased which were false and self-contradictory.

(5) That marks of struggle were found in his field.

(6) That on information supplied by the accused the dead body of the deceased was recovered from a well and lastly;

(7) That a hatchet was recovered from another well on information given by the accused.

The medical evidence shows that Salihon died as a result of three incised wounds on his neck and that five of his ribs were broken, but probably after death.

In my opinion the above facts leave on doubt that it was the accused Pahlu who caused the death of the deceased Salihon and then threw his body in the well. His conviction, therefore, for the murder of Salihon is fully justified by the evidence on the record and the sentence of death was the only appropriate sentence under the circumstances of the case.

I would, therefore, dismiss this appeal and confirm the sentence of death passed upon the convict.

Bhide, J.—I agree.

R.M./R.K.

Appeal dismissed.

* 1930 Cr. Cases 561

(Lahore)

ZAFAR ALI AND JOHNSTONE, JJ.

Banta Singh—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1174 of 1929, Decided on 27th January 1930, from order of Sess. Judge, Amritsar, D/- 18th November 1929.

* (a) Criminal P. C., S. 162—Accused asking for copies of statements made by some prosecution witnesses to police—Police diary showing that their statements were recorded jointly with other witnesses—Court can refuse to supply such copies.

When witnesses for the prosecution M and J were examined, the accused's counsel asked for copies of the statements made by those witnesses to the police. On referring to the police diaries, the Court found that the statement of J was recorded jointly with another prosecution witness who was tendered for cross-examination but was not cross-examined.

Held : that the Court in the circumstances could refuse to supply a copy of the statement made to the police : *Lah. Cr. App. No. 1095 of 1924, Rel. on.* [P. 562 C 1; P. 563 C 1]

(b) Criminal Trial—Evidence—Statements of witnesses recorded in inquest report—

Court can refuse them to be read out to assessors.

The Court is justified in refusing to allow the brief statements of witnesses incorporated in the inquest report to be read out to the assessors as there is no provision in the Code for doing so. [P 563 C 1]

B. R. Puri—for Appellants.

Des Raj Sawhney—for the Crown.

Johnstone, J.—On 19th July 1925 at about 8 a. m., Wasawa Singh, a sunar of Fatehgarh, Sukkar Chak in the Amritsar District was stabbed in the left arm and in the left flank. He was taken to the hospital at Amritsar and died of peritonitis on the morning of 5th August. Three persons were prosecuted in connexion with this outrage, namely, Banta Singh and his two sons, Pindar Singh and Kunna Singh. The learned Sessions Judge of Amritsar has convicted Banta Singh under S. 302, I. P. C. and Pindar Singh under the same section read with S. 34, I. P. C., and he has acquitted the third accused. Banta Singh has been sentenced to death and Pindar Singh to transportation for life. We have heard Mr. B. R. Puri, for the appellants and Mr. Des Raj Sawhney for the Crown.

The story told by the prosecution is briefly to the following effect: A wall separated the vacant sites belonging to the deceased and the appellant Banta Singh. Between 7 and 8 a. m., on 19th July Kunna Singh began demolishing the wall, notwithstanding the protests of the deceased, whose father, Kesar Singh (P. W. 3) came to the place and joined with his son in remonstrating. Banta Singh and Pindar Singh meanwhile watched over Kunna Singh. After some abuse had passed, the three accused went off to their house, remarking that they would settle the matter. The deceased and Kesar Singh then started for Kesar Singh's shop, but before they reached their destination the three accused appeared in the gali, Banta Singh and Pindar Singh carrying spears and Kunna Singh a dang. Banta Singh thrust his spear into the deceased's left side, Pindar Singh afterwards stabbing the deceased's left arm with his spear. at the instigation (it was said) of Kunna Singh. The deceased collapsed on the ground and the accused, after daring the sunars, disappeared towards their home via the haveli of a man named

Rupa Singh, who is a nephew of Banta Singh.

The attack was observed by a number of persons and the prosecution produced five eyewitnesses: Kesar Singh who had been with the deceased from the beginning, Mt. Durgi and Mt. Bisso, respectively daughter and sister of the deceased, and Jowand Singh and Rur Singh (P. W. 7 and P. W. 8). The last two named persons are sunars like the deceased, but are apparently not related to him. Another sunar, Bala Singh (P. W. 9) arrived too late to see the assault, but was told by the deceased the names of his assailants. Rur Singh admits that, after the attack a large number of persons assembled, including Jats, Hindus and Muslims and Jowand Singh particularly refers to Hakam Singh lambardar (D. W. 32) and Ahmad Din chaukidar (D. W. 12). The appellants both denied their presence at the scene of the outrage, Banta Singh asserting that he was at Sultanwind village 7 or 8 miles away, attending an Akali Diwan, and Pindar Singh alleging that he had gone to his well, three miles from the village, before sunrise. The defence also set up the theory that a sunar named Banta Singh had fought with the deceased, and a large number of witnesses was produced by the accused at the trial.

Before considering the evidence, I must advert to certain questions of procedure and evidence which were raised at the trial and have been emphasised by the learned counsel for the appellants. The first point urged was this. When Mt. Bisso was examined, and again when Jowand Singh was examined, the accused's counsel asked for copies of the statements made by those witnesses to the police. On referring to the police diaries, the Court found that the statement of Mt. Bisso had been recorded jointly with that of Mt. Durgi, and similarly that the statement of Jowand Singh had been recorded jointly with that of Indar Singh (P. W. 10), who was tendered for cross-examination but was not cross-examined. This question has already been decided by this Court in *Criminal Appeal No. 1095 of 1924, decided on 23rd March 1925*, and I can see no reason to go contrary to the view there expressed that in such circumstances a Court is

justified in refusing to supply a copy of a statement made to the police.

The next legal argument was that the prosecution had made use of an inadmissible document as the first information report. What happened was this. When the Sub-Inspector heard that the deceased had been conveyed to the hospital, he got a Magistrate (Sayad Karam Shah, P. W. 4 to record the statement of the deceased and that statement is the document (P. M. p. 8 of the paper book). The document contains a bare recital of the occurrence. Immediately afterwards the Sub-Inspector recorded a more detailed statement of the deceased, and the prosecution has used this later statement (P. G. 1 at p. 3 of the paper book) as the first information report. The contention is that the procedure is wrong. Now, the statement P. M. was not made to the police and cannot be regarded as a first information report. The first information received by the police was by means of a telephonic message from the Civil Hospital. Evidently, therefore, the document P. G. 1 was not a first information report, but there is no doubt that the statement made by the deceased to the Sub-Inspector comes within the purview of S. 32, Evidence Act.

A third point taken was that, during the cross-examination of the Sub-Inspector, the Court refused to allow the brief statements of witnesses incorporated in the inquest report to be read out to the assessors. It would appear that such statements could be made use of under S. 162, Criminal P. C., but the accused's counsel at the trial did not ask for that. There is no provision in the Code for reading out such statements, which are inadmissible unless they have been put to the witnesses themselves, and that action was not taken. The learned Sessions Judge was correct in refusing the counsel's request. It is also to be observed that the Judge was correct in holding that the other statements made by witnesses to the police were not formally proved and were inadmissible. The objection to their admissibility is, no doubt, a technical one, but all that need be said is that, even if the statements had been proved, they would not have materially assisted the defence.

Turning now to the facts of the case, I have no hesitation in coming to the conclusion that the place of the occurrence was the lane, and that the appellants left the wall after the quarrel and came to the lane, following up Wasawa Singh and his father. Most of the houses in that locality are occupied by sunars and it was consequently natural that sunars should be eyewitnesses of the attack. No doubt, their evidence is not disinterested, but it cannot be discarded for that reason alone. The most important evidence is that of the victim himself and it is highly improbable that he would falsely implicate persons, who according to the defence theory had no hostility to him. The story of an alleged quarrel and fight between the deceased and a Banta Singh, sunar, is not at all established by the witnesses for the defence. Equally unreliable is the alibi evidence led in favour of the appellants. It is quite possible that Banta Singh could have committed the crime and yet been seen emerging from Sultanwind village, when the Sub-Inspector arrived there, and the alibi does not preclude the possibility of Banta Singh's having attacked the deceased in Fatehgarh beforehand.

The medical evidence shows that the deceased had penetrating wounds in the left arm and left flank. The wounds were in the same line and it is quite possible, as the doctor himself hinted, that the two wounds were caused by one thrust of a spear. The dimensions of the wounds diminish gradually as between the entrance wound in the arm, the exit wound in the arm and the entrance wound in the flank. The circumstance suggests that perhaps only one blow was actually inflicted, and in any event in view of the possibility of such being the case I am of opinion that the benefit of doubt must be given to the defence. That being so, there is reason to question the allegation that Pindar Singh had a spear with him or that he used it. The learned Sessions Judge found that the part attributed to Kunna Singh has been exaggerated, and it is possible that Pindar Singh too has been accused of doing more than he did.

In my opinion the act of Banta Singh amounted to the offence of murder. The use of a spear against a human

being is very often attended with fatal consequences, and Banta Singh obviously intended to cause an injury which in the ordinary course of nature would result in death. I would, therefore, maintain the conviction of Banta Singh under S. 302, I. P. C., and confirm the sentence of death. I would accept the appeal of Pindar Singh and set aside his conviction and sentence.

Zafar Ali, J.—I agree.

P.N./R.K.

Order accordingly.

1930 Cr. Cases 564

(Lahore)

BROADWAY, J.

Emperor

v.

Faizul Hassan—Accused — Respondent.

Criminal Revn. Petn. No. 1855 of 1929, Decided on 7th March 1930, from order of Sess. Judge, Ludhiana, D/- 12th November 1929.

Post Office Act, S. 3—Letters found lying in khola and made over to Postmaster are in course of transmission—Charge under S. 52 in such case is not defective and alternate charge under S. 201, Penal Code does not contravene Criminal P. C., S. 236—Penal Code, S. 201.

M, a servant of *K*, having discovered a number of letters lying in a khola opposite a post office, handed them over to his master. One of the letters was addressed to *P* and *K* took it to the addressee who stated that the letter had never been delivered to him. The matter was reported to the Postmaster *F* who took possession of the letters saying that he would take necessary action in the matter. No action being taken by *F*, the matter was reported to the Postmaster-General with the result that *F* was sent up for trial. The Magistrate framed two alternate charges against him, first under S. 52, Post Office Act and the other under S. 201, Penal Code. The Magistrate found *F* guilty only under S. 201. It was contended that the charge framed by the Magistrate was defective and prejudiced the accused, the alternate charge was illegal and contravened the provisions of S. 236, Criminal P. C.

Held: that the first charge was not defective, as the postal articles in question were "in course of transmission by post" according to S. 3, Post Office Act, when they were made over to *F* by *K* and, therefore, the mere fact that the letters had been posted when *F* was not the Postmaster of the Post Office was immaterial. The framing of the charge in the alternative under S. 201 did not contravene S. 236, Criminal P. C. [P 565 O 1, 2]

Ram Lal and M. L. Batra—for the Crown.

Din Muhammad—for Respondent.

Judgment.—In July 1928, a man named Munshi, servant of Doctor Ram

Kishen of Khanna, discovered a number of letters lying in a khola opposite the Khanna Sub Post Office. He picked up some of these letters and took them to his master, informing him of his discovery. One of these letters was addressed to Master Piare Lal, and Doctor Ram Kishen took it to the addressee who stated that the letter had never been delivered to him. These people thereupon reported the matter to the Sub-Post Master, Faizul Hasan and with him went to the khola where they found a number of other letters etc. All these letters etc., were taken possession of by Faizul Hassan who said that he would take the necessary action in the matter. As no action was taken by Faizul Hassan for some months an anonymous letter was sent to the Post Master General detailing the facts, an enquiry was held, with the result that Faizul Hassan was sent up for trial before a Magistrate. The Magistrate framed two alternative charges against Faizul Hassan. The first charge was under S. 52, Post Office Act, and related to the destruction, secretion or throwing away of postal articles whilst still in course of transmission by post. The alternative charge was under S. 201, I. P. C. and was as follows:—

"I, Vidya Sagar, Magistrate First Class, with powers under S. 30, Criminal P. C., hereby charge you, Faizul Hassan, that you on or about the end of July 1928, while you were acting as Sub Postmaster, Khanna, knowing or having reason to believe that the offence under S. 52, Post Office Act, punishable with imprisonment for seven years and with fine has been committed, did cause certain evidence of the said offence to disappear, to wit, to destroy, secrete or throw away undelivered letters and post cards in the course of transmission by post, recovered from the khola near the Post Office, with the intention of screening one Lajpat Rai, the postman concerned from legal punishment, and thereby committed an offence punishable under S. 201, I. P. C."

The Magistrate came to the conclusion that no offence under S. 52, Post Office Act, had been established but convicted Faizul Hassan on the second charge under S. 201, I. P. C. Faizul Hasan thereupon preferred an appeal to the Sessions Judge before whom certain objections were taken. The first of these was that the charge, as framed by the trial Magistrate, was defective and had prejudiced the appellant in his trial, and secondly, that the alternative charge was illegal and contravened the provisions of S. 236, Criminal P. C. These

objections found favour with the learned Sessions Judge who thereupon accepted the appeal remanded the case for a retrial.

Against this order for a retrial the Crown has moved this Court under Ss. 435 and 439, Criminal P. C., and it has been urged that the learned Sess. Judge was wrong in holding that the charge under S. 201, I. P. C., was defective and further that it had not been shown that the accused had in any shape or form been prejudiced or hampered in his defence by the phraseology of the charge.

It seems to me that the learned Sessions Judge arrived at his conclusion owing to the fact that the provisions of S. 3, Post Office Act were not brought to his notice, with the result that the meaning of the expression "in course of transmission by post" was not fully appreciated. S. 3, runs as follows:

"For the purposes of this Act, a postal article shall be deemed to be in course of transmission by post from the time of its being delivered to a post office to the time of its being delivered to the addressee or of its being returned to the sender or otherwise disposed of under Chap. 7."

In view of this definition it is perfectly clear that the postal articles in question were "in course of transmission by post" when they were made over to Faizul Hassan by Doctor Ram Kishen and Master Piare Lal etc., and that, therefore, the mere fact that some of the letters had been posted in 1927 at the time when Faizul Hassan was not the Post Master of this Sub-Post Office is immaterial.

I agree that the phraseology of the charge under S. 201, I. P. C. is not very happy and the charge, as remodelled by the learned Sessions Judge, is more to the point. At the same time it seems to me that the charge, as framed by the Magistrate, was in no shape or form misleading. Indeed, Mr. Din Muhammad, who appeared for the respondent, frankly and very properly admitted that his client was never under any misapprehension so far as this charge is concerned and fully understood that the gravamen of the charge was that he had suppressed or destroyed postal articles which were still in course of transmission by post and which had been made over to him by Master Piare Lal, and that in suppressing or destroying these articles he was suppressing or destroy-

ing the evidence of an offence under S. 52, Post Office Act, committed by a person other than himself. In face of this definite and frank admission it is exceedingly difficult to see how the phraseology of the charge can be held to have in any way prejudiced or hampered Faizul Hasan in his defence on this charge.

In fact Mr. Din Muhammad practically asked that this petition should be accepted, and that the learned Sessions Judge be directed to dispose of the appeal on the merits.

Nothing was urged by Mr. Din Muhammad in support of the second objection relating to S. 236, Criminal P. C. It is, therefore, only necessary for me to say that, in my judgment, the framing of the charges in the alternative did not contravene that section.

I, therefore, accept this petition and, setting aside the order of the learned Sessions Judge directing a retrial return the appeal for disposal in accordance with law.

R.M./R.K.

Petition allowed.

* 1930 Cr. Cases 565

(Allahabad)

DALAL, J.

Emperor

v.

Jiwan Singh and others — Opposite Parties.

Criminal Revn. No. 729 of 1929, Decided on 17th January 1930, from an order of Sess. Judge, Moradabad, D/-16th August 1929.

(a) Criminal P. C., S. 107 — Scope—It is not necessary to prove an overt act towards breach of peace.

Section 107 is one appearing in a chapter devoted in the Criminal Procedure Code to the object of preventing a breach of the peace, and to prove the existence of circumstances which may lead a reasonable man to apprehend a breach of the peace. It need not always be necessary to prove also an overt act towards a breach of the peace on behalf of any of the accused. [P 566 C 1,2]

(b) Criminal P. C., S. 107 — Subsequent breach of peace is best evidence.

In a criminal case, if the accused persons, seeing proceedings under S. 107 against them pending, attempt to commit a breach of the peace, such evidence would be the best evidence to prove their intention to commit a breach of the peace. [P 566 C 2]

(c) Criminal P. C., S. 107—Only persons definitely contemplating breach should be bound.

Court should not treat the case of all the opposite parties in a lump but should find out-

the persons who could definitely be said to have contemplated a breach of the peace.

[P 566 C 1]

S. Mohammad Husain—for the Crown.

Vishva Mittra—for Opposite Parties.

Judgment.—I feel considerable difficulty in deciding this matter because both the subordinate Courts have gone wrong in certain particulars. They have differed in opinion. The trial Magistrate was of opinion that the opposite party should be bound over, while the appellate Court discharged the order of the Magistrate. The Magistrate has made the mistake so often commented upon by this Court of treating all the accused in a lump without discrimination and without an attempt to discover which of them was likely to commit a breach of the peace. After reading the evidence I have not the slightest doubt that Sirajuddin is in some danger of being submitted to physical force by some of the Jats of his village. The difficulty exists in the confusion caused by the trial Court treating all the accused persons as if they formed one single individual. The appellate Court has gone wrong in his opinion that to bind over persons it is not sufficient to prove a danger of the breach of the peace but further it must be proved that the accused were guilty of some overt act towards a breach of the peace. There is no such necessity, and I emphatically disagree with any such opinion expressed by any High Court. The ruling referred to by the Sessions Court, *Mathura Sahu v. Emperor* (1) is not available in this Court. Counsel for the opposite side has referred me to a Lahore ruling, *Joti Sarup v. Emperor*, A. I. R. 1926 Lah. 689 in which such an opinion may be said to have been expressed by a Sessions Judge. There is no opinion of the High Court. The Sessions Judge's opinion is merely by the way as to the absence of any single overt act and no principle is laid down by the High Court. An overt act towards a breach of the peace would be a substantive offence to be dealt with under the Indian Penal Code, S. 107 is one appearing in a chapter devoted in the Criminal Procedure Code to the object of preventing a breach of the peace, and to prove the existence of circumstances which may lead a reasonable

man to apprehend a breach of the peace. It need not always be necessary to prove also an overt act towards a breach of the peace on behalf of any of the accused. The learned Judge has further expressed other opinions with which I entirely disagree. He was of opinion that if the complainant was assaulted and beaten during the proceedings that would not be any evidence to bind over the opposite party because such evidence as existed at the time of the institution of the proceedings could only be used. This will be taking a very narrow view of criminal responsibility, and it is obvious that the learned Sessions Judge's mind was dwelling on circumstances which would be considered in a civil suit where a cause of action that accrued subsequent to the filing of the suit would not be noticed by a civil Court.

In a criminal case, if the accused persons, seeing proceedings under S. 107, Criminal P. C., against them pending, attempted to commit a breach of the peace such evidence would be the best evidence to prove their intention to commit a breach of the peace. I am thus in disagreement with the general view taken by both the subordinate Courts, and I have got to arrive at a decision independently on the evidence on the record. That evidence has satisfied me that though the mosque was built a long time ago there is friction at present between the complainant and the Jats over the taking out of some Hindu procession. Rightly or wrongly the complainant as Imam of the mosque objects to the procession, while the Jats appear to be keen on taking one out. There is an existing source of dispute. This was further proved by a dead pig, an animal suffering under particular contempt of the Mahomedans, being left in the mosque. There is certainly a danger of the breach of the peace, and that danger exists in reference to the complainant and is likely to proceed from the Jats of the village. My difficulty, however, is to discover the persons among the accused who are likely to commit such a breach. As I have already pointed out, the trial Court has treated the cases of all the opposite parties in a lump. The complainant has mentioned different persons at different times as bearing a grudge against him.

(1) [1916] 14 A. L. J. 769=36 I. C. 164 = 17 Cr. L. J. 484.

'So far as I can make out the only persons who are definitely mentioned out of the accused are Jaggu, Sheonath and Indar about whom he made a report to the police on 16th February 1926, (Ex. A-2). No doubt the report was made a long time ago, but the same dispute is still simmering. They are the only persons out of the accused about whom it could be definitely said that they are among those Jats who contemplate a breach of the peace. I cancel the order of the Sessions Judge with regard to Jaggu, Sheonath and Indar and restore the order of the Magistrate with regard to them. The bonds and sureties given by them shall again become operative. As to the rest, I do not find definite individual evidence against them and I dismiss the application for revision as regards them.

V.B./R.K. *Application dismissed.*

1930 Cr. Cases 567

(Calcutta)

MUKERJI, J.

Ah Yung and others—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 80 of 1929, Decided on 24th April 1929, from order of Addl. Prosy. Magistrate, Calcutta, D/- 8th January 1929.

Calcutta Police Act. (4 B. C. of 1866) Ss. 45, 46 and 47—Presumption is inapplicable where search in consequence of which find takes place is of place other than that ordered to be searched.

Under S. 47, Police Act, if gaming instruments are found in a house, the presumption is that it is a common gaming house, provided the finding of the instrument is in conformity with S. 46. The search in consequence of which the find takes place must, therefore, be of a place of which a search warrant is issued and no such presumption can be drawn from search resulting in find of a place which is not ordered to be searched. [P 567 C 2]

Probodh Chander Chatterjee and Bireswar Chatterji—for Petitioners.

Mrityunjoy Chatterji—for the Crown.

Judgment.—Of the several grounds upon which the conviction of the petitioners which is under S. 45, Calcutta Police Act, (4 B. C. of 1866) in this case has been assailed, none is of any substance except one which in my judg-

ment goes to the very root of the matter and is positively fatal.

The learned Magistrate in dealing with the question which is the primary question in the case, namely, whether the place can be called a "common gaming house" has observed :

"Section 47 of the Act lays down that if gaming instruments are found in a house, the presumption is that it is a common gaming house."

This proposition is entirely correct provided the finding of the instruments is in conformity with the provisions of S. 46, as S. 47 itself provides for by the use of the words "under the provisions of the last preceding section." To go back to S. 46 for a second, the search as a consequence of which the find takes place must be of the place, etc., in respect of which the search warrant was issued under that section. In the present case, the search warrant was for premises No. 71/4 Bentinck Street and the search was of premises No. 71/5 Bentinck Street. This is not a technical defect but a matter of substance, the law attaching serious consequences and importance to the discretion that a Magistrate or the Commissioner of Police exercises in the matter of issuing a search warrant under this section. The result is that what would hold good in respect of premises No. 71/4 cannot hold good as regards 71/5 unless of course the latter is included in the former of which, however, there is no evidence.

Apart from the presumption under S. 47 upon which the learned Magistrate has relied, the evidence aliundi does not satisfy the requirements of the definition of a common gaming house as given in S. 3 of the Act.

The result is that the convictions of the petitioners must fail. The rule is made absolute. The petitioner's convictions and sentences are set aside. The fines, if paid should be refunded.

R.M./R.K.

Rule made absolute.

1930 Cr. Cases 568

(Calcutta)

RANKIN C. J., AND PATTERSON, J.

Lori Chand Saha—Accused—Petitioner.

v.

Niroda Sundari Saha—Complainant—Opposite Party.

Criminal Revn. No. 577 of 1929, Decided on 9th August 1929, from an order of Sess. Judge, Tipperah, D/- 16th March 1929.

Criminal P. C., S. 494—Where accused is discharged on withdrawal of prosecution fresh complaint can be entertained.

Prosecution against an accused under S. 359, I. P. C. was withdrawn with the leave of the Court and an order under S. 494, Criminal P. C., was passed, the accused being discharged. Subsequently a fresh complaint was made to the Magistrate.

Held: that the order of discharge could not prevent a fresh complaint being entertained and inquired into. [P 568 C 2]

K. N. Choudhury, Gopal Chandra Das and Bishwanath Roy—for Petitioner.

N. N. Sircar and D. N. Bhattacharjee—for the Crown.

Rankin, C. J.—In this case the petitioner was accused of an offence against a woman under S. 354 P. C. After certain negotiations to which I shall refer in a moment the case was withdrawn with the leave of the Court. The letter purporting to compromise the case runs thus:

—"I have the honor to withdraw from prosecution the marginally noted case with the permission of the Superintendent of Police and pray that the case may accordingly be withdrawn."

Thereupon an order was passed by the Sub-divisional Officer of Brahmanbaria under S. 494, Criminal P. C. Then the accused man the present petitioner came before the Sub-Divisional Officer again as prosecutor in a case upon the narrative that he had paid Rs. 1000/- to a relative of the person who had been the prosecutor in the previous case, that he had paid this sum to that relative in order that it might be given to the District Superintendent of Police so that the District Superintendent of Police might give this sum to some charity, that the relative after he had taken the money from the present petitioner did not give it to the District Superintendent of Police and the petitioner was able to get only half of the money back out of the hands of this relative of the man

who had prosecuted him on the previous occasion. That being his own story the Sub-Divisional Officer began to think that the order under S. 494 was an attempt to compound an offence which was not really compoundable and so he acted upon this information and therefore set aside the order of discharge. So far as the merits of the proceedings go I think it is a reasonable thing to do if done in a proper way.

Then the matter was taken by the applicant to the Sessions Judge who was very much worried as to the proper way to go about the matter and finally he thought that the best thing to do was to set aside the order of discharge, because the Sub-Divisional Officer had not as much power to do that as the Judge had. He says that the best course for the Sub-Divisional Officer was to get a complaint direct from the woman concerned in the previous charge and to proceed to try that case out upon a fresh complaint. This the Sub-divisional Officer has done and the complaint of the woman against the present applicant is now in the course of trial.

It is contended before us that strictly speaking the proper procedure to get rid of this order of discharge would be by an order of the Sessions Judge to serve a notice upon the applicant calling upon him to show cause why the complaint in the previous case should not be further enquired into. On the other hand it is pointed out by the learned Advocate General that whether this order of discharge stands or does not stand it is of no importance because it cannot in any way prevent the woman's complaint being enquired into. I entirely agree in the view taken by the learned Advocate General. In no circumstances can any order that is made on this application affect the validity of the woman's complaint or of the proceeding which the Sub-Divisional Officer has taken in the ordinary course to try out that complaint. So far as the present question is concerned it is entirely unnecessary for us to wrestle with any such difficulty.

This case is therefore discharged.

Patterson, J.—I agree.

R.M./R.X.

Rule discharged.

*** 1930 Cr. Cases 569**

(Oudh)

PULLAN, J.

Wali Mohammad—Appellant.

v,

Emperor—Opposite Party.

Criminal Appeal No. 59 of 1930, Decided on 27th February 1930, from order of First Addl. Sess. Judge, Lucknow, D/- 12th January 1930.

(a) Criminal Trial — Evidence — First information report by itself is not convincing.

By itself a first information report can hardly be regarded as evidence of a convincing nature. [P 569 C 2]

* (b) Evidence Act, S. 32—Deceased dying of independent malady after assault and hurt—Dying statement as to cause of death is not admissible in evidence against assaulter in trial under S. 324, I. P. C.

Where a person dies in a hospital after being assaulted and hurt, not of the injuries but of a malady independent of such injuries, such for example as pneumonia, the dying statement of such person is not admissible in evidence in a trial of his assailants under S. 324. [P 569 C 2]

Matiuddin—for Appellant.*H. K. Ghose*—for the Crown.

Judgment.—This is an appeal from the judgment of the First Additional Sessions Judge of Lucknow at Bara Banki preferred by one Wali Mahomed, who has been convicted of an offence under S. 325, I. P. C., along with two other persons who have not appealed. There is no dispute now as to the facts of the case. Nanhey, who was a Fakir by caste and who was a relation of the two accused Ittada Baksh and Farzand, had abducted the wife of the latter. Farzand was forced to take proceedings to get his wife back, and having done so he enticed Nanhey into his house and gave him a severe beating. Apart from numerous bruises Nanhey sustained a compound fracture of the right leg. The nature of the injuries shows that they were not intended to cause death and it is the finding of the learned Judge that they did not cause death. Nanhey was taken to the police station where he made a report on the morning of 8th September in which he named Khader Bakhsh, Farzand and Wali Mohammad as his assailants together with another person whose name he did not know. He was removed to hospital, where he became seriously ill. On 15th September his dying statement was taken. In that statement he repeated the first information report but

added that there were fifty or sixty persons concerned in the assault. As his condition became critical he was removed to King George's Medical Hospital, Lucknow, where he died of pneumonia on 3rd October 1929. The Judge accepts the statement of Dr. Modi, who conducted the post-mortem examination, that the cause of death was pneumonia and that there was no reason to connect the onset of pneumonia with the injuries inflicted. The Judge agreeing with the assessors found all the three accused guilty of an offence under S. 325 and it is for me to consider only whether the evidence was sufficient to justify the conviction in the case of Wali Mohammad. No doubt the appellant is mentioned in the first information report and in the so-called dying declaration. The first information report in itself can hardly be regarded as evidence of a convincing nature, and the dying declaration is open to a legal objection that it is not strictly speaking admissible under the Evidence Act.

In order to be admitted under S. 32, para. 1, Evidence Act, it should be made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Now the cause of death came into question although it has been found that the injuries were not the cause; but once it has been held that the cause was pneumonia it cannot properly be held that the statement made by the deceased showing that he had been severely beaten is a statement made as to the cause of his death. Thus I am doubtful whether the learned Judge was right in laying stress on the statement as against the three accused. The Judge has said that the evidence of the two eye witnesses Bashir and Puttu fully corroborates the information report and the dying declaration. Bashir was not an eye witness. He came up after the assault had been committed and it is not stated that he saw Wali Mohammad although he knows him. Puttu made conflicting statements as to what he saw so much so that in my opinion his evidence is of little or no value. At least he only stated that he recognized Wali Mohammad by his voice and he never committed himself to saying that

Wali Mohammad took any part in the assault. Thus the so-called corroboration of the first information report and the dying declaration is of little value. Further the Judge has observed that the accused themselves alleged that the deceased came to their house in order to commit theft but Wali Mohammad made no such statement and he does not live in a house near that of his co-accused. The connexion of Wali Mohammad in the affair said to have been a liaison between him and the widowed daughter of Khuda Baksh and sister of Farzand. The Judge appears to have some misgivings in convicting him as he fails to see why a person behaving in the manner that Wali Mohammad behaved should join in in assault on another person for an immoral connexion with a woman in the same family. In my opinion, however, the question of motive is immaterial; possibly it was sufficient to induce Wali Mahommed to join in the affair but I am not satisfied that the evidence justifies the conviction. The learned Judge in my opinion lays too much stress both on the dying declaration and on the evidence of the two witnesses Bashir and Puttu whom he describes as eyewitnesses. Puttu it may be observed has been engaged in litigation with Wali Mohammad and this may have been one of the reasons why the man was named. I give the appellant the benefit of the doubt and allow the appeal, set aside his conviction and sentence and order that he be set at liberty.

V.B./R.K. *Conviction set aside.*

1930 Cr. Cases 570

(Oudh)

PULLAN, J.

Emperor

v.

Madho and others—Accused.

Criminal Ref. No. 6 of 1930, Decided on 27th February 1930, made by Addl. Sess. Judge, Gonda.

(a) Cattle Trespass Act (1 of 1871), Ss. 11 and 24 read with Railways Act S. 125 (4)—Cattle passing over regular track at place where there is no fencing to railway line—Unless there is damage conviction under S. 24 cannot be sustained.

In order that an offence may be established under S. 24, Cattle Trespass Act, the seizure of the cattle must be legal and consequently driving heads of cattle across the railway line at a place where there is no fence and where there is a regular track does not constitute any

offence under S. 24 in the absence of any damage to the line: 43 I. C. 445; 1 P. L. T. 176 and 29 C. W. N. 987, *Rel. on.* [P 570 C 2]

(b) Cattle Trespass Act (1 of 1871)—Conviction not justified under law and fine arbitrary—Conviction can be set aside—Criminal P. C., S. 439.

Where a conviction was not justified under the Cattle Trespass Act and especially where the fine was arbitrary, High Court interfered and set aside the conviction. [P 571 C 2]

H. K. Ghosh—for the Crown.

Bhagwati Nath Srivastava—for Accused.

Judgment.—Four persons have been convicted of an offence under S. 24, Cattle Trespass Act (Act 1 of 1871) and S. 125, Cl. (2), Railways Act in a summary trial and fined Rs. 100 each under the former section and Rs. 20 each under the latter. The case has been referred to this Court by the learned Additional Sessions Judge of Bahraich on the ground that the conviction under S. 24, Cattle Trespass Act is illegal, but the learned Judge is of opinion that the conviction and sentence under S. 125 (2) Railways Act can be maintained. I am not concerned with any injuries that may have been inflicted in this case on the person of any railway servant as no charge was framed under any sections except those to which I have referred, and I have merely to consider whether the evidence in this case justifies a finding that these persons were guilty either of an offence under S. 24, Cattle Trespass Act, or of an offence under S. 125 (2), Railways Act. The four persons were driving ten head of cattle across the railway line at a place where there was no fence and where, according to the Magistrate, there was a regular track. They were stopped by a railway employee who tried to seize the animals with a view to taking them to the pound, and they forcibly opposed the seizure. In order that an offence may be established under S. 24, Cattle Trespass Act, the seizure of the cattle must have been legal, that is to say, the animals must have been liable to seizure under S. 11 of the same Act. S. 11 authorises persons in charge of public roads, which under the provisions of S. 125 (4), Railways Act, includes railways, to seize any cattle doing damage or straying. Cattle which have been driven across a railway line by their owner cannot be said to have strayed and damage must be proved. In this case it was not even alleged that

the cattle were doing any damage, and it is not easy to say what damage could have been caused by them while they were merely being driven over the line. The Magistrate in his explanation says that when he inspected the locality on 24th September 1929, that is to say eight weeks after the alleged offence, he found that some ballast kankar had been scattered, an earthen embankment had been fissured and worn out and some grass nibbled; but he does not profess to believe that this damage was caused only by the cattle in the present case, and such a view would be untenable in face of his own judgment where he says that a regular track had been worn across the land at this place. I must therefore find that the cattle caused no damage and this being so they were not in my opinion liable to seizure. Whether the railway employees could or could not order the owners of the cattle to remove them and refuse them a right of passage need not be considered. S. 24 refers only to those who forcibly oppose the seizure of cattle liable to be seized. In my opinion the cattle were not liable to be seized and no penalty can be imposed under the Cattle Trespass Act upon the owners for forcibly opposing the seizure. I have already stated that no charge was preferred against them under the Indian Penal Code for causing hurt or assault and I find therefore that the reference as to the conviction and sentence under S. 24, Cattle Trespass Act should be accepted. I am not referred to any ruling of this Court on this point but there are two rulings of the Patna High Court reported in *Criminal Law Journal Reports* both of which insist on the fact that damage must be proved before a conviction under S. 24, Cattle Trespass Act can be sustained: see *Sukhnandan Rai v. Emperor* (1) and *Dassi Guala v. Sardar Mahton* (2). The same view was held by the Calcutta High Court in *Manik Chandra Roy v. Ismail Kalu* (3).

I would, however, go further than the learned Judge and find that the conviction under S. 125 (2), Railways Act is also unsustainable. That section applies if cattle were wilfully driven on any railway otherwise than for the purpose

of lawfully crossing the railway. In order that these persons should be convicted under that section it must be proved that their purpose was not lawful. Now there is no provision in the Railways Act by which the public is forbidden to cross railway lines or drive animals across them at places other than level crossings, and if the railway erects no fence the public will continue to cross the line and drive their animals across it until they are stopped. I find no section in the Act under which the public can be stopped. It is not obligatory on railway companies to provide fences unless they are directed to do so by the Governor General in Council: but where they do not choose to erect fences they cannot in my opinion prevent persons crossing the railway line at will. They have their remedy where the cattle are found to commit damage or to stray without owners on the railway ground but the mere crossing of the railway is not unlawful. Thus on general grounds I am of opinion that the conviction under S. 125 (2) should be set aside. There is also a special ground for so doing. The section lays down that the fine may extend to Rs. 10 for each head of cattle to be recovered from the owner. There is no finding in this case as to the number of cattle owned by each of the accused. An arbitrary fine of Rs. 20 each should not have been inflicted. It is true that this may be considered to be a more or less trivial point but it is an additional reason for interfering in a case where the conviction is not justified by the law under which the Magistrate purported to act. I, therefore, accept this reference as to the conviction under S. 24, Cattle Trespass Act and I also accept the request made on behalf of the accused as to their conviction under S. 125 (2), Railways Act, and I order that both the sentences and convictions be quashed and the fine, if paid, be refunded.

V.B./R.K.

Convictions quashed.

1930 Cr. Cases 571

(Oudh)

STUART, C. J.

Emperor

v.

Mohammad Hanif—Applicant.

Criminal Ref. No. 2 of 1930, Decided on 11th February 1930.

(1) [1919] 19 Cr. L. J. 157=48 I. C. 445.

(2) [1930] 1 P. L. T. 176=37 I. C. 464=31 Cr. L. J. 640.

(3) [1919] 23 C. W. N. 387=30 I. C. 1006=20 Cr. L. J. 398.

Motor Vehicles Act (8 of 1914), S. 16, Oudh Government Rules R. 79—"License form F"—"Ply" means "ply" for hire.

The word "ply" in the permit form F must be read to mean "ply for hire". [P 572, C 1]

H. K. Ghose—for the Crown

Asghar Hasan—for Accused.

Order.—This is a reference by the Additional Sessions Judge of Lucknow sitting at Bara Banki in respect of a conviction and sentence under S. 16, Motor Vehicles Act (Act 8 of 1914). Mohammad Hanif is a licensed driver of a public motor vehicle which is licensed to ply between Lucknow and Bara Banki and Bara Banki and Haidergarh. On a certain date he drove this public vehicle on the road from Bara Banki to Fyzabad and he has been convicted under S. 16 of the Act read with rule No. 79 of the rules for having contravened the condition of his license in plying on a route in respect of which he held no permit. On the facts it is clear that at the time Mohammad Hanif was not driving the vehicle for hire. He was using the vehicle for the purpose of transporting himself, his brother and his cleaner from Bara Banki to Fyzabad. He was proceeding to Fyzabad as he had private business there. The license Form F states the route on which the vehicle is permitted to ply, and the learned Magistrate considered that by proceeding from Bara Banki to Fyzabad he was plying. Now it is to be noted that the word 'ply' standing alone, though used in the license, is not used in the definition. In the definition Rule 3 No. (g) a 'public motor vehicle' is stated to mean a vehicle which is let for hire or which stands or "plies for hire" in any public place. I agree with the learned Sessions Judge that the word 'ply' in the permit Form F must be read to mean "ply for hire". In this connexion it appears to me impossible to hold that it can have any other meaning. To take the other view would involve extraordinary consequences. If a permit was granted to ply between Lucknow and Bara Banki to a public motor vehicle and that public motor vehicle was garaged outside Lucknow on the Cawnpore road the holder of the permit would, if this view were taken, be liable to a criminal prosecution on every occasion that he drove vehicle empty to the garage or drove it back empty to the place in which he commenced his business. The learned

Sessions Judge has taken a correct view of the matter and in these circumstances the conviction cannot stand. I set aside the conviction and sentence of fine and direct the fine, if paid, to be refunded. The order suspending the license will be annulled.

V.B./R.K.

Conviction set aside.

1930 Cr. Cases 572.

(Oudh)

NANAVUTTY, J.

Iqbal Husain and others—Accused—Appellants.

v.

Emperor — Complainant — Opposite Party.

Criminal Appeal No. 24 of 1930, Decided on 24th February 1930, from order Sess. Judge, Sitapur, D/- 17th January 1930.

(a) Penal Code, S. 304—Death due to peritonitis from rupture which could not be connected with injuries — Offence under S. 304 cannot be sustained.

If a victim of an assault dies of peritonitis due to a rupture which could not be connected with the injuries received in the assault, there is no case of culpable homicide not amounting to murder. [P 573, C 2]

(b) Penal Code, S. 97—Right of private defence is not available to parties determined to fight.

According to the Penal Code no right of private defence arises in circumstances such as those when both parties arm themselves for a fight to enforce their right or supposed right and deliberately engage in very large numbers in a pitched battle killing one man and wounding others: 35 Cal. 368, *Foll*; 40 *Eom*. 105; 20 *All*. 459; *A.I.R.* 1925 *Oudh* 438, *Ref.*; 10 *O. C.* 196; *A.I.R.* 1923 *All*. 194; 17 *O. C.* 21; *A. I. R.* 1923 *Oudh* 167 and *A.I.R.* 1925 *Oudh* 425, *Dist.* [P 575, C 1]

Matinuddin, J. Jackson and Fateh Shah—for Appellants.

H. K. Ghosh—for the Crown.

Judgment. — In this case Iqbal Husain and 12 others have appealed against the judgment of the learned Sessions Judge of Sitapur convicting them of offences under S. 304, I. P. C., and S. 147, I. P. C., and sentencing them to various terms of imprisonment. I have heard the learned counsel for the appellants as also the learned Government Pleader and have carefully perused the evidence on the record. It is common ground that a riot did take place in village Dubsena, Thana Mahmudabad, District Sitapur. Iqbal Husain, Hamid Husain, Fida Husain and Bad-

shah Husain, all four brothers, at one time owned the entire village of Dubseena. Fida Husain died and his share devolved upon his son Tahawar Husain. About ten years ago Tahawar Husain mortgaged with possession his patti to Badshah Husain, and recently he sold his equity of redemption to Iqbal Husain and Hamid Husain who have recovered possession of the mortgaged share of Tahawar Husain by redeeming the mortgage from Badshah Husain. This redemption of the mortgage created bad blood between Iqbal Husain and Hamid Husain on the one hand and Badshah Husain on the other.

A small portion of the mortgaged patti consisting of 16 bighas seven biswas, however, was not redeemed by Iqbal Husain and Hamid Husain, and is still in the possession of Badshah Husain, and Durjan Pasi is a tenant of a plot in that portion of the patti which is still in the possession of Badshah Husain. The fight between the two factions took place over the collection of rent from this Durjan Pasi. It is common ground between the parties that Durjan Pasi wanted to pay his rent in kind. Upon the evidence on the record I am more inclined to believe the version of the appellants that Paras Ram, Sumer, Mahesh and Gobinde went with Ram Charan and Bhup Singh, tenants of Badshah Husain, to collect Durjan's rice in payment of the rent due from him. Durjan began to weigh out the rice, and the rice which was weighed was put into baskets and Bhup Singh and Ram Charan were going to take it away when Mumtaz Husain, Ali Husain, Phullar and Ghulam Ali came up on behalf of Iqbal Husain and Mumtaz Husain the son of Hamid Husain. An altercation ensued, the party of Badshah Husain insisting upon Bhup Singh and Ram Charan taking away the rice and Mumtaz Husain, Ali Husain and others wishing to prevent them. While this altercation was going on, the partisans of both sides rushed up to Durjan's house and then Mumtaz knocked the baskets of rice from the heads of Bhup Singh and Ram Charan, and Ali Husain struck Paras Ram with a lathi, and then the fight became general. Gobinde fled from Durjan's house to the house of Chhedi Pasi. Chhedi Pasi as P. W. 9 deposes that after a while when the fight ceased

Sardar told the men of Mumtaz Husain that Gobinde had taken refuge in his (Chhedi's) house. Iqbal Husain, Ali Husain, Mumtaz Husain, Ghasite and Sardar then ran to Chhedi's house and dragged Gobinde out of the house and began to beat him with lathis and practically left him for dead at Chhedi's house, and then when most of the men of Badshah Husain had been severely beaten the party of Ali Husain and Mumtaz left the place. Sarju Chaukidar went and made a report at the thana and Mumtaz Husain also made a report at the thana which is Ex. 6. The police investigated the offence and prosecuted both sides for riot and, as Gobinde died two days after the beating he had received, they prosecuted Mumtaz Husain and the men of his party on a charge under S. 302, I. P. C., but the learned Sessions Judge has convicted them only of the minor offence under S. 304, I. P. C., as also of the offence under S. 147, I. P. C.

The first point for determination in this appeal is whether the medical evidence justifies the conviction of the appellants of the offence of culpable homicide not amounting to murder under S. 304, I. P. C. The Civil Surgeon of Sitapur was of opinion that the cause of Gobinde's death was peritonitis. At the time of the post-mortem examination he found the peritoneum congested and flakes of pus present. He also found that the skull of the deceased was fractured. He deposed that the peritonitis from which Gobinde died was caused by a circular rupture half an inch in diameter in the ilium through which the contents had escaped. This rupture in his opinion must have been caused by violence but he could not connect the rupture with any one of the injuries of which he found marks on the body. Thus it is clear from the medical evidence that no case of culpable homicide not amounting to murder has been made out against anybody and in this state of the medical evidence it would not be safe to hold all the 13 appellants guilty of constructive culpable homicide by reason of the provisions of S. 149 read along with S. 304, I. P. C. In my opinion upon the evidence on the record the appellants cannot be legally convicted of culpable homicide not amounting to murder. They are, however, clearly

guilty of the offence of grievous hurt under S. 325, I. P. C., read with S. 149, I. P. C., as Gobinde's skull was fractured and grievous hurt was also inflicted upon Mahesh, according to the evidence of the Civil Surgeon of Sitapur (Ex. 2). For the reasons given above, I acquit all 13 appellants of an offence under S. 304, I. P. C., read with S. 149, I. P. C., but in its stead convict them all of an offence under S. 325/149, I. P. C.

I now turn to discuss the plea of the right of private defence of person and property raised on behalf of the appellants by their learned counsel Mr. John Jackson. It was strenuously argued on behalf of the appellants that the defence version of the occurrence, as set forth by Panchu Chamar and Ram Charan Chamar, should have been accepted by the learned Sessions Judge and that, if this version of the occurrence be accepted, then the accused were clearly entitled to the right of private defence of person and property given in Ss. 100 and 103, I. P. C. In support of his contention, the learned counsel for the appellants relied upon the ruling of the late Court of the Judicial Commissioner of Oudh reported in *Baij Nath v. Emperor* (1). He also cited another ruling reported in *Indarjit v. Emperor* (2). Upon the strength of the rulings quoted above it was contended that the appellants were merely acting in maintenance of an existing peaceful possession and that they were not enforcing any right or supposed right and that they were merely maintaining a possession already lawfully achieved. Reliance was also placed upon another ruling of the late Court of the Oudh Judicial Commissioner reported in *Sarabhawan Singh v. Emperor* (3). A judgment of a single Judge of the Allahabad High Court reported in *Emperor v. Hira* (4) was also quoted by the learned counsel for the appellants in support of his contention that the appellants were within their legal right in holding themselves in readiness to repel an attack on them and were protected by S. 97, I. P. C. It was also argued upon the strength of a ruling of the late Court of the Judicial

Commissioner of Oudh reported in *Hafiz Ali v. Emperor* (5), that when a person was attacked while doing a lawful act he was entitled to stand his ground and defend himself. I have carefully studied these rulings and it seems to me that the facts of the present case are different from the facts of the cases cited by the learned counsel for the appellants and the ratio decidendi laid down in the rulings cited on behalf of the appellants, is not applicable to the facts and circumstances of the present case. I have already shown that in the present case there was a free fight between two factions in village Dubsena. There was no question of maintaining a possession lawfully achieved or that Badshah Husain's party was the aggressor and that the appellants acted in the exercise of the right of private defence of person and property. At the commencement of the row the appellants may have had a reasonable case that they were merely doing a lawful act in collecting the rice crop in lieu of the rent due to them from Durjan Pasi, but they had no right to pursue the deceased Gobinde to the house of Chhedi and to drag him out of that house and to beat him mercilessly and to leave him for dead in front of Chhedi's house. S. 99, I. P. C. clearly lays down that the right of private defence either of person or of property in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

In the present case the appellants deliberately out of malice and hatred for the opposite party far exceeded their right of defence if any. The collecting of the rice crop from the house of Durjan was merely the occasion or the pretext which the appellants availed of for feeding fat their ancient grudge against the opposite party. The quarrel began with a few men on both sides, but it rapidly became a serious riot with dozens of men on both sides, and, in this view of the occurrence, neither party to the riot can claim the right of private defence. In *Mulla v. Emperor* (6) it was held by Daniels J. that where both parties came down armed with a full determination to settle their quarrel by force there could be no right of private defence. The same view was maintain-

(1) A.I.R. 1925 Oudh 425=27 O.C. 292.

(2) A.I.R. 1928 Oudh 167.

(3) [1914] 17 O.C. 21=23 I.C. 184=1 O.L.J. 527.

(4) A.I.R. 1928 All. 194=45 All. 250.

(5) [1907] 10 O.C. 198.

(6) A. I. R. 1925 Oudh. 488=29 O. C. 92.

ed by the Allahabad High Court in *Queen Empress v. Prag Dat* (7) in which it was held that when a body of men were determined to vindicate their rights or supposed rights by unlawful force and when they engaged in a fight with men who on the other hand were equally determined to vindicate by unlawful force their rights or supposed rights, no question of self defence arose.

The Bombay High Court in a ruling reported in *Emperor v. Beohar Anop* (8) has also laid down the same principle and held that the right of private defence cannot be successfully invoked by men who voluntarily and deliberately engage in fighting with their enemies for the sake of fighting, as opposed to the case where men are reluctantly forced to use violence in order to protect themselves from violence offered to them. Their Lordships of the Bombay High Court in this ruling relied upon a judgment of the Calcutta High Court reported in *Kabiruddin v. Emperor* (9) in which Rampini, J. delivered himself of the following weighty pronouncement:

"I have no doubt that according to the Penal Code no right of private defence arises in circumstances such as those of the present case when both parties arm themselves for a fight to enforce their right or supposed right and deliberately engaged in very large numbers in a pitched battle killing one man and wounding others."

The extract quoted above from the judgment of the learned judge of the Calcutta High Court is fully applicable to the facts and circumstances of the present case. It is common ground that there was long-standing and deep-rooted animosity between Badshah Husain and his men on the one hand and Iqbal Husain and Mumtaz Husain on the other, and the visit to Durjan Pasi's house for the purpose of collecting rice merely furnished both sides with a pretext to give vent to their feelings of hatred for one another. As pertinently observed by the learned Sessions Judge:

"We no longer live in the Nawabi days and zamindars must be taught—in these days they frequently need teaching—that disputes about land must be settled by the Courts and not by *he lathi*."

I entirely concur in this observation of the learned Judge.

I hold, therefore, for the reasons given above that the appellants cannot justify their commission of the riot and their infliction of grievous hurt on the opposite party by pleading the right of private defence of person and property. I hold upon the evidence on the record that the appellants were members of an unlawful assembly within the meaning of S. 141, I. P. C.

The learned counsel for the appellants also relied upon the evidence of of alibi furnished by Iqbal Husain. D. W. 5, Hakim Niamat Rasul and D. W. 6, Syed Ainul Hasan are the two witnesses examined by Iqbal Husain in support of his alibi. Syed Ainul Hasan deposes that he cannot remember the date on which Iqbal Husain came to Bara Banki. He further states that he has not been asked to produce the memorandum showing that Iqbal Husain rented a house from him in Bara Banki. His evidence is therefore on the face of it, worthless. Hakim Niamat Rasul admits in cross-examination that he has no writing to prove the fact that Iqbal Husain came to Bara Banki just about the time when this riot took place. This medical practitioner keeps no register of patients, he pays no income-tax and he keeps no account of his fees. His statement that Iqbal Husain left Bara Banki on 28th September is, in my opinion, not based upon any fact capable of proof independently of the mere statement of this witness, and even if that statement be believed it does not make the presence of Iqbal Husain on the scene of the occurrence, when the riot took place, a physical impossibility. In my opinion the learned Sessions Judge was perfectly right in disbelieving the evidence of alibi furnished by the appellant.

The learned counsel for the appellants has not discussed before me the question of the guilt of each appellant in this case nor has he pointed to any evidence on the record in support of his allegation in his memorandum of appeal that the learned Sessions Judge has allowed himself to be influenced by extraneous circumstances and has adopted a most arbitrary criterion for convicting and acquitting the accused persons. So far as the question of the guilt of the 13 appellants before me is concerned, there is ample evidence on

(7) [1898] 20 All. 459=(1898) A. W. N. 11.

(8) [1916] 40 Bom. 105=31 I. C. 372=17 Bom. L. R. 888.

(9) [1909] 85 Cal. 363=7 C. L. J. 359=12 C. W. N. 384.

the record in proof of the fact that they took part in the riot and, as grievous hurt was inflicted on the deceased Gobinde and on Mahesh, I think all these 13 appellants can be rightly convicted of an offence under S. 325 I. P. C. read with S. 149 I. P. C. and S. 147 I. P. C.

As regards the question of punishment it seems to me that Iqbal Husain, Mumtaz Husain, Tahawar Husain and Ali Husain are the ring-leaders and the other appellants are merely their servants and supporters. I maintain the convictions and sentences passed upon each of the appellants for an offence under S. 147, I. P. C. I acquit all 13 appellants of an offence under S. 304 read with S. 149 I. P. C., but convict them of an offence under S. 325 I. P. C. read with S. 149 I. P. C. and sentence Iqbal Husain, Mumtaz Husain, Tahawar Husain and Ali Husain to three years' rigorous imprisonment each, and the remaining appellants to two years' rigorous imprisonment each. The sentences in each case will run concurrently.

To this extent this appeal is allowed. For the rest it stands dismissed.

V.B./R.K. *Sentences modified.*

1930 Cr. Cases 576

(Madras)

JACKSON, J.

(*Vonti Kommu*) *Rami Reddy and others*
—Accused—Petitioners.

v.

Emperor

Criminal Revn. Case No. 688 of 1929, and Criminal Revn. Petn. No. 624 of 1929, Decided on 28th November 1929, against judgment of Sess. Judge, Cuddappah, in C. A. No. 19 of 1929.

Criminal P. C., S. 235—Trial for rioting with common object of hurt—Charge of rioting found unsustainable—Further trial for hurt in absence of direct charge vitiates trial.

A man cannot be convicted of hurt unless he is charged with hurt and hence if from the charge as originally framed, accused are charged with rioting with the common object of causing hurt, and the Court finds the charge of rioting with the said common object unsustainable, on acquitting the accused of the said charge of rioting, the Court cannot proceed to find them severally guilty of grievous or simple hurt without framing a direct charge. The omission to frame a direct

charge vitiates the trial : 27 Cal. 516 ; A. I. R. 1925 Mad. 1 (F.B.) Ref., 47 Mad. 746, Dist. [P 576 C2]

V. L. Ethiraj—for Petitioners.

Public Prosecutor—for the Crown.

Order.—The petitioners have been sentenced: petitioner 1 to six months' rigorous imprisonment under S. 325, I. P. C., and petitioners 2, 3 and 4 to four months' rigorous imprisonment under S. 324, I. P. C.

They were originally charged generally that some one or other of them caused the hurt, and all were guilty by reason of S. 149 I. P. C. from the fact that they were rioting and the hurt was likely to be committed in prosecution of their common object.

The appellate Court has found that they did not riot and had no common object and then proceeds to find them severally guilty of grievous or simple hurt. A man cannot be convicted of hurt unless he is charged with hurt. As the charge stood accused were not in the least concerned in sifting who caused each particular injury; for all were to be held liable for the act of each. Therefore it cannot be said that the omission to frame a direct charge occasioned no failure of justice. *Theethumalai Gounder v. Emperor* (1) is distinguishable. There the accused were charged under Ss. 326 and 149, I. P. C. and could have been convicted under those sections, but the Judge convicted under S. 326 alone. But here the accused could not be convicted under S. 149. The case bearing more closely upon the present case is *Abhi Misser v. Lachmi Narain* (2), I. L. R. 27 Cal. 566 which is affirmed in *Theethumalai Gounder v. Emperor* (1) at 754 (of 47 Mad.).

The petition must be allowed and petitioners acquitted. Their bail is released.

P.R.S./V.B.

Petition allowed.

(1) A. I. R. 1925 Mad. 1=47 Mad. 746(F.B.).
(2) [1900] 27 Cal. 566=4 C. W. N. 546.

1930 Cr. Cases 577
(Madras)

WALLACE AND JACKSON, JJ.

Krishnayya Naidu and another—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 672 of 1929, and Criminal Revn. Petn. 608 of 1929, Decided on 31st January 1930, from judgment of Joint Magistrate, Tirupatur, in Criminal Appeal No. 74 of 1928.

Criminal Trial—Evidence—Deposition of witnesses as prosecution witnesses in counter case admitted with consent of both parties in another case as defence evidence—Procedure is not irregular—Criminal P. C., S. 530.

If in a trial Court the depositions given by defence witnesses, when examined as prosecution witnesses in the counter case, are filed with the consent of both sides, and if these witnesses are called and examined in the presence of the accused and swear to the truth of their previous statements, which are then filed with their consent to save time, there is nothing illegal or irregular in such procedure *A. I. R. 1928 Mad. 32, Expl.; A. I. R. 1927 Lah. 781; A. I. R. 1924 Lah. 104 and A. I. R. 1926 Bom. 231, Dist.* [P 578 O 2]

V. L. Ethiraj—for Petitioners.

Public Prosecutor—for the Crown.

Jackson, J.—This petition raises a point of some importance. It will be seen on p. 23 that the depositions given by D. W. 2 in a previous trial were read out to him and exhibited as evidence in the present case. This is precisely what I myself did in the case which was subject of appeal in *Umar Hajee v. Emperor* (1) when it was ruled that my action was fatally irregular.

Of course there is no objection to a witness being led, if both sides consent and the alternative and correct procedure according to that ruling would be for the Judge to copy out the previous depositions in his own hand.

You were examined at the previous trial?

Yes.

You deposed that etc. etc.

Yes.

and then the Judge is set busily to work for a few hours committing to paper what is already on paper. With the greatest respect I can see no necessity for this deplorable waste of time. The accused is in no way prejudiced. He can ask any supplementary questions

(1) *A. I. R. 1928 Mad. 32=46 Mad. 117.*

he likes. He is present when these depositions are exhibited, so the rule in *2 Hawkins Pleas, Chap. 46* is not violated. As regards the implied consent discussed on p. 120 I may say perhaps that the depositions were exhibited at the express request of the defence vakils as in the present case. I have never been able to understand this ruling and think it should be examined by a Bench.

[This case coming on for hearing on Thursday the 16th January 1930, in pursuance of the above order, upon perusing the petition and the judgments of the lower Courts and the records in the case and upon hearing the arguments of Mr. V. L. Ethiraj and A. S. Sivakaminathan for the petitioners and the Public Prosecutor on behalf of the Crown and having stood over for consideration till this day. This Court made the following.]

Order.—This case arises out of a judgment in a criminal appeal in which the appellate Magistrate refused to reverse the conviction of the petitioners on the ground urged before him that the conviction was illegal because the trial Court had allowed certified copies of evidence given by the petitioners as defence witnesses in a counter case to be filed as evidence for the defence in this case. It is contended that the refusal of the appellate Magistrate is directly opposed to the ruling of a Bench of this Court in *Umar Hajee v. Emperor* (1).

On another ground raised it appears to us that the appellate Magistrate's judgment cannot be supported. He considered that S. 167, Evidence Act, did not compel him to order a retrial merely because these copies of depositions had been put in, since, to use his words: "without the evidence thus admitted there is sufficient evidence to prove the charges."

He seems to have entirely overlooked the fact that the evidence thus admitted was for the defence and not for the prosecution. He has thus decided the case against the accused by the simple process of ruling out and refusing to consider the evidence for the defence. But it would not suffice for us merely to order him to re-hear the appeal, if under the law as it stands stated in *Umar Hajee v. Emperor* (1), he would still have to reject these depositions and order retrial. We therefore had the question argued before us whether the 46 Madras case applies here and if it

does, whether it does not lay down too strict a procedure, and whether we should not have the case posted before a Full Bench to consider whether *Umar Hajee v. Emperor* (1) case has been rightly decided.

We have perused the printed papers in the two cases which gave rise to the *Umar Hajee v. Emperor* (1) judgment. A criminal trial had proceeded for some time against two persons in part before one Special Sessions Judge. It was then split up into two. That Judge was succeeded by another, who decided on a de novo trial. At the de novo trial the second Judge permitted the depositions of the prosecution witnesses taken at the original trial to be filed as evidence for the prosecution; whether this was done at the request or with the consent of the defence is not material. The evidence of the defence witnesses was taken entirely by the second Judge. Now the judgment in *Umar Hajee v. Emperor* (1) proceeds on the general proposition that:

"in cases of life, no evidence is to be given against a prisoner, but in his presence" subject to the exceptions permitted by some express provisions of law. It is clear from the facts as set out above that the Bench was dealing only with a case where previous depositions not taken in the presence of the accused were used as evidence against him. We think that the decision does not go further than to decide that such a procedure is contrary to law, and if we may say so with respect, it embodies a very salutary principle, the principle upon which *Reg v. Bertrand* (2) on which *Umar v. Hajee Emperor* (1) relies, proceeded. In the latter case there was the additional infirmity that what was read over to the witnesses was not their actual depositions but only notes of those cases taken by the trying Judge. We do not think that *Umar Hajee v. Emperor* (1) can be taken to having decided that evidence taken in favour of a prisoner in a counter case in which he was a witness but was not himself the prisoner cannot be put in by him on his own behalf.

In the case before us the deposition given by defence witnesses 2 and 3 when

examined as prosecution witnesses in the counter case was filed with the consent of both sides. We do not think that *Umar Hajee v. Emperor* (1) prohibits such a procedure, which obviously saves a great deal of time which would otherwise be occupied in merely copying down previous depositions. No one is prejudiced. Obviously the prisoner is not and if the Crown had thought its case would be prejudiced, it would not have consented to the procedure.

Our attention has been drawn to a ruling of a Bench of the Lahore High Court in *Thakar Singh v. Emperor* (3) but, so far as we can gather the facts of the case, it appears that the defence witnesses were not summoned and examined in Court, but their previous depositions were put on the record without the witnesses coming to swear to their truth. The same procedure appears to have been adopted in the case reported in *Allu v. Emperor* (4). In the present case, however, the defence witnesses were called and examined in the presence of the accused and they swore to the truth of their previous statements, which were then filed with their consent to save time. In another case, *Emperor v. Harjivan Valji* (5) at p. 178 (of 50 Bom.) a High Court Bench held that to file for the Crown depositions taken in one case as substituted evidence in another case against the same prisoner was merely an irregularity. But it may be noted that in that case all the depositions had been taken in the presence of the prisoner.

We do not therefore think it necessary to refer this case to a Full Bench on the question of reconsidering the decision in *Umar Hajee v. Emperor* (1). We hold on the facts here that there was nothing illegal or irregular in the procedure at the trial Court. However, as we have already remarked the appellate Magistrate has erred in refusing to consider that evidence recorded for the defence. We must therefore set aside his order and direct him to rehear the appeal and decide it after giving due weight to the evidence recorded in the previous depositions filed as Exs. 6, 6a, 7 and 9a. We order accordingly.

P.R.S./V.S. Order accordingly.

(2) [1867] 1 P. O. 520=86 L. J. P. O. 51=4 Moore P. C. (n.s.) 460=10 Cox. C. C. 618=16 W. R. 9=16 L. T. 752.

(3) A. I. R. 1927 Lah. 781.

(4) A. I. R. 1924 Lah. 101=4 Lah. 878.

(5) A. I. R. 1926 Bom. 281=50 Bom. 174.

1930 Cr. Cases 579

(Madras)

PANDALAI, J.

Munusami Nainar—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 440 of 1929 and Criminal Petn. No. 399 of 1929, Decided on 9th January 1930, from judgment of Sess. Judge, South Arcot, in Criminal Appeal No. 54 of 1928.

Penal Code, S 409—Mere delay in payment of money into treasury entrusted to person does not amount to misappropriation.

It does not follow, merely because an instalment of an agricultural loan is not paid the very next day into the treasury, that thereupon and therefrom an inference begins to be drawn against the village Munsif that he has misappropriated the amount so omitted to be paid. Mere delay in payment of money entrusted to a person, when there is no particular obligation to pay it at a certain date, does not amount to and does not furnish by itself a sufficient proof of misappropriation: *A. I. R. 1925 Cal. 613, Rel. on.* [P 579 C 2, P 580 C 1]

K. S. Jayarama Ayyar for *S. Nagaraja Iyer*—for Petitioner.

K. N. Ganapathi for Public Prosecutor—for the Crown.

Order.—The petitioner was the village headman of Sirukadambur vattam in the District of South Arcot. He was convicted by the Sub-Divisional Magistrate of Tirukoilur of an offence under S. 409, I. P. C., criminal breach of trust by a public servant of a sum of Rs. 17-12-6 and sentenced to simple imprisonment till the rising of the Court and a fine of Rs. 60 or further imprisonment for 15 days in default. At the outset it does strike one that if the conviction is right the sentence is utterly inadequate. The conviction and sentence were, however, upheld by the learned Sessions Judge of South Arcot. The petitioner now applies to this Court to set aside his conviction.

The facts are, that on 19th June 1925 P. W. 1, a ryot within the jurisdiction of the village where the petitioner was the headman paid to the petitioner Rs. 17-12-6 being an instalment of an agricultural loan taken by him and which fell due on 10th April 1925. The petitioner paid this sum into the treasury on 20th July 1925, together with one rupee, in all Rs. 18-12-6. The additional sum was represented by the petitioner to be the interest levied from

P. W. 1 according to the rules for takavi loans for the delay in the payment of the instalment.

It is said that the amounts kept by the petitioner show that this additional sum of one rupee was paid by P. W. 1 and it was therewith that the ultimate sum of Rs. 18-12-6 was paid. The charge against the petitioner is that he misappropriated the sum of Rs. 17-12-6 dishonestly for his own benefit during the period between 19th June and 20th July. I have heard the learned Public Prosecutor on this point and I am unable to see that there is any evidence in the case except the delay to show that during the period between 19th June and 20th July the petitioner did dishonestly use this sum Rs. 17-12-6. The lower Court seems to be of the opinion that the delay is sufficient proof and that because the petitioner did not remit the sum of Rs. 17-12-6 immediately on receipt to the treasury he must be held or presumed to have misappropriated the amount to his own use. I do not think that there is any such presumption which arises on facts like the present. I asked the learned Public Prosecutor to say whether there was any rule under which a sum paid as an instalment of an agricultural loan should be paid into the treasury within a particular period. There appears to be no such rule. This, of course, does not mean that an officer who receives money of that character may retain it for all time with impunity and then say that as he was not required to pay it within a certain time, he is at liberty to do what he likes with it.

On the contrary it does not follow, merely because an instalment of an agricultural loan is not paid the very next day into the treasury, that thereupon and therefrom an inference begins to be drawn against the village Munsif that he has misappropriated the amount so omitted to be paid. The inference is purely one of fact and I certainly think there are no circumstances in this case from which such an inference could be drawn. What the petitioner himself said was that as the full amount of the instalment due, namely, the amount of the principal and the interest due, was not paid, he detained the amount till the balance was brought. There is nothing to show that this was not the

case. The accounts apparently show that the interest was subsequently paid and when it was paid the total amount was sent to the treasury. P. W. 1, no doubt says that he did not pay the interest subsequently and that it was the petitioner himself, to cover up his fraud, that supplied the sum of one rupee and paid the total. But obviously the statement of a man like P. W. 1 in this case cannot be acted upon, where it turns the scale between guilt and innocence of the petitioner, because, upon his own statement, he bears some kind of grudge or ill will to the petitioner.

It seems that there was a previous case similar to the present against this petitioner and that the petitioner was acquitted on appeal. The present P. W. 1 has the effrontery to say that upon that acquittal the petitioner was restored to his office, and that if he were not so restored he would not have preferred this complaint. A man who can acknowledge such a conduct certainly does not deserve to have his words accepted as true, where the intention of it is to incriminate the petitioner whom he wishes to see out of his office. If authority were necessary for the proposition that mere delay in payment of money entrusted to a person when there is no particular obligation to pay it at a certain date, does not amount to and does not furnish by itself a sufficient proof of misappropriation, such authority will be found in *A. I. R. 1925 Cal. 613* at p. 615, where it is stated that :

"where there is no time fixed for the payment of the money or where no place is assigned for the keeping thereof, the accused cannot be said to have committed the offence of criminal breach of trust for merely mixing the trust money with his own, etc."

There is no question here of mixing the money with the petitioner's money because there is absolutely no proof in the case of any such conduct. As the only fact proved against the petitioner was that he paid the money only 31 days after its receipt and that fact is legally insufficient by itself to prove that the accused committed criminal breach of trust, the conviction must be set aside and the fine, if paid, will be refunded.

P.R.S./V.S.

Conviction set aside.

1930 Cr. Cases 580 (Madras)

CURGENVEN, J.

D. Viraswami Naidu—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 267 of 1929, and Criminal Revn. Petn. No. 238 of 1929, Decided on 2nd August 1929, from the judgment of Sess. Judge, Bellary, in Criminal Appeal No. 43 of 1928.

Criminal P. C., S. 234 (1)—Accused tried for four offences in one trial—Trial is vitiated—Criminal P. C., S. 527.

Where an accused is charged with and tried at one trial for four offences, it is not merely an irregularity but an illegality which vitiates the trial 25 *Mad. 61* (P. C.), *Foll.;* *A. I. R. 1927 (P. C.) 44, Dist.;* 28 *M.L.J. 397* and 5 *Pat. L. J. 11, Ref.* [P 581 C 1]

V. K. John—for Petitioner.

K. N. Ganapathi for Public Prosecutor—for the Crown.

Judgment.—The petitioner has been convicted under S. 19 (c), Arms Act, of exporting arms in contravention of the provisions of S. 6 of that Act. In the trial Court he was charged with and convicted of four acts of export, and on appeal the learned Sessions Judge, while holding to be inadmissible some of the evidence on which the conviction was based, found that the evidence remaining was sufficient, and upheld the conviction. No objection has before me been taken to the merits of that decision. The objection urged is that the trial offended against the provisions of S. 234 (1), Criminal P. C., which enables a person to be tried for not more than three offences of the same kind committed within the space of 12 months. The charge in the present case, as I have said, enumerates four instances of the export of fire-arms. It is somewhat obscurely worded and so far as appears quite unnecessarily opens with a recital of the dates on which the petitioner is alleged to have "imported" these weapons by land from Bombay to Hospet. "Imported," I think, is an inappropriate word when used in such circumstances. It then goes on to allege that he subsequently took or exported them to a place in the Nizam's Dominions. No dates are attached to the acts of export. Mr. Ganapathi who appears for the Public Prosecutor informs me that the dates of the receipt of the weapons by the petitioner at Hospet were respectively 25th

May, 10th June, 13th August and 26th August, and suggests that the presumption is that he must have exported them to Hyderabad shortly after those dates of receipt. Prima facie, therefore, he exported them on different dates and the four acts cannot in any sense be said to have been committed in one transaction, nor am I asked to conclude that even any two of the weapons were exported together, so as perhaps to make three sets of offences within the meaning of S. 234 (1), Criminal P. C. It certainly lay on the prosecution to show that the terms of that section were complied with when asking the Court to entertain a complaint of these four acts of exportation. It has not been contended that all four acts constituted one "offence" as that word is used in the section.

The further question then arises as to the legal effect of non-compliance with S. 234, Criminal P. C. That has now, I think, been set at rest by the Privy Council judgment in *Subramanya Iyer v. Emperor* (1), which decides that it is not merely an irregularity which vitiates the trial. This ruling is in no manner affected by the later Privy Council case *Abdul Rahman v. Emperor* (2), which relates to the reading over of witnesses' depositions and distinguishes the earlier case. Instances in which *Subramanya Iyer v. Emperor* (1) has been followed by Indian Courts are supplied by *Virupana Goud v. Emperor* (3) (though it does not actually cite the case *Tepanidhi Gobinda Chandra v. Emperor* (4)).

I have accordingly no alternative but to set aside the conviction on these grounds. The petitioner besides being sentenced to six months' imprisonment in the present case, was sentenced to a prior term of six months' imprisonment in C. C. No. 61 on the file of the First Class Magistrate, Hospet, the two sentences running consecutively. I understand that he has already served his first sentence and is now in course of serving his second. Inasmuch as in the other case also I have found it necessary

to set aside the conviction I think there are no grounds for making any further order in the present case. The petitioner will, therefore, be acquitted and set at liberty.

P.R.S./J.M. *Conviction set aside.*

1930 Cr. Cases 581

(Madras)

JACKSON, J.

Nallamadan Chettiar and others—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 825 of 1929, and Criminal Revn. Petn. No. 739 of 1929, Decided on 19th December 1929, from judgment of Joint. Magistrate, Sivakasi, in Criminal Appeal No. 25 of 1929.

Penal Code, S. 424—Removing crop attached by Madras Village Courts is not offence under S. 424 since such Court has no right to attach it—Madras Village Courts Act (1 of 1889), S. 52.

Since a village Court cannot attach crops which are not moveables within the meaning of S. 52 by virtue of Madras General Clauses Act and S. 22, I. P. C., there is no fraud in removing such crops so as to sustain a conviction under S. 424, I. P. C. [P 581 C 2]

S. Narayana Ayyangar—for Petitioners.

Public Prosecutor—for the Crown.

Order.—The eight petitioners have been fined under S. 424, I. P. C., for removing crops attached by the village Court. Under S. 52, Act 1 of 1889, a village Court can only attach moveables. The definition of moveables must by provision of the Madras General Clauses Act, 1867, be sought for in the Penal Code; and under S. 22, moveables do not include crops. Therefore, a village Court cannot attach crops. The petitioners committed no fraud in removing them, and the conviction must be cancelled and all the fines be refunded.

Naturally it causes great confusion in the minds of simple villagers that under S. 2 (13), Civil P. C., moveable property includes growing crops, and under S. 22, I. P. C., or S. 3 (25-34), General Clauses Act, moveable property does not include growing crops. I would suggest that the legislature make it abundantly plain what a village Court can do in regard to crops as such. It might at the same time make it plain what is meant by "personal property" in S. 13 of the Act. I have held that

(1) [1902] 25 Mad. 61=28 I. A. 257=8 Sar. 160 (P.C.).

(2) A. I. R. 1927 P. C. 44=5 Rang. 53=54 I. A. 96 (P.C.).

(3) [1915] 28 M. L. J. 337=28 I.C. 653=(1915) M. W. N. 241.

(4) [1920] 5 Pat. L. J. 11=54 I.C. 769=1 Pat. L. T. 180.

personal property includes crops in *Sundara Naicker v. Potti Naicker* (1), but I admit that it is arguable either way. If personal only means moveable as defined in I. P. C., moveable should be the word employed.

P.R.S./V.B. *Convictions cancelled.*

(1) A. I. R. 1927 Mad. 192=50 Mad. 494.

1930 Cr. Cases 582 (1) (Madras).

PANDALAI, J.

Public Prosecutor—Appellant.

v.

Pandaram and another—Accused—Respondent.

Criminal Appeal No. 643 of 1929, Decided on 21st January 1930, from acquittal order of Bench Mags., Tiruvarur, in Bench Case No. 403 of 1929

Madras District Municipalities Act, S. 182 (1)—Either owner or occupier of premises, or both, may be proceeded against.

The only object of S. 182 (1) in saying that the chairman may require the owner or the occupier to remove encroachment is to enlarge the class of persons against whom notice may be sent and not to restrict it. Either the owner may be proceeded against or the occupier or both. There is nothing in the use of the word "or" in that section which restricts the municipality to choosing one out of the two persons proceeded against. [P 582 C 2]

K. S. Vasudenan—for Appellant.

P. S. Ramachandran and *K. S. Desikan*—for Respondent.

Judgment.—This is an appeal by the Public Prosecutor against the order dated 29th August 1929 of the Bench Magistrate of Tiruvarur acquitting the respondents respectively the occupier and owner of premises within the Municipality of Tiruvarur, who were charged at the instance of the municipality with having disobeyed a notice under S. 182 (1), District Municipalities Act, to remove certain alleged encroachments in front of the said premises. The Bench without going into the merits of the charge acquitted the respondents upon the ground that under S. 182 (1), District Municipalities Act notice to remove construction or encroachment can only be given to either the occupier or the owner but not to both. The Bench further held that the municipality not having elected to proceed against the one or the other but having proceeded against both, the prosecution case failed. The only question in this appeal is whether this

view is correct. In my view it is not. The only object of saying that the chairman may require the owner or the occupier to remove encroachment is to enlarge the class of persons against whom notice may be sent and not to restrict it. Either the owner may be proceeded against or the occupier or both. There is nothing in the use of the word "or" in that section which restricts the municipality to choosing one out of the two persons proceeded against. The order of acquittal of the Bench Magistrate is set aside and the case will go back to them for disposal according to law.

P.R.S./V.S.

Order set aside.

1930 Cr. Cases 582 (2) (Oudh).

NANAVUTTY, J.

Burmha—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 16 of 1930, Decided on 20th March 1930, from an order of Sess. Judge, Fyzabad, D/- 16th January 1930.

Penal Code, S. 366—Person taking away girl below 16 from lawful guardianship commits offence under S. 366.

A person who finding the girl below 16 years of age takes her away from guardianship to make use of her for his own purposes, is guilty of the offence and the offence is completed the moment he takes away the girl: *A. I. R. 1921 Oudh 226; 27 Cal. 1041; 33 All. 644; A. I. R. 1926 Pat. 493; A. I. R. 1924 Oudh 335, Dist.* [P 584 C 1]

Moti Lal Saksena—for Applicant.

H. K. Ghose—for the Crown.

Judgment.—This is an application for revision of an appellate order of the learned Sessions Judge of Fyzabad upholding the conviction and sentence passed upon the applicant *Burmha* of an offence under S. 366, I. P. C. The story of the prosecution out of which this application for revision has arisen are briefly as follows:

One *Mt. Nanka*, a minor girl of about 12 or 13 years of age is said to have been taken away from her mother's lawful guardianship by *Mt. Maharani*, on the pretext that she wanted her to grind corn and then made her over to two other persons. The story of the minor girl *Mt. Nanka* is that she was living in *Durjankapurwa* with her mother *Mt. Lachhna* and had been married to one *Bhagoti Ahir* of village

Mau. She stated that 4 or 5 days before her arrest at Dharyanwan she was sleeping in the "usara" of her house when at about three gharis before sunrise the accused Mt. Maharani came to her and asked her to go with her to grind corn in her house. Mt. Nanka left her home with Mt. Maharani and did spend some time in grinding corn at the house of Mt. Maharani. Mt. Maharani then got her to the outskirts of the village and made her over to her own son Chedi and the applicant Burhma; these two persons took her to Baidkapurwa and there kept her at the house of one Shambhu. After she had been kept there for some days, four or five persons came with the applicant Burhma and they were taking her to another place when after going a short distance, one Bhagwan intervened and there was a lathi fight between Burhma and Bhagwan in which the latter was knocked down and Burhma then ran away. At this juncture a constable and a chaukidar arrived on the spot and Mt. Nanka and Badri were arrested and taken to the thana. Mt. Maharani, Ohedi, Mt. Ram Kali, Mt. Bhagana, Shambhu and Sudama were all acquitted, and it follows logically from this that it is not established who took Mt. Nanka away from her mother's lawful guardianship and how she came to be in the unlawful possession of the applicant Burhma.

On behalf of the applicant it is strenuously argued that the offence of kidnapping is not a continuous offence, and, in support of this contention, reliance is placed upon a ruling of Lindsay, J. reported in *Emperor v. Gokaran* (1) in which it was held that it was a well-established point of law that kidnapping was not a continuing offence. The same view was taken by a Full Bench of the Calcutta High Court in the case of *Nemai Chatteraj v. Queen-Empress* (2) in which it was held by a majority of the Full Bench that the taking away out of the guardianship of the husband was complete before the petitioner joined the principal offenders in taking the girl to Calcutta, and that the petitioner therefore could not be convicted under S. 363, I. P. C., and it

was further held that the offence of kidnapping was complete when the minor was actually taken away from her legal guardian. The same view was taken by Sunder Lal, J., in *Emperor v. Abdul Rahman* (3) in which it was held that the offence of kidnapping was completed the moment a girl under 16 years of age was taken out of the custody of her lawful guardian and was not an offence continuing so long as the minor was kept out of such guardianship. Similarly, the Patna High Court in the case of *Nanak Sao v. Emperor* (4) held that the offence of kidnapping was not a continuing offence but was complete the moment the minor was removed from the keeping of the lawful guardian. The question, however, in the present case is when was the act of kidnapping completed. Upon the findings of the trial Court, which are accepted as correct by the lower appellate Court, Mt. Nanka is not proved to have been kidnapped by Mt. Maharani. She was, however, found in the unlawful possession of the applicant Burhma, at a time when she was not under the lawful guardianship of her mother. In the case of *Idu v. Emperor* (5) it was held by the late Court of the Judicial Commissioner of Oudh that it was not necessary for a conviction under S. 366, I. P. C. that the accused should know definitely who the guardian of the minor girl was, whom he found wandering about and made use of for his own purposes.

Upon the findings of fact arrived at by the lower Courts, it is clear that the applicant Burhma found this minor girl at the house of Mt. Maharani away from the lawful guardianship of her mother and was taking her in the company of Badri and others to another place when he had a fight with Bhagwan and the police arrived on the spot and arrested Badri and the minor girl. The applicant when he joined Badri and others in taking the girl away from Mt. Maharani's house must have known that this minor girl had a lawful guardian from whose custody he was taking her away. The question of the offence of kidnapping being a continuous offence

(1) A. I. R. 1921 Oudh 226=24 O. C. 329.

(2) [1900] 27 Cal. 1041 = 4 O. W. N. 645 (F. B.).

(3) [1916] 88 All. 664 = 38 I. C. 486 = 14 A. L. J. 765.

(4) A. I. R. 1926 Pat. 493 = 5 Pat. 526.

(5) A. I. R. 1924 Oudh 385 = 27 O. C. 92.

does not arise in the present case, because the finding of the trial Court is that Mt. Maharani is not proved to have kidnapped Mt. Nanka. That being the case no offence of kidnapping in respect of Mt. Nanka is proved to have taken place before the applicant Burhma came on the scene and he, in taking away this girl in order to sell her to Bishun Dayal and in pocketing half the proceeds of the sale-price, was clearly guilty of an offence under S. 366, I. P. C. The fact that Bishun Dayal, the would-be husband and purchaser of Mt. Nanka was a Brahman whilst Mt. Nanka was an Ahiran does not affect the question of the guilt of the applicant. The sentence in my opinion, if anything, errs very much on the side of leniency.

For the reasons given above, I uphold the conviction and sentence passed upon the applicant and dismiss this application for revision.

V.B./R.K.

Conviction upheld.

1930 Cr. Cases 584

(Patna)

MACPHERSON, J.

Mahabir Pandey — Accused — Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 627 of 1929, Decided on 22nd November 1929, from order of Dist. Magistrate, Darbhanga, D/- 24th September 1929.

Penal Code, S. 411—Stolen bullocks taken to distant village and left with professional grazer of that village for pasturage along with his own—Mere fact of possession of bullocks by such person will not warrant inference of dishonest possession.

Where bullocks were stolen from one village and taken to another village at a distant place and handed over to a person resident of that another village to pasture them with his own, the mere fact of possession of the bullocks by such person would not warrant the inference that the possession was dishonest so as to cast upon such person the onus of displacing the inference of dishonesty. [P 584 C 2]

Dhyan Chandra—for Petitioner.

Judgment.—This rule has been issued to consider the conviction under S. 411, I. P. C., of the petitioner Mahabir Pandey and his sentence of two months' rigorous imprisonment and fine.

It is established that three cousins of the petitioner, who is a Bhumihar, committed theft of two bullocks in village Chaits, thana Samastipur, and that

the bullocks were found some days afterwards at the village of Jorauna in thana Singhia, in which village the petitioner was grazing his cattle and residing at the house of one Ramdhari Jha within a rasi of whose house the bullocks were found tied. The Court below have inferred that the bullocks were there in possession of the petitioner and that he has not shown that they were not in his possession dishonestly.

It has been urged that on the findings of the first Court, which apparently have not been set aside by the learned District Magistrate in appeal, the bullocks were not in the possession of the petitioner at all. The particular ground urged is that the petitioner was not present at the place where the bullocks were found tied though the complainant averred that he was. Apart, however, from the question of possession by the petitioner of the stolen bullocks on which I am not sanguine that in the circumstances of the case the petitioner can succeed, it appears to me that the conviction is unsound upon another ground. I consider that the inference of dishonest possession cannot safely be made in the circumstances of the case. The theft of the bullocks was perpetrated by the petitioner's cousins. The petitioner was grazing his cattle at a distant place. It would not necessarily follow that he would have reason to believe that cattle brought to him by his cousins in order to pasture them along with his own were not honestly come by. The mere fact of possession is in the peculiar circumstances of this case not sufficient in my opinion to warrant the inference which no doubt may under the statute be made in certain circumstances that he was in possession of them dishonestly and to cast upon him the onus to displace the inference of dishonesty.

Accordingly the conviction must be set aside, the petitioner must be released from custody or bail if he is on bail, and the fine, if paid, must be refunded.

V.B./R.K.

Conviction set aside.

1930 Cr. Cases 585

(Rangoon)

MYA BU, J.

T. Sathi Reddy—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1304 of 1929, Decided on 17th December 1929, against order of Dist. Magistrate, Rangoon, D/- 7th October 1929.

(a) Criminal P. C., Ss. 476 and 195—Complaint merely quoting S. 193, Penal Code but alleging fabrication of false evidence without any allegations of having given false evidence is no complaint for offence of intentionally giving false evidence.

It is absolutely necessary to give the particular false statements in a complaint for the offence of giving false evidence and therefore a complaint merely quoting S. 193, Penal Code, alleging fabrication of false evidence without any allegations of having given false evidence can in no sense be deemed to be a complaint for an offence of intentionally giving false evidence: *A. I. R.* 1925 Rang. 195; 32 *Mad.* 35; 26 *All.* 514; 35 *All.* 8, *Disting.*; *A. I. R.* 1925 *Mad.* 603, *A. I. R.* 1925 *Cal.* 721 *Rel. on.* [P 597 C 1 2]

(b) Criminal P. C. S. 537—Want of complaint affects jurisdiction of Court and legality of trial and is not covered by S. 537.

The want of a complaint for a particular offence is quite a different thing from an error, omission or irregularity in the complaint. It affects the jurisdiction of the Court and the legality of the trial and the case does not fall within the provisions of S. 537. [P 587 C 2]

Bose, Venkatram De, Darwood and Naidu—for Appellant.

The Government Advocate—for the Crown.

Judgment.—The appellant T. Sathi Reddy one of the partners of the firm of K. C. V. Reddy & Co., labour contractors who have for some years procured labour on contract for the Port Commissioners and the B. I. S. N. Co., at Rangoon stands convicted and sentenced by the District Magistrate of Rangoon in Criminal Regular Trial No. 84 of 1929 under S. 193, I. P. C. The charge framed against the appellant was that he on or about 31st January 1929 when examined by Mr. Fischer, Income-tax Officer, intentionally gave false evidence with reference to the accounts of K. C. V. Reddy & Co. by stating:

"All the thumb impressions in the two registers are those of maistries. None of the thumb impressions are those of coolies."

The facts which led to the trial are as follows:

The Income-tax Officer commenced proceedings for the assessment of the firm by issuing a notice under S. 28 (2), Income-tax Act on 13th July 1928, call-

ing on the firm to submit a return of income for the year 1927-1928. The return was furnished in two portions signed by K. C. V. Reddy, the senior partner which together showed a loss. The Income-tax Officer was not satisfied with the return and called for production of books of accounts. Certain books of accounts were produced among which there were the labour payment registers referred to in the charge. Certain other books were obtained by the Income-tax department at the instance of the appellant.

It is the case for the prosecution that the labour payment registers contained not only the thumb impressions of the cooly maistries, but also a large number of thumb impressions of coolies purporting to be acknowledgements of receipt of payments which were never in fact made for labour. In compliance with the summons calling on the firm to appear to answer questions before the Income-tax Officer in regard to the firm's accounts the appellant appeared before Mr. Fischer and made certain statements in the course of which the appellant on 31st January 1929 stated to Mr. Fischer inter alia:

"All the thumb impressions in the two registers are those of maistries. None of the thumb impressions are those of coolies."

Subsequently Mr. Nicholas, Assistant Commissioner of Income-tax, Rangoon, on the report of Mr. Fischer directed the prosecution of the four partners of the firm of K. C. V. Reddy & Co., with the result that on 6th June 1929 a complaint was filed by Mr. Fischer in the Court of the District Magistrate. The complaint mentioned the names of the four partners as accused persons, the name of the present appellant being the third in the list.

The complaint stated inter alia that on 17th August 1928 and 17th November 1918, accused 3 together with an assistant in the firm produced certain books purporting to be correct books of the firm's accounts, that on 27th November 1928 other account books purporting to be a correct statement of the firm's account were obtained by the complainant at the instance of accused 3 from the Criminal Investigation Department; and that all the said account books were false to the knowledge of the accused and had been fabricated for the

purpose of income-tax and to support the false return. The complaint charged the accused:

(a) that between the dates 1st April 1927 and 27th August 1928, they fabricated accounts for income-tax purposes and thereby committed an offence under S. 193, I. P. C.

(b) that on 20th and 21st August 1928 they filed a false return of income and thereby committed an offence under S. 177, I. P. C. and

(c) that they having produced books of accounts which are false to their knowledge thereby committed an offence under S. 196, I. P. C.

By the complaint, Criminal Regular Trial No. 59 of 1929 was instituted in the District Magistrate's Court. After recording evidence for the prosecution and examination of accused 4 the then District Magistrate on 19th August 1929 framed charges against accused 1 K.C.V. Reddy under Ss. 193, 196 and 177, I. P. C. and discharged accused 2 and 4, V. D. Reddy and T. N. Reddy and recorded the following order in regard to accused 3, the present appellant:

"Against accused 3 Sathi Reddy I direct that a new proceeding be opened under the original complaint to enquire into an offence or offences under S. 193, I. P. C. in respect of the statements which he made to the Income-tax Officer pursuant to the return of income made by K. C. V. Reddy & Co., in August 1923 for the income-tax year 1927-28."

In consequence of this order, the Criminal Regular No. 84 of 1929 was opened against the appellant on the same day. Thereafter the District Magistrate who made the order was transferred and was succeeded by the District Magistrate before whom the case against the appellant was tried up to the very end. In the judgment the District Magistrate remarked that his predecessor had discharged the appellant in Criminal Regular No. 59 of 1929 and opened new proceedings against him. In view of this remark it is contended that the discharge of the appellant in Criminal Regular No. 59 of 1929 initiated on the complaint of 6th June 1929, necessitated a new complaint for the valid initiation of the new proceedings in Criminal Regular No. 84 of 1929. I do not think that the remark of the learned District Magistrate referred to above should be so literally construed for, it is clear from the wording of the order of

19th August 1929 expressly discharging accused 2 and 4 and ordering a new or separate proceeding against accused 3 that the order was never meant to operate as an order of discharge of accused 3 the present appellant. I therefore fail to see that there was any legal necessity for the filing of a new or a fresh complaint to initiate the proceeding in Criminal Regular No. 84 of 1929.

The further ground which has been taken up on behalf of the appellant is that as there was no complaint under S. 476, Criminal P. C. against the appellant for the offence of intentionally giving false evidence, the District Magistrate was incompetent to take cognizance of the offence in view of S. 195 (1), (b), Criminal P. C. The complaint filed by the Income-tax Officer on 6th June 1929 made no allegation regarding statements made by the appellant before the Income-tax Officer. With reference to S. 193, I. P. C. the complaint charged accused 4 that between dates 1st April 1927 and 27th August 1928 they fabricated account for income-tax purposes and thereby committed an offence under the section. It is urged on behalf of the Crown that this is sufficient to give the District Magistrate power to take cognizance of the offence for which the appellant was prosecuted in Criminal Regular No. 84 of 1929. S. 193, I. P. C. prescribes the punishment for the offence of intentionally giving false evidence which is defined by S. 191 and for the offence of fabricating false evidence which is defined by S. 192. The question for determination is whether a complaint charging an accused under S. 193, I. P. C. specifically for the offence of fabricating false evidence before the fabricated evidence was used in a judicial proceeding can be regarded as a complaint for the offence of giving false evidence in the judicial proceeding by reason of the fact that the section under which both offences are punishable is mentioned in the complaint. I have referred to two cases decided by single Judges of the Allahabad High Court. *Emperor v. Sundar Sarup* (1) and *Emperor v. Debi Prasad* (2). In the former where an Assistant Collector trying a rent suit came to the

(1) [1904] 26 All. 514=(1904) A. W. N. 90.

(2) [1918] 35 All. 8=17 I. C. 578=10 A. L. J. 361.

conclusion that the plaintiff has committed perjury and sent the record to the Collector of the district (who was also District Magistrate) for "starting a case under S. 193, I. P. C.," the Collector ordered:

"that a case under S. 193, I. P. C. be initiated against Sundar Sarup and made over for decision to a Magistrate, 1st Class."

It was held that although the order of the Assistant Collector could not be regarded as an order under S. 476, Criminal P. C. it fell within the definition of a complaint. In the latter, a Munsiff being of opinion that a document filed in a case before him had been tampered with, communicated his suspicions to the District Judge, who thereupon wrote to the District Magistrate requesting him to take action in the matter. It was held that the letter of the District Judge to the District Magistrate amounted to a complaint within the meaning of S. 195 (1) (c), Criminal P. C.

It appears to me that in these cases, the basis on which the prosecution was respectively sought were manifest and there could have been no doubt as to whether the prosecution was to be for the offence of giving intentionally false evidence or for the offence of fabricating false evidence. These cases are therefore distinguishable from the present one in which the complaint specifically alleged the offence of fabrication of false evidence prior to the judicial proceeding in question. In *Kalyanji v. Ram Deen Lala* (3) where a complaint was made under S. 476, Criminal P. C. for offences under S. 193 and 196 I. P. C. and the complaint did not state what was the false evidence given by one of the persons accused, Wallace, J. pointed out that it was not for the Magistrate to fish about in order to find out what statements the complaining Court might have considered to be false and held that the complaint under S. 193, I. P. C. could not therefore stand.

A Bench of the Calcutta High Court has also ruled in *Kalisadhar Addya v. Nani Lall Hazra* (4), that it is absolutely necessary to assign a complaint made under S. 476 and 476 (b), the particular false statements alleged to constitute the offence under S. 193, I. P. C. I agree with this ruling. It

is, however, not necessary for the purpose of the present case to go to the full extent of this ruling or that in *Kalyanji's* case. (3). But I have cited them to show that if it is necessary to give the particular false statements in a complaint for an offence of giving false evidence, a complaint merely quoting S. 193 but alleging fabrication of false evidence without any allegations of having given false evidence, can in no sense be deemed to be a complaint for an offence of intentionally giving false evidence.

The case is therefore one in which there was no complaint against the appellant for the offence of intentionally giving false evidence which the learned District Magistrate took cognizance of, and therefore the proceeding taken against the appellant in Criminal Regular No. 84 of 1929 was ultra vires and illegal. I have referred to the case of *Maung Shwe Phe v. Ma Me Hmoke* (5) in which it was held that where instead of making a formal complaint the Court ordered the prosecution of a party to the suit under the provisions of S. 476, Criminal P. C. and forwarded a copy of the order to the District Magistrate for necessary action, that the want of strict compliance with the provisions of the section by making a formal complaint was only a formal defect which did not vitiate the order. The ruling does not assist in establishing the legality of the proceeding now under consideration in which there is no order under S. 476, Criminal P. C., stating that the appellant had committed the offence of giving false evidence, to make up for the absence of a formal complaint for that offence.

Lastly, the counsel for the Crown invokes the aid of the provisions of S. 537, Criminal P. C. and urges that error, omission or irregularity in the complaint does not vitiate the proceeding unless such error, omission or irregularity has in fact occasioned a failure of justice. But, in my judgment, the want of a complaint for a particular offence is quite a different thing from an error, omission or irregularity in the complaint. There is no complaint in this case charging the appellant with the offence of intentionally giving false evidence and it affects the jurisdiction of the Court and the legality of the trial

(3) A. I. R. 1925 Mad. 809=48 Mad. 395.

(4) A. I. R. 1925 Cal. 721=52 Cal. 478.

(5) A. I. R. 1925 Rang. 195=8 Rang. 48.

The case does not fall within the provisions of S. 537.

I have read the case of *V. C. Chidambaram Pillai v. Emperor* (6) laid before me by the learned counsel for the Crown but for reasons already stated I consider that it is inapplicable to the present case. The proceeding in Criminal Regular No. 84 of 1929 from which this appeal has arisen must be and it is hereby set aside as being ultra vires and illegal. From this it follows that the conviction and sentence passed on the appellant in that trial are set aside. I do not enter an order of acquittal but leave it open to the authorities concerned to lay a complaint as required by law for the prosecution of the appellant if they deem fit to do so.

P.N./R.K. *Proceeding set aside.*

(6) [1903] 82 Mad. 35=1 I. C. 86=9 Cr. L. J. 130.

1930 Cr. Cases 588

(Rangoon)

BROWN, J.

Dhana Reddy—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 414-B of 1929,
Decided on 25th October 1929.

(a) Criminal P. C., S. 403—Order discharging accused though not set aside by competent authority does not bar taking cognizance of same offence on fresh complaint.

An order dismissing a complaint or discharging an accused person does not operate as an acquittal under S. 403 and does not bar the taking cognizance of a fresh complaint of the same offence even though the order of dismissal or discharge has not been set aside by a competent authority: 28 Cal. 652; 29 Cal. 726 and 29 Mad. 126 (*F. B.*), *Rel. on* [P 589 C 1]

(b) Criminal P. C., S. 202—Accused discharged—Fresh complaint of same offence—Magistrate in dealing with such complaint should proceed in manner laid down in S. 200 et seq.

If an accused is discharged and a fresh complaint is made for the same offence, the Magistrate in dealing with such complaint is bound to proceed in manner laid down in S. 200 et seq., that is after examining the complaint, and if necessary after a preliminary enquiry or local investigation to decide whether there is sufficient ground for proceeding. In coming to this decision he is bound to examine a proper discretion, and a discretion improperly exercised would be a ground for interference by a Court of revision: 1 U. B. R. Cr. P. 19, *Rel. on*.

[P 589 C 2]

(c) Criminal P. C., S. 202—Accused discharged—Notice of fresh complaint of same offence is not necessary.

Where accused is discharged it is not necessary to give notice to him before a Magistrate

takes cognizance of a fresh complaint of the same offence against him, [P 590 C 1]

Campagnac—for Applicant.

Gaunt—for the Crown.

Judgment.—On 6th June 1929 a complaint was filed by the Income-tax Officer, Rangoon, against four persons of whom the petitioner *Dhana Reddy* was one. The four accused were alleged to be members of a firm carrying on business as labour contractors at Rangoon and the charges against them were that they fabricated accounts for income-tax purposes and filed false returns of income and produced books of account which were false to their knowledge. The Magistrate took cognizance of the complaint and examined witnesses for the prosecution. On 19th June he charged accused 1. directed as regards accused 3 fresh proceedings would be taken, and discharged accused 2 and 4. *Dhana Reddy* was accused 2. No reasons were given by the Magistrate for his discharge of two of the accused. On 30th August, that is, eleven days after the order of discharge, the Income-tax Officer filed a fresh complaint against the petitioner. In that complaint he set forth that a previous complaint had been filed and that the accused had been discharged but alleged that he now had evidence to place before the Court which was not within his knowledge at the time of filing the complaint referred to. The Magistrate examined the complainant on oath and took cognizance of the complaint. The accused has now come to this Court against the order taking cognizance. The first ground taken is that the accused having been discharged by the District Magistrate the Magistrate was not competent to take cognizance of a fresh complaint against him. I do not understand the learned advocate for the petitioner seriously to press now the extreme view that the order of discharge was an absolute bar to the opening of fresh proceedings. Authority for such an extreme view can be found in some of the earlier cases decided by the High Courts of Calcutta and Madras. Thus, in the case of *Nilratan Sen v. Jogesh Chandra Bhatta-charjee* (1), it was held that:

"where an original complaint is dismissed under S. 203, Criminal P. C., a fresh complaint on the same facts cannot be entertained so

(1) [1898] 28 Cal. 983=1 C. W. N. 57.

long as the order of dismissal is not set aside by a competent authority."

And this view of the law was approved by the High Court of Madras in the case of *Mahomed Abdul Mennan v. Panduranga Row* (2). But the decision in *Niratan Sen's* case (1) has been clearly overruled by a Full Bench of the Calcutta High Court in the case of *Dwarka Nath Mondul v. Beni Madhab Banerjee* (3) followed by another Full Bench ruling in the case of *Mir Ahmad Hossein v. Mahomed Askari* (4). And the same view of the law has been taken by a Full Bench of the Madras High Court in the case of *Emperor v. Chinna Kaliappa Gounden* (5). In Burma the late Chief Court and the Judicial Commissioner of Upper Burma have taken the same view, and the Courts now appear to be practically unanimous in holding that an order dismissing a complaint or discharging an accused person does not operate as an acquittal under S. 403 and does not bar the taking cognizance of a fresh complaint of the same offence even though the order of dismissal or discharge has not been set aside in revision by a competent authority. There can, I think, be no doubt now that that is the correct view of the law, and it is not necessary for me to discuss the arguments which have led the various Courts to come to this decision. The contention before me really is that although the Magistrate had jurisdiction to entertain a complaint he should not in fact have done so without at first making a preliminary enquiry to satisfy himself that there was a good ground for making a complaint. Although there is no legal bar to the institution of fresh criminal proceedings against an accused person, who has been discharged, for the same offence as that with regard to which he has been discharged it is obvious that the Courts should be chary in taking cognizance of complaints in such cases; otherwise there would be nothing to prevent an accused person being harassed again and again with regard to one charge. In the case of *Mi The Kin v. Nga E Tha* (6) the learned Judicial Commissioner whilst holding that:

"the discharge of an accused person or the dismissal of a complaint is no bar to the institution of fresh proceedings otherwise than under S. 437, Criminal P. C."

pointed out:

"that in dealing with a complaint in such circumstances the Magistrate is bound to proceed in the manner laid down in Ss. 200 seq. that is, after examining the complainant, and if necessary, after a preliminary enquiry or local investigation, to decide whether there is sufficient ground for proceeding. In coming to this decision he is bound to exercise a proper discretion, and a discretion improperly exercised would be a ground for interference by a Court of revision."

I agree generally in these remarks. And as regards this aspect of the case, the only point to consider appears to be whether the exercise of the discretion of the Court to proceed without holding a preliminary enquiry is so clearly improper in the present case that the Magistrate should be ordered to hold such enquiry now, before taking further proceedings. The Magistrate who admitted the second complaint was not the same Magistrate as the Magistrate who discharged Dhana Reddy, and unfortunately, no reasons were given for the discharge in the order of discharge. When examined on oath as a complainant on the filing of this second complaint the complainant stated:

"the evidence I now propose to call was not available at the time I filed the first complaint."

If this statement is true it is impossible to say that the Magistrate exercised his discretion wrongly in taking cognizance of the complaint. I understand the fresh evidence referred to was the evidence of certain clerks who directly implicate the petitioner and who were not examined by the Court before he was discharged. These witnesses have since been examined by the Magistrate in the original case against K. C. V. Reddy. But beyond the statement of the complainant, the proceedings do not show that when cognizance was taken of the second complainant against Dhana Reddy the Magistrate had any material before him to show what these witnesses would state beyond what the complainant himself deposed to.

It has been suggested that as S. 437, Criminal P. C., now specifically prescribes that before an order of discharge is set aside the accused should have an opportunity of showing cause against

(2) [1905] 23 Mad. 255.

(3) [1901] 28 Cal. 652=5 C. W. N. 457 (F.B.).

(4) [1902] 2 Cal. 726=6 C. W. N. 638 (F.B.).

(5) [1906] 39 Mad. 123=16 M. L. J. 79.

(6) [1904-06] U. B. R. Or. P. 19.

its being set aside the Magistrate ought to have issued notice to the accused before taking cognizance of the offence. This contention I am unable to uphold. There is no question here of setting aside an order of discharge. The prosecution do not contend that the discharge order was wrong. What they contend is that with the fresh evidence now available they can establish the guilt of the accused.

Section 202, Criminal P. C., gives a Magistrate power to hold a preliminary enquiry before taking cognizance of a complaint but does not ordinarily contemplate the accused taking part in that enquiry. I am unable to hold that there was any necessity to give notice to the accused before cognizance was taken. The Magistrate would perhaps have been better advised, had he taken some steps to satisfy himself that fresh evidence really would be forthcoming before taking cognizance. After careful consideration, however, I am not satisfied that there is sufficient reason now for interfering with the Magistrate's orders. I do not understand it to be disputed that certain fresh witnesses have, since the filing of the complaint in the present case, given evidence before the Magistrate in the original case against the accused I. K. C. V. Reddy and that that evidence if believed would be evidence against the present applicant. And in deciding whether to take cognizance the Magistrate was justified in considering the fact that the complainant was a responsible official who had sworn before him that the fresh evidence he proposed to bring was not available when the first complaint was filed. There was in my opinion quite clearly no want of jurisdiction in the Magistrate when he took cognizance on account of the previous order of discharge, nor am I satisfied that there was such an improper use of his discretionary power as would in the circumstances justify the interference by this Court in revision at this stage.

The other objections taken to the action of the Magistrate as I understand them are :

(1) that the Income-tax Officer should, under the provisions of S. 476, Criminal P. C., have recorded a finding in writing before filing the complaint, and

(2) that the first complaint having

failed the Income-tax Officer has become functus officio, and has no further power to file a fresh complaint.

In the first place it is to be noted that one of the charges brought against the petitioner is under the provisions of Ss. 417 and 511, I. P. C. So far as an offence under these sections is concerned S. 476, Criminal P. C., has no application. These objections can only be considered so far as the complaint under Ss. 193 and 196, I. P. C., is concerned. As regards the first of the two objections there is not sufficient material before me to say whether in fact a finding in writing has been recorded. As regards the second, no authority has been cited to me which justifies the view that the second complaint was incompetent. I do not propose, however, to discuss these two points any further or to come to any definite finding on them, because they seem to me to be points which should be raised first before the Magistrate. So far as I can discover no objection whatever has been taken as yet before the Magistrate on either of these two grounds. That being so, I do not consider that they should be dealt with in revision now. I therefore dismiss this application.

P.N./R.K.

Revision dismissed.

1930 Cr. Cases 590

(Rangoon)

BAGULEY, J.

U Ka Doe—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 439-B of 1929, Decided on 6th November 1929, from order of Seventh Addl. Magistrate, Tharrawaddy, in Criminal Regular No. 13 of 1928.

(a) Penal Code, 405—Scope.

Section 405 refers only to moveable property: 28 Cal. 372; 6 Bom. H. C. Cr. 83 and 88 Cal. 758, *Foll.* [P 591 C 2]

(b) Penal Code, S. 20—Scope.

Standing teak trees must be held to be immovable property [P 591 C 2]

(c) Criminal P. C., S. 238—Person having license to fell aule-nath at teak trees only but Range Officer marking growing trees and allowing them to be felled—Officer charged under S. 409, I. P. C., and found guilty under S. 409 or S. 427, I. P. C., and convicted—Alternative conviction is bad.

A person had a license to fell only aule-nath at teak marked by a Forest Range Officer. But the Range Officer marked certain growing teak trees and allowed them to be felled by the

licensee. The Officer was charged under S. 409, I. P. C. The Magistrate found him guilty of an offence under S. 439, Penal Code or an offence under S. 427, I. P. C. and convicted him.

Held: that alternative conviction under S. 427, I. P. C. was bad inasmuch as mischief is not a minor form of criminal breach of trust but is quite distinct from it. [P 591 C 2]

(d) Penal Code, S. 425—Scope.

Intention to cause wrongful loss or damage is an essential for the offence of mischief.

[P 591 C 2]

Ba Han—for Applicant.

Baguley, J.—The applicant, U Ka Doe, is or was Forest Range Officer of Sitkwin Range Tharrawaddy Forest Division. One Po Thi got a free grant for ten tons of aule-nathat teak timber for construction of a kyaung. The condition of the license was that he was permitted to fell ten tons of aule-nathat teak marked by Range Officer, Sitkwin, that is, U Ka Doe, in Sitkwin Unclassed Forest. The procedure was that first of all U Ka Doe had to mark the teak trees in order that the free licensee-holder should fell them. After the trees were felled, the trunks were cut into logs and measured and the free hammer mark had to be put upon them. The Magistrate has found as a fact that instead of the teak trees so marked and felled being aule-nathat trees they were growing teak trees. He has charged U Ka Doe under S. 409, I. P. C.:

"That you on or about the month of Waso 1290 B. E., at Sitkwin, being a public servant in the employment of Government, namely a Forest Ranger, and in such capacity entrusted with certain property, to wit teak trees committed criminal breach of trust in respect of the said property."

After this charge had been framed, the accused entered upon his defence and in the end the learned Magistrate found him guilty of an offence under S. 409, I. P. C., or an offence under S. 427, I. P. C. He then sentenced U Ka Doe to six months' rigorous imprisonment. On appeal to the Sessions Judge, the conviction was upheld, but the sentence was reduced to the term of imprisonment already undergone and a fine of Rs. 300 or in default three months' rigorous imprisonment. There were other accused in this case, but their fate is of no importance in the present matter.

The first point to be considered is whether the applicant could possibly have been convicted under S. 409, I. P. C.

in connexion with standing teak trees. The general current of authority is that S. 405, in which criminal breach of trust is defined, can only refer to moveable property: vide *Jugdawn Sinha v. Queen-Empress* (1), which followed *Reg. v. Girdhar Dharamdas* (2). The same opinion has also been expressed in *Queen-Empress v. Bhagu* (3) and *Durga Tewari v. Emperor* (4). In the last mentioned case, the accused was entrusted with a standing crop of paddy which he reaped as soon as it was ripe, but nevertheless it was held that S. 405 could not apply to his offence.

In the present case it is hardly necessary to decide whether a Range Officer is to be regarded as entrusted with the teak trees throughout the whole of his range or with dominion over those teak trees, for those teak trees must be held to be immovable property in the form in which they are entrusted to him and, therefore, he cannot be held to be guilty of criminal breach of trust in respect of them.

The alternative conviction under S. 427, I. P. C., I must also regard as bad. In the first place, there was not an alternative charge under S. 427 of mischief. The applicant has not been given any chance of defending himself with regard to the allegation of mischief. Mischief is not a minor form of criminal breach of trust. In fact the offence of mischief is quite distinct from criminal breach of trust and, most important of all, there is no allegation that Government has been put to any loss owing to the marking or cutting down of these teak trees, and the causing of wrongful loss or damage and intent to cause wrongful loss or damage is an essential for the offence of mischief.

It seems to me that the accused has been tried with the Magistrate's view at an entirely wrong angle. On the allegation which has been held to be proved, it would have been perfectly simple to have charged, him under the Forest Act and Rules, but for some reason which is not apparent the prosecution have chosen to take their stand on the Indian Penal Code. It is impossi-

(1) [1896] 23 Cal 372.

(2) 6 Bh. C. C. 33.

(3) Rat Un, Cr. C. 928.

(4) [1909] 36 Cal. 753=3 I. C. 182=10 Cr. L. J. 353.

ble, if I accept the facts put forward for the prosecution as proved, to convict the applicant under the Forest Act and Rules, because he has not been charged under these and has not been given any opportunity of putting up a defence which might meet a charge under the Forest Act. The applicant I am told, is an elderly man at the end of his service with the Forest Department and he has spent some time in jail and undoubtedly been put to a very great deal of expense in carrying this case through the Courts. It may be that he has been sufficiently punished for anything that he may have committed. I, therefore, set aside the conviction and sentence but make no order for a re-trial. The fine will be refunded. Whether further charges are brought under the Forest Act must lie with the authorities concerned.

P.N./R.K. *Conviction set aside.*

1930 Cr. Cases 592 (Lahore)

ZAFAR ALI, J.

Gansham Das—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Misc. Petn. No. 9 of 1930, Decided on 14th February 1930.

Criminal P. C., S. 215—Where there is no evidence to support order of commitment, commitment must be quashed.

Where there is no evidence to support an order of commitment, the commitment must be quashed because absence of evidence is a question of law and not of fact: 5 C. W. N., 411: 9 C. W. N. 829; 6 All. 98 and 33 All. 29, *Ex l.* [P 592 C 2]

Moti Sagar and *Har Gopal*—for Petitioner.

D. R. Sawhney—for the Crown.

Order.—This is an application under S. 215, Criminal P. C., to quash a commitment. The petitioners are Mt. Ram Devi, a widow, Gansham Das, alleged to be her paramour, and Mt. Khemi Bai, her maid servant. All three have been committed for trial on a charge of murder.

Mt. Ram Devi was delivered of a male child which was found to be dead soon after delivery. The medical officer who made the autopsy was of the opinion that the child did not breathe after birth, and that there were no signs to show that it had been killed. The only injury that he detected on the body was the swelling of the scrotum. He found the testicles in a normal condition.

There was nothing in his evidence to show that the death might have been caused by the injury to the scrotum. Thus there is no evidence as to the cause of the death. Further, there is no evidence as to who caused the injury to the scrotum. According to the prosecution theory, the persons who were present at the time of the birth of the child were the three petitioners as well as a daughter of Mt. Ram Devi and a son of Gansham Das accused. On the evidence on the record the case of these two persons i. e. the daughter of one accused and the son of another, could not possibly be distinguished from that of the accused, so that if there was no case against those two, there could be none against the accused.

The only circumstantial evidence in this case is that the child was an illegitimate one and had been begotten by the male accused and so he and the mother had presumably a motive for causing its death. But in the absence of all other evidence it cannot possibly be said that the child had been killed or that all three or any one of the accused had killed it. The committing Magistrate himself disbelieved the evidence that the cries of the child were heard after its birth. Thus there is no evidence whatsoever in support of the charge of murder against any one of the accused. On the other hand, the evidence is that no murder took place. The Calcutta, Allahabad and Burma High Courts have held that, where there is no evidence to support an order of commitment, the commitment must be quashed because absence of evidence is a question of law and not of fact: see *Jogeshwar Ghose v. Emperor* (1), *Sheo Bux v. Emperor* (2), *Empress v. Narotam Das* (3) and *Rustom v. Emperor* (4).

The learned counsel for the Crown has taken me through all the evidence on the record but is unable to show that there is any evidence direct or circumstantial, to support the charge against any one of the accused.

I, therefore, quash the commitment.

R.M./R.K. *Commitment quashed.*

(1) [1901] 5 C.W.N. 411.

(2) [1901] 9 C.W.N. 829.

(3) [1888] 6 All. 98 = [1888] A.W.N. 225.

(4) [1916] 33 All. 29 = 31 I.C. 817 = 13 A.L.J. 1043.

1930 Cr. Cases 593

(Lahore)

AGHA HAIDAR, J.
Atam Parkash—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Case No. 200 of 1930, Decided on 21st February 1930, on report by Sess. Judge, Lahore on D/- 27th January 1930.

Criminal P. C., S. 263 (h) — Besides brief summary of evidence if trial ends in conviction concise statement of reasons showing presence of ingredients necessary to complete offence should be given — Where such evidence and reasons are not given, order is illegal.

Though it is true that in summary trials the judgment need not be very long, yet it is the duty of the Magistrate to give a brief summary of the evidence and a concise statement of the reasons if the trial ends in a conviction. These safeguards are essential so that in the case of revision, the High Court may have sufficient material or arriving at the conclusion as to whether the order of the Magistrate is right or wrong. Further, the Magistrate must give reasons which would show that there was evidence to prove the ingredients necessary to complete the offence of which the accused is convicted: 18 *Bom.* 97 and 10 *A. L. J.* 251, *Foll.*

Where therefore a Magistrate does not at all mention any act of the accused which in his opinion constitutes an offence under S. 34, Police Act of 1861, and does not record the evidence in brief, his order convicting the accused should be set aside. [P 593 O 2; P 534 O 1]

The facts of this case are as follows:

Facts.—The accused and several persons whose cases have also been reported for revision were arrested by the police for being riotous in front of the Lahore Central Jail on 25th November 1929. They were all placed before a Magistrate on the same day, who after trying them summarily convicted and sentenced each of them to a fine.

Report.—The proceedings are forwarded for revision on the following grounds:

The evidence against the accused and the other persons consists of the statement of an Inspector of Police and one other person to the effect that the accused was riotous, but there is nothing to show as to what particular behaviour on the part of accused and the other persons constituted their conduct being riotous. There is also nothing in the evidence to show that in being riotous the accused and the other persons were causing obstruction, inconvenience, annoyance, risk, danger, or damage to the residence or passengers, in the locality. According to S. 34, Police

Act, the commission of any of the offences specified in the eight clauses of the section must be accompanied by one or other of the elements mentioned above. In the record of the summary trials, there is nothing, whatever, to show that any of these ingredients was present at the time of the alleged riotous behaviour. Further, the imperative provisions of S. 263, Criminal P. C., have not been complied with, as the learned Magistrate has quite failed to arrive at a finding and record a brief statement of the reasons for convicting the accused. The heading under Cl. (h), S. 263, is as follows:

"The finding and in the case of a conviction a brief statement of the reasons therefor,"

but instead of this heading, there is in the record of each of the trials, a heading "statement of the parties" one which finds no place in S. 263. It was further urged before me that the accused and the other persons were afforded no opportunity of producing their defence and there is nothing on the record to show that the accused did not avail themselves of this right. The procedure which should have been followed in these trials is that prescribed for summons cases (vide S. 262) and under S. 244 which relates to the trial of summons cases, the Magistrate is required to hear the accused and take all such evidence as he produces in his defence. The proceedings, in my opinion, have not only been much too summary, but have not been held in accordance with law and in this connexion I would refer to *Mehtub v. Empress* (1) and the remarks of Straight, J. and Knox, J. as quoted in note (c) on p. 650, of Sohoni's, Criminal P. C., 12th Edition.

For the above reasons I would recommend to the Hon'ble High Court that the conviction and sentence of the accused be set aside and the fine, if paid, be refunded.

Order of the High Court:

Order.—The order of the trying Magistrate cannot stand. It is contrary to every recognized rule of law and procedure. It is true that in a summary trial the judgment need not be a very long and detailed one but it is the duty of the Magistrate to give a brief summary of the evidence and a concise statement of the reasons if the trial

(1) [1887] 7 P.R. 1887 Cr.

ends in a conviction. These safeguards are essential so that in case of revision the High Court may have sufficient materials on the record before it for arriving at the conclusion as to whether the order of the Magistrate is right or wrong. The language of the legislature itself is sufficiently clear and if any authority were needed for this elementary rule of procedure *Queen Empress v. Shidgauda* (2) may be quoted. Furthermore as observed in *Brijbasi Lal v. Emperor* (3) the Magistrate must give reasons which would show that there was evidence to prove the existence of the ingredients necessary to complete the offence of which the accused is convicted.

Here the Magistrate does not at all mention any acts of the accused which, in his opinion, constituted an offence under S. 34, Police Act 5 of 1861. These are matters which ought to be present before the mind of every Magistrate when he is trying cases summarily; otherwise there is a danger of the summary trial, which after all is a judicial proceeding, being converted into a drum-head court-martial.

I accept the recommendation of the learned Sessions Judge and setting aside the conviction of the accused order that the fine, if paid, be refunded.

R.M. R.K., *Order accordingly.*

(2) [1894] 18 Bom. 97.

(3) [1912] 10 A.L.J. 251=16 I.C. 516=18 Cr. L.J. 708.

* 1930 Cr. Cases 594

(Lahore)

ZAFAR ALI AND FFORDE, JJ.

Amin Lal—Complainant—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1158 of 1929, Decided on 10th February 1930.

* (a) Criminal P. C., S. 250—S. 250 is not applicable to offences ordinarily triable by Court of Session—Order of Magistrate awarding compensation in respect of offence triable by Sessions Court is without jurisdiction.

The words "offence triable by a Magistrate" in S. 250 relate to an offence which is shown as triable by a Magistrate in Col. 8 Sch. 2 Criminal P. C. [P 515 C 1, 2]

Section 250 is not applicable to offences triable by a Court of Sessions according to Col. 8, Sch. 2. An order by a Magistrate awarding compensation in respect of accusation under S. 477 P. C. (the offence not being triable by a Magistrate according to Sch. 2) is without jurisdiction; 14 P. R. 1902 Cr.; 21 W. R. 1910 and 1 Bur. L. J. 38 Ref: 15 P. R. 1919 Diet, [P 595 C 2]

* (b) Criminal P. C., S. 250—Two false accusations—One of offences triable by Court of Session and other of offence triable by Magistrate under S. 30—Magistrate awarding compensation in respect of both offences—Apportionment not possible—Order being bad for uncertainty should be set aside.

Where a complainant brings two false accusations, one of an offence triable by a Magistrate and the other triable by a Court of Session, and the Magistrate with powers under S. 30 finds both to be false, he is competent to award compensation only in respect of offences triable by Magistrate. But if compensation is awarded for both kinds of offences and it is not possible to apportion the amount so awarded between the two, the order is bad for uncertainty and must be set aside as a whole. [P 595 C 2]

B. S. Puri and R. C. Soni—for the Crown.

Facts.—Amin Lal brought a complaint against Jagat Narain and Shiv Narain under Ss. 477 and 323 I. P. C. Summonses were issued to them under these sections, prosecution evidence was recorded and thereafter the trial Magistrate on 16th April 1929 passed an order discharging the accused and calling on the complainant to show cause why he should not pay compensation to each of the accused under S. 250, Criminal P. C. On 31st May 1929 he passed a supplementary order awarding 25/- compensation to each of the accused. This petition for revision is against the order dated 31st May 1929.

Reference order. One of the offences alleged was one under S. 477, I. P. C. exclusively triable by a court of Sessions; S. 250, Criminal P. C. expressly refers to offences triable by a Magistrate. *Mohamed Hayat v. Bhoia* (1) A. I. R. 1921 Rangoon 15; 14 P. R. 1902 and *Emperor v. Qundus* (2) are all cases in which it was held that when a Magistrate invested with S. 30 powers tries a case ordinarily triable by a Court of Sessions he is not empowered to award compensation under S. 250, Criminal P. C.

A. I. R. 1926 A. 11. 159 establishes the same principle and further shows that there is no distinction introduced in cases where the alleged offences are several in number and some only are exclusively triable by a Court of Sessions.

In the face of these rulings I must hold that the trial Magistrate had no power to award compensation; I have been taken through the evidence by counsel for petitioner and find no reason to dis-

(1) [1919] 1 P. R. 1919 Cr.=49 I. O. 178=20 Cr. L. J. 141.

(2) [1907] 26 P. R. 1902 Cr.

agree with the trial Magistrate's finding that the accusations made were false and vexatious; it would appear that, with the law as it now stands, a complainant can avoid the consequences of instituting a false and vexatious complaint by adding a false and frivolous accusation of an offence triable only by Court of Sessions.

As I consider that the order dated 31st May 1929 awarding compensation against the petitioner is one contrary to law I report the case for the orders of the High Court under S. 438, Criminal P.C.

Zafar Ali, J.—The question for our determination is whether the order of the Magistrate in this case under S. 250, Criminal P. C., awarding compensation to the accused against whom a complaint under Ss. 477 and 323, I. P. C., was found to be false is legal, or is illegal in part or as a whole.

An offence under S. 477, I. P. C., is triable by a Court of Sessions, but the Magistrate in this case had jurisdiction to try it as he was empowered under S. 30, Criminal P. C., to do so. Mr. Soni, who appears for the Crown, contends that S. 250, Criminal P. C., makes no distinction between a Magistrate empowered, under S. 30 and one not so empowered, and he argues that an offence shown in Col. 8, Sch. 2, Criminal P. C., as triable by a Court of Sessions should be deemed to be triable by a Magistrate for the purposes of S. 250 where it has actually been tried by a Magistrate with S. 30 powers. This argument is seemingly plausible, because the term 'Magistrate' in the expression 'an offence triable by a Magistrate' which occurs in S. 250, would seem to be applicable to any Magistrate whether empowered under S. 30 or not. But in the light of the phraseology of Sch. 2, it appears repugnant to the general sense of that expression to interpret the word "Magistrate" there in its wider significance, and it has never been so interpreted. Mr. Soni confessed that he could cite no authority in support of his contention. On the other hand the rulings on this point are all against him: see 14 *P. R.* 1902 (*Cr.*) which was followed in 26 *P. R.* 1902 (*Cr.*) 1 *P. R.* 1919 (*Cr.*); 21 *Weekly Reporter* 1910, and *Burma Law Journal*, 38. In all these cases it was held that the words 'an offence triable by a Magistrate' in

S. 250 relate to an offence which is shown as triable by a Magistrate in Col. 8, Sch. 2, Criminal P. C. An offence under S. 477 not being triable by a Magistrate according to that schedule the Magistrate's order awarding compensation in respect of accusation of that offence was without jurisdiction.

Next comes the question whether it is a case where the complainant brings two false accusations, one of an offence triable by a Magistrate and the other of one triable by a Court of Sessions, the Magistrate is competent to award compensation in respect of the former though he cannot do so with regard to the latter. In my judgment the answer to this question must be in the affirmative as S. 250 would clearly apply to one accusation though not to the other. The Magistrate could have done so in the present case, but his order covers both the accusations and it is not possible to split up the compensation awarded for both the accusations jointly and to assign a portion of it to one accusation and the balance to the other. The order is therefore unenforceable in respect of either accusation on account of uncertainty and must be set aside.

In 15 *P. R.* 1919, also, there were two accusations of which one was of an offence triable by a Court of Sessions, and in the reference to the Chief Court made in that case two illegalities were pointed out: (1) that S. 250 was not applicable to that offence and (2) that the amount of compensation awarded was in excess of that which could be awarded under S. 250. A single Judge of the Chief Court reduced the amount but said nothing about the other illegality. That case therefore affords no evidence on the question now before us.

In view of what has been stated above the conclusions to which I arrive are (1) that S. 250 is not applicable to offences triable by a Court of Sessions according to Cl. 8, Sch. 2, Criminal P. C. (2) that where a complainant brings a joint accusation of both classes of offence and the Magistrate with S. 30 powers finds both to be false he is competent to award compensation only in respect of offences triable by a Magistrate, and (3) that if compensation is awarded for both kinds of offences and it is not possible to apportion the amount so awarded between the two, the order is bad for

uncertainty and must be set aside as a whole. In the present case the Magistrate has made no such distinction and his order must therefore be set aside.

B.M./R.K.

Order set aside.

* 1930 Cr. Cases 596

(Lahore)

FFORDE AND ADDISON, JJ.

Basant Singh—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1119 of 1929, Decided on 20th January 1930, against order of Sess. Judge, Amritsar, D/- 2nd November 1929.

* (a) Criminal P. C., S. 162 — Police officer can explain his conduct.

Section 162 does not prevent a police officer from explaining his conduct in sending up a particular set of accused persons for trial by making a report that he had received no information to such and such effect: *A.I.R. 1929 Cal. 298, Foll.* [P 597 C 1]

(b) Criminal Trial — Court should not make use of police diaries.

In a criminal trial the Court should not make use of police diaries. [P 597 C 1]

Jai Gopal Sethi and *Harbans Singh*—for Appellant.

R. C. Soni—for the Crown.

Addison, J.—Basant Singh, son of Mewa Singh, appellant, has been sentenced to death under the provisions of S. 302, I. P. C., for the murder of Mt. Bachni, the infant daughter of his brother Hardit Singh, on the evening of 15th August 1929.

Mt. Raj Kaur is the widow of Dewa Singh the uncle of the appellant. Mt. Bishan Kaur is the widow of Pal Singh, a collateral of Dewa Singh and Mewa Singh. Relations became strained between Mt. Raj Kaur and Mt. Bishan Kaur for various reasons and Mt. Bishan Kaur was supported by Mewa Singh and his sons, including the appellant. Mt. Raj Kaur was preventing Mt. Bishan Kaur from going to her room on the roof through the courtyard and accordingly on the morning of 15th August the sons of Mewa Singh came with earth loaded on donkeys, apparently in order to build a wall in the courtyard so as to allow Mt. Bishan Kaur a passage which could not be interrupted by Mt. Raj Kaur. Mt. Raj Kaur objected and there was a scuffle. Thereafter Mt. Raj Kaur and her son Darbara Singh proceeded to the police station and made a report about this occurrence at 1 P.M. When she and

her son returned in the evening they discovered that a kacha wall had been built in the courtyard in their absence. This they proceeded to demolish at once, an easy task as it was made of wet mud. The appellant Basant Singh arrived on the scene with his brother Hardit Singh, while Mt. Bishan Kaur and Mt. Labh Kaur, wife of Hardit Singh, looked on from the roof. Apparently the two brothers, Basant Singh and Hardit Singh, lost their tempers and Hardit Singh called out to his wife on the roof to throw the child down. His wife did nothing but Mt. Bishan Kaur, for whom the wall had been built, took the infant out of Mt. Labh Kaur's arms, brought it down to the courtyard and flung it at, or to, Mt. Raj Kaur who at the time was seated on the demolished wall. Basant Singh struck Mt. Raj Kaur's arm when she had the child in her arms and she therefore handed it to her daughter, Mt. Dalip Kaur. Basant Singh attacked Mt. Dalip Kaur and she took the child on to the roof and made her over to Mt. Pritam Kaur, a neighbour who was there. Basant Singh, the appellant, followed on to the roof, but Mt. Pritam Kaur refused to give the child up. She only gave her up on Mt. Labh Kaur's saying that it was no concern of hers. Thereupon Basant Singh seized the child by the legs, battered its head against the parapet of the roof and flung it down into the courtyard. After this Hardit Singh, the father of the child, went to the police station and reported that Mt. Raj Kaur in consequence of the dispute over the wall commenced flinging bricks and that one of the bricks struck the child and killed her. Mt. Raj Kaur did not go to the police station but sent telegrams reporting the occurrence.

The case for the prosecution is made out by Mt. Raj Kaur, her son Darbara Singh, her daughter Mt. Dalip Kaur, by Mt. Pritam Kaur, who has already been referred to, and by two *Sud* residents of the village, Dial Chand and Mulkh Raj. It is also supported, though in a halting fashion, by Pal Singh, a *Jat* of the village. Labh Singh, on the other hand, supports the defence story, but the learned Sessions Judge has given good reasons for rejecting his testimony. As against this evidence the appellant examined no witness in his defence.

The learned Sessions Judge has made use of the police diaries and he should not have done this. The principal use he made of them was to see when the various witnesses were examined and this he could have ascertained by questioning the various investigating officers. Without making any use of these diaries I hold that the guilt of the appellant has been clearly established. The investigating officers stated that nobody came forward before them to support the defence theory that a brick had been thrown by Mt. Raj Kaur and that this killed the child. It appears to me that S. 162, Criminal P. C., does not prevent a police officer from explaining his conduct in sending up a particular set of accused persons for trial by making a statement that he had received no information to such and such effect. This view was taken by a Division Bench of the Calcutta High Court: see *Tota Meah Chaudhuri v. Emperor* (1).

Mt. Raj Kaur impressed the Sessions Judge when she was giving her evidence and he stated that he was satisfied that her evidence was true. She appeared to him to be a woman of determined character whom the appellant and his family found considerable difficulty in overruling. There is also no reason why the two *Sud* witnesses, who have nothing to do with the parties, should be disbelieved. On the evidence I have no hesitation in holding that the appellant in a frenzy of passion because of the resistance of Mt. Raj Kaur deliberately killed the infant daughter of his brother with the intention of implicating Mt. Raj Kaur. I would, therefore, maintain his conviction for murder punishable under S. 302, I. P. C.

The question of sentence is a difficult one. At first sight the crime appears to be one of a very brutal type but it is not a case of deliberate murder. It is a case where the appellant in a fit of frenzy at the resistance of Mt. Raj Kaur when he was scarcely a reasoning animal, seized the infant and killed her. In these circumstances, and especially as such crimes are not common, I would accept the appeal to the extent of reducing the sentence to transportation for life.

Fforde, J.—I agree.

R.M./R.K.

Order accordingly.

(1) A.I.R. 1929 Cal. 298=56 Cal. 1106.

1930 Cr. Cases 597

(Lahore)

TAPP, J.

Dhanwant Singh and another—Convict—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 138 of 1930, Decided on 31st March 1930, against order of Sub-Judge, Ludhiana, D/- 14th January 1930.

Penal Code, S. 34—Where fight resolves into single combat and results in death and injuries principles of joint responsibility do not apply.

Where a fight in response to a challenge resolves itself into two single combats and results in death of a person and injuries to the other the accused are individually responsible for their own act, there being no common intention but only single intention on the part of each of the accused to fight with his own opponent and the principles of joint responsibility provided for in S. 34 cannot be applied in such case. One accused cannot therefore be held responsible for the act of the other, [P 598-C 2]

Mehtab Singh—for Appellants.

R. A. Jermy for the Govt. Advocate—for the Crown.

Judgment.—Dhanwant Singh (24), Bhagwant Singh (21) and Balwant Singh (16), three brothers Jats of Chocke in the Ludhiana District were charged under S. 302/34, I. P. C. with murder, in respect of the death of Arjan Singh on 29th August 1929 and under S. 324/34, I. P. C., with having caused hurt to Bhag Singh, the elder brother of Arjan Singh at the same time. The learned Sessions Judge in agreement with the four assessors found Bhagwant Singh not guilty and acquitted him. In agreement with two of the assessors he convicted the appellants Dhanwant Singh and Balwant Singh under Cl. 2, S. 304 read with S. 34 and S. 324/34 and on both counts sentenced each to five years' rigorous imprisonment.

It appears that there was some ill-feeling between the two families over a wall and shortly before the occurrence there was a quarrel between the deceased and the two appellants and Bhagwant Singh over the trespassing of a camel into the fields of the deceased, who is alleged to have slapped Balwant Singh.

There are only two eyewitnesses of the subsequent occurrence Bhag Singh and Kishen Singh. According to the former he was cutting chart in his fields when Kishen Singh called out to

him that the deceased was fighting with the two appellants and Bhagwant Singh. Witness ran in the direction of the fight and saw the three brothers assailing the deceased with kassis. Deceased had fallen under the assault and when Bhag Singh reached the spot he found his brother was dead. Balwant Singh caught witness by the hair and the other two brothers struck him with their kassis and knocked him senseless.

Kishen Singh on the other hand tells a somewhat different story. He was grazing his mare at a distance of some 50 or 60 karms from the spot when he saw the deceased pick up two kassis from the spot from a field and heard him shout out a challenge. Bhag Singh joined the deceased, arming himself with the second kassi and on the two appellants arriving on the scene a fight ensued between these four persons, Dhanwant Singh versus Bhag Singh and Balwant Singh versus the deceased. In cross-examination Kishen Singh made it appear that the two appellants at first ran away from the deceased and his brother, who pursued and overtook the appellants who then turned and opposed the deceased and Bhag Singh.

It was on this part of the evidence of Kishen Singh that the appellants apparently based a plea as to the right of private defence. The learned Sessions Judge did not accept the evidence of either Bhag Singh or Kishen Singh in its entirety on the ground that the former was exaggerating the case against the appellants while the latter was trying to favour them. On the medical evidence he arrived at the conclusion that there was a standup fight between the deceased and Balwant Singh on the one part and Bhag Singh and Dhanwant Singh on the other. He impliedly rejected the plea as to the right of private defence, which has again been urged before me, and after giving the case and the arguments of the learned counsel for the appellants my careful consideration I agree with the view taken by the learned Sessions Judge of the affair. The post-mortem examination which was held on 1st September when the body was in an advanced stage of decomposition disclosed a bruise on the right ear and another above and behind the left ear. Five of the upper front

teeth had been completely fractured as were also the right and left temporal bones.

Bhag Singh bore no less than 12 injuries of which two were incised wounds; Dhanwant Singh bore 4 injuries one of which was an incised one on the head and Balwant Singh sustained 5 injuries all due to a blunt weapon. In the case of each of these three persons the injuries were simple in nature. In my opinion it has been established by the evidence that in response to a challenge by Arjan Singh there was a fight between him and his brother on one side and the two appellants on the other, which resolved itself into two single combats or duels between the deceased and the appellants Balwant Singh and Bhag Singh and Dhanwant Singh respectively. Each of the combatants was armed with a kassi of which the cutting edge was used by Bhag Singh and Dhanwant Singh and the blunt side or socket and by the deceased and Balwant Singh. The absence of incised wounds on their persons in the case of the two latter would not necessarily indicate the kassis were not used by them. This implement is just as, if not more, effective when used as a weapon of offence with the cutting edge uppermost. The plea as to the right of private defence is I consider untenable and has not been borne out by the evidence. The testimony of Kishen Singh as to the two appellants having been pursued by the deceased and Bhag Singh is I think unreliable to this extent. On the above findings S. 34, I. P. C. will not apply and in the circumstances Balwant Singh cannot be held responsible for the act of Dhanwant Singh in causing hurt to Bhag Singh nor can Dhanwant Singh be held liable for the act of Balwant Singh resulting in the death of Arjan Singh. Each appellant is individually responsible for his own act and in my judgment it is not possible to apply the principle of joint liability provided for in S. 34. There was no common intention in the present case, but a single and individual intention on the part of each appellant to fight with his own opponent. For instance A and B two brothers challenge C and D two others to a duel owing to a common cause of quarrel. A kills D and B slightly injures C. Can B be held

jointly responsible for the death of D and A for causing hurt to C? I do not think so, as the only intention which is common is to have a combat each with his own opponent.

For the above reasons I would partly accept the appeal and set aside the conviction of Balwant, Singh under S. 324 and that of Dhanwant Singh under S. 304 (2). I affirm the conviction of Balwant Singh under Cl. (2), S. 304 for causing the death of Arjan Singh and also the sentence which is by no means severe in view of the weapon used and the force employed. The conviction of Dhanwant Singh under S. 324 for causing hurt to Bhag Singh is also affirmed but the sentence is reduced to two years' rigorous imprisonment.

R.M./R.K. *Order accordingly.*

1930 Cr. Cases 599

(Patna)

ADAMI AND SCROOPE, JJ.

Bhagwan Das Bhagat—Accused—Appellant.

v.

Emperor—Opposite Party.

Death Ref. No. 3 of 1930, and Criminal Appeal No. 22 of 1930, Decided on 11th February 1930, made by J. C., Chota Nagpur, on 17th January 1930, and from his decision, D/- 15th January 1930 respectively.

Criminal Trial—Retracted confession—It is not absolute rule of law that retracted confession cannot be accepted without corroborative evidence—But where corroborative evidence does not show beyond reasonable doubt that accused is guilty he should be given benefit of doubt—Evidence Act, S. 114.

A retracted confession must be supported by independent and reliable evidence corroborating it in material particular, but it cannot be laid down as an absolute rule of law that a confession made and subsequently retracted cannot be accepted as evidence of guilt without independent corroborative evidence. But where the corroborative evidence is insufficient to show beyond reasonable doubt that the accused had committed the murder the accused should be given the benefit of doubt.

[P 601 C 1, 2]

B. C. De for Appellant.

Asst. Govt. Advocate—for the Crown.

Adami, J.—The appellant, *Bhagwan Das Bhagat*, has been found guilty of the murder of his brother Mahabir alias Nunoo Bhagat, by the Judicial Commissioner, Chota Nagpur, and has been sentenced to death. The sentence comes before us for confirmation.

On 4th October last, at dawn the chaukidars, Motid Ghatwar and Budhna were returning from their rounds in village Bagodar Dih when they heard from the appellant and two other men that there was a dead body floating in the tank of Anant Lal. They went to the tank and saw the dead body of a man floating in the water. While Budhna stayed behind to keep watch, Motia went to the police station and gave information at 7 a. m. The Sub-Inspector recorded an information of an unnatural death, and went off to the tank. He had the body taken out of the water in the presence of P. W. 11 and P. W. 12 and others, who identified it as that of Mahabir. It was in a very decomposed state. The upper half of a grindstone was found tied to the body by a rope round the chest, and a gamcha was tied round the neck. An inquest report was drawn up and the body was sent to Hazaribagh for post mortem examination.

The Sub-Inspector then went to Mahabir's house where, on a charpoy in the verandah, he found a bloodstained lendra and a torn pillow. There were drops of blood on the floor leading from the charpoy to the back door which opened towards the bari, adjoining which is the tank where the body was found. Bhagwan Das, the appellant was questioned and stated that he had last seen Mahabir on Sunday the 29th September. He thought that Mahabir might have gone to his father-in-law's house at Dumri. Ram Charitar, the son of the appellant was also questioned, but gave no information, nor did the wife of the appellant. Bhagwan's house was searched but nothing incriminating was found. The Sub-Inspector, however, had some suspicion against him because he knew that Bhagwan had laid an information at the police station in June in which he said he suspected Mahbir to be the thief, and because there had been a quarrel between the two men who were brothers.

On 5th October, Saturday, Bhagwan made a statement to the Sub-Inspector and took him to his bari where, from a heap of manure he took out a gilaf (wrapper). It showed signs of having been burnt and had stains of blood on it. Bhagwan was arrested and sent to the jail at Hazaribagh on 6th. On 11th

October Bhagwan made a confession before the Magistrate.

The confession was a very full one. It told how eight years before the two brothers and a nephew had divided the family inheritance, how Mahabir had encumbered his share and had tried to trick Bhagwan in conspiracy with one Iswar in an exchange of lands leading to a complaint by Bhagwan which was unsuccessful, how in February 1929, Mahabir executed a deed of gift of his lands in favour of Bhagwan and his son Ramcharitar, the agreement being that Bhagwan was to feed and maintain his brother; how Mahabir, at the instigation of Iswar, stole from Bhagwan's house a box containing a deed of a sale by Iswar to Bhagwan, and information was given at the police station, and how on 19th July 1929 Mahabir, on the ground that he had not been fed and maintained as agreed, executed a deed cancelling the deed of gift executed in February.

The confession proceeds to relate how on the 29th September while Bhagwan was away, Mahabir went to a field which he had transferred to Bhagwan and cut and took away the marua crop from it. When Bhagwan got home in the evening his son told him what had happened and he was very angry. At about 10 p. m. he went to the shop of one Madho and there met Chaman, Raghunath and Jungli. He told them what had happened and they, relating their experience of transactions with Mahabir, agreed that he must be put out of the way. The five men went to Mahabir's house and finding him in the verandah took his gamcha and twisted it round his neck and strangled him. While Raghunath twisted the gamcha round Mahabir's neck, Bhagwan helped by holding Mahabir's hand. Then they took Mahabir's body to the tank, fastened a grindstone by a rope to the chest and threw the body into the tank. They burned Mahabir's cloth on the bank, but when they tried to burn his wrapper also, but finding it made too much light and might attract attention, Bhagwan buried it under a manure heap.

At the inquiry before the committing Magistrate Bhagwan denied that he had killed Mahabir and said that the Sub-Inspector had beaten him and told him he would be made an approver,

and so he had made the confession for fear of his life. The appellant's son, Ramcharitar, deposed before the committing Magistrate that on 29th when Bhagwan returned home at 6 p. m. he Ramcharitar, had told his father that Mahabir had robbed his marua. At midnight the boy went out to make water, and when he was returning he saw Bhagwan, his father, with Ohumru, Jangli, Madoo and Raghunath killing Mahabir. He saw them through a hole in the wall. He was attracted to look through the hole by the noise he heard.

In the Sessions Court Bhagwan adhered to his denial made before the committing Magistrate, and denied that anything was recovered in his presence. Ramcharitar in his examination-in-chief stated that he did not know how Mahabir died and that he did not go out to make water and that what he had said before the committing Magistrate was induced by a beating and tutoring by the constable and chaukidar. He admitted that he had deposed as recorded by the committing Magistrate, and in answer to a question said, after hesitation that what he had deposed during the inquiry was true. Then in cross-examination he denied that Bhagwan was angry when he heard Mahabir had cut his marua, and said that he, Ramcharitar, had seen nothing and never had said he had seen anything. He had twice been examined by the Sub-Inspector, and on the first occasion told him he had seen nothing, and on the second occasion had told the Sub-Inspector that he had gone out with his mother, and had come back, shut the door and slept.

In spite of the fact that the appellant retracted his confession both before the committing Magistrate and in the Sessions Court, and that Ramcharitar, the only eyewitness of the actual murder according to the prosecution, resiled from his statement made before the committing Magistrate, the learned Judicial Commissioner had held that the retracted confession has been so corroborated that the guilt of the appellant has been proved, and the assessors too have expressed opinion that he is guilty.

The oral and documentary evidence shows satisfactorily that the relations between the brothers were not happy. It is proved that in April 1928 Bhag-

wan filed a complaint against Iswar asking for inquiry into an alleged fraudulent exchange of lands between Mahabir and Iswar to the detriment of Bhagwan, that on 22nd February 1929 Mahabir executed a deed of gift in favour of Bhagwan and his son, and then on 19th July 1929 cancelled the said deed of gift because Bhagwan had failed to feed and maintain him according to the agreement. It is true too that Bhagwan laid an information at the police station to the effect that he suspected that Mahabir had stolen a box containing some documents of his. Witnesses have shown too that on 29th in Bhagwan's absence Mahabir cut the marua in Bhagwan's field.

Therefore the confession has been corroborated in its account of the relations of the brothers up to the evening of 29th and the motive it supplies for the murder.

The grindstone found fastened to the body and the gamcha round the neck, as well as the production by Bhagwan of the wrapper with signs of burning on it corroborate the method of the murder and the disposal of the dead body given in the confession. The learned Judicial Commissioner has found that the fact that Bhagwan kept silent and gave no information that his brother was missing also points to his guilt. I do not, however, think that this is a strong point, for having regard to the illfeeling between the brothers Bhagwan would care little if his brother was absent.

The question is whether the corroboration of the retracted confession in this case is sufficient to fasten the guilt on the appellant.

A retracted confession must be supported by independent reliable evidence corroborating it in material particulars, but it cannot be laid down as an absolute rule of law that a confession made and subsequently retracted cannot be accepted as evidence of guilt without independent corroborative evidence. Is the corroborative evidence in this case sufficient to fasten the guilt on the accused without any reasonable doubt? As to the actual murder the only witness put forward by the prosecution is Ramoharitar and he has resiled from his statement. The learned Judicial Commissioner is inclined to rely on his state-

ment before the committing Magistrate but his evidence can hardly be held to be reliable and to corroborate the confession. He denied all knowledge of the occurrence when first examined by the police, and it was only three days after when his father had made a statement that he came forward and said he had seen the actual murder.

Bhagwan Das says he was induced to make the statement by the hope held out to him that he would be made an approver against the other men he mentioned as taking part in the murder. There is no evidence to corroborate his story that these men had enmity against Mahabir.

The medical evidence so far corroborates the confession that it shows that Mahabir was dead before his body was thrown into the tank. The medical evidence is to the effect that death was not due to drowning. But the body was so far decomposed that it was impossible for the Civil Surgeon to determine what the cause of death was. No wounds could be noticed nor could it be said definitely that death was due to strangulation. The finding of the gamcha twisted round the neck would appear to corroborate the story of strangulation in the confession, but the finding of blood on the bed and ground and on the wrapper of the deceased produced by Bhagwan before police points the other way. I can find no good reason for the presence of so much blood, if strangulation was as shown by the confession, the cause of death.

It may well be that Bhagwan had enmity with Mahabir and this was the cause why Bhagwan was suspected. There can be no doubt that the suspicion against him is very strong, but, in the light of the fact that he has retracted his confession and that Ramcharitar has resiled from his statement implicating Bhagwan I am very doubtful whether the fact that Bhagwan produced the wrapper of Mahabir and made a confession implicating other persons after the body had been discovered with a gamcha fastened round the neck which confession has afterwards been retracted is sufficient to show beyond reasonable doubt that Bhagwan caused the death of Mahabir.

I would, therefore, give him the benefit of the doubt and acquit him.

Scroope, J.—I agree.

R.M./R.K. *Conviction set aside.*

1930 Cr. Cases 602

(Lahore)

ADDISON AND HILTON, JJ.

Sewa Singh—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 39 of 1930, Decided on 20th March 1930.

(a) Criminal Trial—Evidence—No sufficient motive for murder shown—Failure of prosecution to establish additional motive is not fatal defect in prosecution case—Penal Code, S. 302.

Where no sufficient motive for the assault on the deceased is shown the mere fact that the prosecution does not establish any additional motive for the assault cannot be taken as a fatal defect in the prosecution case. The accused may be the only surviving person knowing the cause of enmity with the deceased and the failure of the prosecution to elicit it is not a sufficient reason to disbelieve the eye-witnesses. [P 602 C 2; P 603 C 1]

(b) Penal Code, S. 302—Best criterion of force and character of blow is result which it effects—Person striking with weapon like lathi on vulnerable part of body as head must be deemed to have intended to cause injury as he knew was likely to cause death.

The best criterion of the force and character of a blow is to regard the result which it has effected. A person delivering a violent blow with a lethal weapon like a lathi on a vulnerable part of the body as the head must be deemed to have intended to cause such bodily injury as he knew was likely to cause the death of the person to whom the injury was caused: *A.I.R. 1928 Lah. 93, Rel. on; 5 P.R. 1893 Cr. and 9 S.L.R. 99, Dist.*

Where, therefore, there are no indications that the accused dealt any other kind of blow or to cause any other sort of injury he can be held guilty under S. 302. [P 603 C 1]

Nand Lal—for Appellant.

Des Raj Sawhney—for the Crown.

Hilton, J.—*Sewa Singh* appeals against his conviction under S. 302, I. P. C., and sentence of transportation for life for the murder, on 22nd September 1929, at Ajitwal, in the district of Ferozepore of *Pala Singh*.

Pala Singh died from extensive fracture of the right parietal bone of the skull caused by a blow from a blunt weapon such as a lathi. He had a swelling on the right side of his head three inches above the right ear. There was also a skin deep contusion on the left side of the front of the head which may have been caused by the same blow

as the injury on the right side of the head, or in the alternative may have been caused by a fall after receiving the said blow.

Four eyewitnesses appeared for the prosecution and described the affair. They are *Sham Singh* (P. W. 4), *Ramzan* (P. W. 5), *Umer Din* (P. W. 7) and *Amar Singh* (P. W. 8). According to the account given by them *Sham Singh* (P. W. 4) and the deceased *Pala Singh* were proceeding along the village lane in one direction and were met by the appellant *Sewa Singh*, accompanied by one *Ganda Singh*, coming in the opposite direction. The appellant is said to have had a lathi and with his lathi he struck a blow on the head of *Pala Singh* which resulted in the latter's death.

There was also a witness named *Mt. Fatti* whose evidence corroborates the fact that *Sham Singh* (P. W. 4) and *Pala Singh* deceased were in each other's company just before the occurrence.

The defence was that the appellant did not strike the deceased and that the prosecution witnesses are inimical to the appellant and have told a false story on that account. No defence evidence was called.

There is no very clear motive for the crime, but *Mt. Khemi* (P. W. 9), the mother of the deceased, related that the appellant had a grudge against the deceased an account of his suspicion that the deceased had stolen a hen some three weeks earlier. When the deceased had offered to pay for the hen the appellant is said to have abused him and refused to accept such payment. The Sessions Judge has believed that there was such a quarrel about a hen but that it was not followed by any other dispute during the three weeks that intervened before the death of *Pala Singh* and that by itself it does not afford a sufficient motive for the assault upon *Pala Singh*. This view is, in my opinion, correct, but the fact that the prosecution have not established any additional motive for the assault cannot be taken as a fatal defect in the prosecution case. If there was any other cause of enmity between the appellant and the deceased it was not necessarily known to any other person than these two and as *Pala Singh* is dead it may be that the appellant is the only surviving person who is aware of such a matter

and the failure of the prosecution to elicit it is not a sufficient reason for disbelieving the eyewitness.

There is, in my opinion, no good reason to doubt the evidence of these eyewitnesses, their alleged grounds of enmity with the appellant being matters of insufficient importance to justify a conclusion that they have perjured themselves in the present case. Sham Singh's presence at the scene of occurrence finds corroboration in the evidence of Mt. Fatti, while Ramzan and Umar Din live close to the spot where the affair took place and it would be strange if they had not witnessed it. I, would therefore, accept the version of the affair as given by these eyewitnesses.

The appellant's counsel has strongly contested the finding of the learned Sessions Judge that the act of the appellant amounted to murder. All the assessors and also the learned Sessions Judge held that there was no intention to cause death. The Sessions Judge, however, considered that the deed fell under Cl. 2 or 3, S. 300, I. P. C.

Now, the facts are that the appellant struck a single blow with a lathi on the head of Pala Singh with sufficient force to cause extensive fracture of the skull. The medical witness deposed, and I agree with him, that the fracture of the skull was sufficient in the ordinary course of nature to cause death. The question thus remains whether the appellant had the intention of giving a blow with that force sufficient to cause that amount of bodily injury or not. If he had such an intention Cl. 3, S. 300 covers the case and the offence is one of murder. In my judgment there is no sufficient ground for imputing to the appellant an intention to deal a blow or to cause an injury different from that which he actually did cause. The best criterion of the force and character of the blow is to regard the result which it effected. There are no indications in the present case that the appellant had intended to deal any other kind of blow or to cause any other sort of injury.

The appellant's counsel has in the course of his arguments mentioned certain authorities including 5 P. R. 1893 (Cr.) and *Saidino v. Emperor* (1). Of these the last mentioned authority dealt

(1) 1915 S.L.R. 99=80 I.C. 998=16 Cr. L.J. 710.

with an entirely different sort of assault and does not appear to be helpful in deciding the present case. In the first mentioned ruling the instrument used was a wooden kharwanji and it was remarked in the course of the judgment that this was not a weapon of a lethal nature. Importance was also attached in that case to the fact that the blow was given in anger on the impulse of the moment. It was also pointed out that the question of the intention or knowledge with which the striker acted is always one of fact and not of law.

An authority to which the learned Public Prosecutor has drawn attention is *Premam v. Emperor* (2), the facts of which are closer to those of the present case. In that case it was held that a person delivering a violent blow with a lethal weapon like a dang on a vulnerable part of the body such as the head must be deemed to have intended to cause such bodily injury as he knew was likely to cause the death of the person to whom the injury was caused.

In my opinion the appellant Sewa Singh intended to cause the bodily injury which he actually did cause and on that view of the matter I would uphold the finding and sentence passed by the learned Sessions Judge and would dismiss the appeal of Sewa Singh.

Addison, J.—I concur.

R.M./R.K. *Appeal dismissed.*

(2) A.I.R. 1928 Lah. 93.

1930 Cr. Cases 603

(Lahore)

JAI LAL AND BHIDE, JJ.

Gopi Chand—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 109 of 1930, Decided on 25th March 1930, against order of Sess. Judge, Shahpur, D/- 13th January 1930.

(a) Criminal Trial—Evidence—Intention of culprits should be gathered from their acts and surrounding circumstances—Penal Code, S. 30.

Intention of the culprits has to be gathered from their acts and all the surrounding circumstances. [P 606 C 2]

Where from the circumstances there can be no doubt that the intention of the accused was to cause the death of a person, they must be assumed to have intended the natural consequences of their act and the burden lies heavily on them to prove that they had some other intention. In absence of any such proof the accused can be held guilty under S. 307.

[P 606 C 2]

(b) Criminal P. C., S. 162—Statement before investigating officer can be used to contradict witness but only if provisions of S. 145 Evidence Act. have been complied with—Evidence Act, S. 145.

Under S. 162 a statement made before the investigating officer can be used for the purpose of contradicting such witness when produced at the trial but after strict compliance with the provisions of S. 145, Evidence Act.

[P 607 C 1]

If the witness admits to have made the statement the previous statement in writing need not be proved. If he denies to have made any such statement and it is intended to contradict him the relevant portions of the record contrary to his statement in Court must be read to him and the witness should be given the opportunity to reconcile the same. It is only after this is done that the record of the previous statement becomes admissible in evidence for the purpose of contradicting the witness and can then be proved in any manner provided by law.

[P 607 C 2]

(c) Evidence Act, Ss. 145 and 155—S. 155 does not lay down how former statement is to be proved—Mode of proof is provided for in S. 145 which controls S. 155.

Section 155 only lays down that the credit of a witness may be impeached inter alia by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted; but it does not lay down the manner in which the former statement is to be proved. The mode of proof of such a statement in writing when it is sought to be tendered in evidence for contradicting a witness is provided in S. 145. In other words S. 155 is controlled by S. 145 and is not independent of it.

[P 602 C 2]

M. L. Batra—for Appellant.

R. C. Soni and *Nanak Chand*—for the Crown.

Jai Lal, J.—This judgment will dispose of criminal appeals Nos. 109, and 110 of 1930. Gopi Chand and Fazal Karim have been convicted by the Sessions Judge of Shahpur for an offence under S. 307, I. P. C., and have both been sentenced to transportation for life. They are alleged to have caused injuries to Nanak Chand, a shopkeeper of Chak No. 21 G-B, to which village both the appellants also belong, on the night preceding the 22nd July 1929.

No immediate cause of the alleged assault on Nanak Chand is disclosed by the prosecution evidence but there is abundant evidence on the record from which it appears that Gopi Chand and Nanak Chand were bitter enemies of each other. In fact the existence of enmity is common ground between the parties because it is alleged on behalf of the prosecution that it was due to this enmity that Nanak Chand was as-

saulted by Gopi Chand, his son Ishar Das and Fazal Karim who is alleged to be a friend of Ishar Das, while the defence is that Nanak Chand was assaulted by some unknown persons probably robbers who came with muffled faces and could not for that reason be recognized and that the appellants have been named owing to enmity and on suspicion.

The medical evidence shows that there were five injuries on the person of Nanak Chand; and incised wound on the left eyebrow, skin deep; a shot wound on the right side of the chest; a curved big incised wound on the shoulder; a curved incised wound on the right side of the back of the chest. Mt. Karam Devi, daughter of Nanak Chand also had received a pistol shot in the back.

The prosecution case in brief is that Nanak Chand was sleeping on the platform in front of his shop and Roshan Lal, aged about 12 years, his daughter's son, was sleeping near him and Mt. Karam Devi his daughter was sleeping a short distance away while Mt. Daropti his wife was sleeping inside the door. At about two in the morning Nanak Chand woke on hearing footsteps and the bark of a dog and saw three men standing by his bed. Two of them, that is, Gopi Chand and Fazal Karim, were armed with chhavis, while Ishar Das had a pistol. Nanak Chand sat upon the charpoy and raised an outcry upon which Gopi Chand gave a chhavi blow on his forehead. In the meantime Mt. Karam Devi arrived but was fired at by Ishar Das being hit in the back. Roshan Lal woke up but ran inside the house and a chhavi blow aimed at him by Gopi Chand missed him and fell on the ground. Nanak Chand ran towards the south but was pursued by the culprits and in the course of the pursuit Ishar Das fired four pistol shots one of which injured him in the back, the rest having missed, and Gopi Chand who had overtaken him struck him with the chhavi near the right shoulder and Fazal Karim also struck him with the chhavi with the result that he collapsed on an empty bedstead belonging to one Raja which was lying in the street in front of his house. As a result of this injury his right shoulder had to be amputated.

Several persons came to the scene of the occurrence on hearing the noise and the pistol shots and seeing them arrive the three culprits ran away towards the north but it is alleged by the prosecution witnesses that they identified them before they were able to make good their escape. The lambardar Mardan Ali had Nanak Chand carried to his house and then went in pursuit of the culprits and meeting Gopi Chand returning from the direction in which the culprits had run away, secured him and handed him over to the police. Ishar Das and Fazal Karim could not, however, be found then. After arresting Gopi Chand the lambardar sent his son Fazal Mehdi to the police station to report the affair. This person lodged the first information report at the thana and brought the head constable to the village. In the meantime Muzaffar Hussain son of the zaildar came to the scene of the crime at about four in the morning and learning that Fazal Karim had returned to his house went for his arrest but finding that the door was closed from the inside and Fazal Karim would not open it he jumped over the wall but as on seeing him Fazal Karim ran into the interior room of his house he locked the door of the room from the outside. The accused was taken out of the room by the head constable after his arrival at about 5 a. m. Ishar Das, it may be mentioned, is a fugitive from justice and his case, therefore, need not be considered.

The question that has to be determined is whether it has been satisfactorily established by the prosecution evidence that Gopi Chand and Fazal Karim assaulted Nanak Chand in the manner already described. The learned Sessions Judge has divided the prosecution evidence in three grounds: First of the inmates of the house, secondly residents of the village who arrived on hearing the pistol shots and saw the culprits and thirdly those who arrived later and deposed to what was being said by others who were present on the spot and who generally gave evidence as to the manner in which the appellants were arrested and other incidents connected with the affair.

With regard to the inmates of the house, the Sessions Judge has believed their evidence with the exception of

Mt. Daropti wife of Nanak Chand who according to the learned Judge could not have seen the occurrence as she was sleeping inside; I do not, however, propose to examine the reasons given by him for discarding the testimony of Mt. Daropti in view of the fact that there is otherwise ample evidence of the other inmates of the house about the incidents mentioned by her though the learned Assistant Legal Remembrancer strenuously contended that no good grounds had been given by the Sessions Judge for discarding the testimony of Mt. Daropti. Out of the remaining witnesses who profess to have witnessed the assault the Sessions Judge has accepted the evidence of P. W. Nadir but has excluded the evidence of other witnesses on the ground that it has been established that they are inimically disposed towards the accused. For similar reasons I do not think it is necessary to examine the grounds given by the Sessions Judge for discarding their evidence also. The testimony of the witnesses believed by the Sessions Judge is quite sufficient to support the prosecution version in the main and it receives corroboration from the medical evidence and the statement of the head-constable who deposes to having seen indications of assault having been committed in the manner described by the prosecution witnesses inasmuch as he says that he saw blood on the charpoy on which Nanak Chand was lying and also mark of a chhavi blow on the ground and further deposes to having taken charge of Gopi Chand on arrival at the village from the lambardar and to have arrested Fazal Karim from his house where he was locked in.

All the prosecution witnesses who have been believed by the Sessions Judge directly implicate both the appellants but in view of the fact that there was admittedly enmity between Nanak Chand and Gopi Chand the first question that we have to determine is whether Gopi Chand's participation in the crime has been established beyond any reasonable doubt.

Now, it is to be observed that Fazal Mehdi when he made the first information report did not mention the name of Gopi Chand. On the other hand he stated that there were two assailants, Ishar Das and Fazal Karim, and this

statement he repeated not once but at least thrice. His explanation, therefore, that he really made a slip in omitting the name of Gopi Chand cannot be accepted as satisfactory. It must be remembered that Gopi Chand had been arrested, according to the prosecution witnesses, before Fazal Mehdi was sent to the police station. He clearly stated in the report that the two assailants had made good their escape (Fazal Karim had not then been arrested by the zaildar's son when he left for the thana), if he intended to implicate Gopi Chand it is inconceivable that he could have failed to notice the fact of his arrest before he went to the thana. Moreover Gopi Chand was arrested by Mardan Ali lambardar when returning to the chak. If he was one of the assailants it is unlikely that he would return to the scene of the crime knowing that he had been seen by the witnesses when assaulting Nanak Chand. It is further unlikely that an old man of his age would consider it necessary to join his son and Fazal Karim, who were both young men, in the assault. In my opinion there is an element of doubt as to the participation of Gopi Chand in this affair of which he must get the benefit. We would, therefore, accept his appeal and acquit him.

With regard to Fazal Karim, there is ample evidence from which it appears that he was armed with a chhavi and actually assaulted Nanak Chand and that his companion was armed with a pistol. He stated at the trial that he was not present at the scene of the crime but was arrested the next day in his house. He denied that he was secured by the zaildar's son in the room. But in this he has been flatly contradicted by the head-constable and the other witnesses. In fact one of his own witnesses corroborates the prosecution version as to the manner in which he was secured and arrested. He produced evidence to the effect that the assault was committed by some persons who were not recognized and that it was after the arrival of the police that the convicts were mentioned. This is obviously wrong because he along with Ishar Das was mentioned by Fazal Mehdi in the first information report. The defence evidence, therefore, is unreliable. I have no hesitation in holding that Fazal

Karim was one of the assailants of Nanak Chand.

The learned counsel, however, contended that on the facts alleged by the prosecution an offence under S. 307, could not be held to have been committed by the appellant. It was contended that the intention of the assailants was merely to chastise Nanak Chand and that they should have been convicted, if at all, under S. 325, I. P. C. I am unable to accede to this contention. Intention of the culprits has to be gathered from their conduct and all the surrounding circumstances. In this case previous enmity is admitted. It is proved by the prosecution evidence that the assailants were armed with a chhavi and a pistol and set upon Nanak Chand when he was asleep. They pursued him when he ran away and one of them fired four pistol shots at him while the other caused an injury with a chhavi which necessitated the amputation of his arm. It was only because the noise attracted the neighbours that the culprits were unable to cause greater injury to Nanak Chand and it was providential that three out of the four pistol shots missed the victim. Under these circumstances there can be no doubt that the intention of the accused was to cause the death of Nanak Chand as I must assume that they intended the natural consequences of their act and the burden lies heavily on them to prove that they had some other intention, but there is no indication of this on the record. It is obvious that if Nanak Chand had died as a result of the injuries received by him his assailants would have been held guilty of murder. The appellant Fazal Karim, therefore, has been rightly convicted under S. 307 and in view of the ferocious nature of the attack the maximum punishment provided by the law was fully merited by him. I would, therefore, dismiss the appeal of Fazal Karim.

I desire to make a few observations on a matter which transpired during the hearing of this appeal. It appears that the prosecution witnesses were cross-examined by the counsel for the accused as to their statements made before the head-constable during the investigation, and also before the committing Magistrate. To some questions the answers were that the witnesses did not make

the statement or that they did not remember having made them. No further questions were asked from them with regard to these statements and finally when the investigating officer appeared as a witness questions were put to him whether those statements were made by the witnesses. The learned counsel then attempted to refer before us to the statements made by the witnesses concerned before the head-constable in order to contradict their testimony in Court. An objection was raised that the appellants were not entitled to make use of those statements to contradict the witnesses because the provisions of S. 145, Evidence Act, had not been complied with as the attention of the witnesses was not drawn to the statements recorded by the head-constable. The appellant's counsel conceded that the strict procedure provided by the law had not been followed in this case but he contended that this was due to the fact that the learned Sessions Judge did not permit the appellants' counsel to draw the attention of the witnesses to the statements made during the investigation. There is no record that this happened in the present case but it is not the first time that it has come to our notice that the trial Courts in many cases do not properly follow the procedure laid down by the Criminal Procedure Code and the Evidence Act on this subject and consequently difficulty is felt in this Court in granting permission to the appellants to refer to previous statements of witnesses with regard to which proper procedure has not been followed. In the present case, however, we allowed the appellants' counsel as a special case to refer to the previous statements of the witnesses assuming that proper procedure had been followed.

I would, however, note for the guidance of the Sessions Judge and the Magistrates that under S. 162, Criminal P. C., a statement made before the investigating officer by a witness can be used for the purpose of contradicting such witness when produced at the trial but after strict compliance with the provisions of S. 145 Evidence Act. That section provides that a witness may be cross-examined as to a previous statement made by him in writing or reduced into writing and relevant to the matters

in question, without such writing being shown to him or being proved : but if it is intended to contradict him by the writing his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. The proper procedure would, therefore, be to ask a witness first whether he made such and such statement before the police officer. If the witness returns the answer in the affirmative, the previous statement in writing need not be proved and the cross-examiner may, if he so chooses, leave it to the party who called the witness to have the discrepancy, if any, explained in the course of re-examination. If, on the other hand, the witness denies having made the previous statement attributed to him or states that he does not remember having made any such statement and it is desired to contradict him by the record of the previous statement, the cross-examiner must read out to the witness the relevant portion or portions of the record which are alleged to be contradictory to his statement in Court and give him an opportunity to reconcile the same, if he can. It is only when the cross-examiner has done so, that the record of the previous statement becomes admissible in evidence for the purpose of contradicting the witness and can then be proved in any manner permitted by law.

It was contended by the appellants' counsel that having regard to S. 155 (3), Evidence Act, it was not necessary to draw the attention of the witness to the previous statement. I am unable to agree with this contention. S. 155 only lays down that the credit of a witness may be impeached, inter alia, by "proof of former statements inconsistent with any part of his evidence, which is liable to be contradicted", but it does not lay down the manner in which the former statement is to be proved. The mode of proof of such a statement in writing when it is sought to be tendered in evidence for contradicting a witness is provided in S. 145 of the Act. In other words, S. 155 is, in my opinion, controlled by S. 145 and is not independent of it.

Bhide, J.—I agree.

R.M./R.K.

Order accordingly

1930 Cr. Cases 608

(Patna)

WORT, J.

Sohan Lohar—Petitioner.

v.

Jiutupadhyas and others — Opposite Parties.

Criminal Ref. No. 49 of 1929, Decided on 10th July 1929, made by Dist. Mag., Shahabad, on 13th June 1929.

(a) Criminal P. C., S. 147 (2), proviso—Meaning of "inquiry" explained.

The inquiry contemplated by the proviso to sub-S. (2) is the inquiry referred to in Sub-S. (1): *A. I. R. 1926 Cal. 1051, Foll.*

(b) Criminal P. C., S. 147 (3)—Order can be made only when no right exists. [P 608 C 2]

An order under S. 147 (3) is to be made only in those cases in which it is shown that no right of way exists. [P 608 C 2]

K. N. Verma—for Petitioner.

Judgment.—This is a reference under S. 438, Criminal P. C., against an order recommending that an order made by the Magistrate on 22nd April 1929, under S. 147 (3), Criminal P. C., be set aside.

It appears that an occurrence of some sort took place on 15th November 1928, in the nature of a petty assault which arose by reason of a dispute over an alleged right of way. The complaint lodged was sent for local inquiry and the result of the local inquiry was that the land over which the dispute arose was entered in the name of one Jiutupadhyas, that an obstruction had been caused and that the right of pathway existed. There was also a statement that an assault was committed. The Sub-Divisional Officer, as it appears from the letter of reference, considered the report and heard the parties and their pleaders on 12th January 1929, and asked for further report as to the likelihood of a breach of the peace. On 16th February the report of the police was considered, the complaint was dismissed and proceedings under S. 147, Criminal P. C., were instituted. The Honorary Magistrate heard the case after a written statement had been filed and he came to the conclusion that as the alleged obstruction was beyond three months of the date of the institution of the inquiry, he had no jurisdiction to make an order under S. 147 (2) but, at the same time passed an order under S. 147 (3) of the Code.

The learned District Magistrate appears to be of the opinion that the Honorary Magistrate was wrong inasmuch as in the opinion of the District Magistrate the inquiry was commenced on 12th January within three months of the alleged obstruction. 12th January was the date on which the Sub-Divisional Officer heard the parties and their pleaders on the question of the complaint. In my opinion the learned District Magistrate came to a wrong conclusion when he decided that that was the date of the inquiry within the meaning of the section. Sub-S. (1), S. 147, Criminal P. C., provides inter alia:

"he may make an order in writing stating the grounds of his being so satisfied and requiring the parties concerned in such disputes to attend the Court in person or by pleader"

and shall thereafter inquire into the matter. It has been pointed out in the case of *Ram Chandra Acharjee v. Aditya Chandra Pal* (1) that the inquiry contemplated by the proviso to sub-S. (2) is the inquiry referred to in sub-S. (1); that is to say, the date on which the parties are heard and evidence is taken and adjudicated upon. With that view I am in agreement. Consequently the reference so far as S. 147 (2) is concerned must be discharged.

I agree, however, with the view that the order of the Magistrate under S. 147 (3) is illegal and must be set aside. That order is to be made only in those cases in which it is shown that no right of way exists. Any inference to be drawn from the facts of this case is that such a right of way does exist, although I do not decide the question. In any event, the order of the Magistrate under S. 147 (3), Criminal P. C., was bad in law and must be set aside. The view expressed by the District Magistrate, however, is equally wrong in the sense that the obstruction did not take place within three months of the date of the enquiry.

V.B./R.K.

Order set aside.

(1) *A. I. R. 1926 Cal. 1051=58 Cal. 851.*

1930 Cr. Cases 609

(Bombay)

MIRZA AND BROOMFIELD, JJ.

Kanchanlal Chunilal—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appl. No. 502 of 1929, Decided on 20th February 1930, from order of Sess. Judge, Surat.

Penal Code, S. 153-A—Burden of proof shifts on accused when he asserts that natural inference does not hold good in his case.

Where the articles can bear a meaning only that they are calculated to produce hatred and enmity between two classes the natural inference from the publication of such articles and writing is that the person who published them had the malicious intention that they should produce such hatred and enmity. The burden of proof shifts to the accused when he asserts that the natural inference to be drawn from the publication of the articles does not hold good in his case: *A. I. R. 1927 Cal. 215, Dist.*

[P 609 C 1, 2]

Purshottam Trikamdas, G. G. Mahadeva and K. Mehta—for Applicant.

P. B. Shingne—for the Crown.

Mirza, J.—This is an application for revision of a conviction and sentence of the accused for an offence under S. 153-A, I. P. C., by the Special Magistrate, First Class, Surat, confirmed in appeal by the Sessions Judge, Surat.

Ground 1 urged is that the lower Courts wrongly threw the burden of malicious intention upon the accused. It appears from the judgments of the two lower Courts that from a consideration of the three writings complained of they came to the conclusion that the natural meaning to be attached to those writings was that they would be calculated to produce hatred and enmity between the two classes, viz., the Hindus and the Mahomedans. Having come to that conclusion they state that if the accused relies upon the want of malicious intention which would take his act out of the purview of this section it would be for him to show that such was not his intention. Where the articles can bear meaning only that they are calculated

to produce hatred and enmity between two classes the natural inference from the publication of such articles and writings is that the person who published them had the malicious intention that they should produce such hatred and enmity. The burden of proof shifts to the accused when he asserts that the natural inference to be drawn from the

publication of the articles does not hold good in his case. It was conceded before the Sessions Court in appeal and it has been conceded in argument before us that the three writings complained of are calculated to produce hatred and enmity between Hindus and Mahomedans.

The next ground urged is that the accused being the editor of a newspaper published these three writings bona fide and as a piece of a news of public interest and that therefore no inference should be drawn against him that he had the malicious intention to produce hatred and enmity between Hindus and Mahomedans. Reliance has been placed upon the case of *Hemendra Prasad Ghose v. Emperor* (1). In that case, however, it was found that there was no malicious intention on the part of the editor of the paper who published the purport of a genuine telegram which had been previously received in Calcutta from a person in Mauritius offering to finance Mahomedan opposition against Hindus in Calcutta. The purport of the telegram was published with a view to ascertain whether it was authentic and as a warning to the authorities that a plot of that nature was being hatched in Calcutta and to prevent any disturbance of the peace between members of the two communities. In the present case the finding of both Courts is that the accused had the malicious intention to promote hatred between the two communities. To use the language of the Sessions Judge the accused "acted as a herald for either party and shouted defiance to each in turn." The second case relied on is *P. K. Chakravarti v. Emperor* (2). In that case it was found that the newspaper had given its readers in the ordinary way a perfectly legitimate and sensible piece of news without any intention to utilize that piece of news for the purpose of promoting or furthering class hatred. The original leaflet complained of in that case was in the vernacular but the paper had published its English translation and the object of the editor in publishing the leaflet in English obviously was to warn the authorities and prevent disorders. In the case before us it cannot be reasonably contended that the object of the accused

(1) *A. I. R. 1927 Cal. 215.*(2) *A. I. R. 1926 Cal. 1183=54 Cal. 59.*

was to warn the authorities or to prevent disorders. It has been urged that the accused sent the original of the anonymous letter signed "Gazi Mussalmans" to the District Magistrate and we must infer, therefore, that his object in publishing the letter was to warn the authorities against disturbances which were threatened. But there appeared no leader or comment in the accused's paper from which such intention could be inferred. The letter signed "Gazi Mussalmans" appeared under head lines which set out in bold print highly objectionable extracts of a provocative character to the members of the Hindu community. This letter appeared in the issue of 25th September. On the morning of 27th September, the accused brought out a special edition of his paper reporting a speech made by Dr. Raiji on the previous day in reply to the anonymous letter of the "Gazi Mussalmans." Again there is nothing in the morning edition of 27th September to indicate that the object of the accused was to put the authorities on their guard and to prevent disorders. The heading of the writing is "Dr. Raiji's reply to Gazi Mussalmans" and among other things the reply as reported is:

"I say to the Miyanbhais you are not the only users of a knife. With me also there is a knife."

The same day in the evening edition of the paper the accused published an anonymous letter purporting to be a reply by the "Lalas" to the "Gazi Mussalmans." Here again there is nothing which would show that the intention of the accused was to prevent disorders or to give a warning to the authorities.

Mr. Purshottam has appealed to us that the sentence passed on the accused is too severe. The offence of which the accused has been convicted is of a serious nature. The offence was committed at a time when there was a great tension of feeling between the Hindu and Mahomedan communities of Surat and the accused as the editor of a responsible paper in that locality ought to have behaved better than he did. Although it has not been proved that the publication of the three writings was directly responsible for the disorders which occurred on 28th September yet it cannot altogether be ignored that serious riots accompanied by loss of life and property

took place between the two communities soon after the publication of these writings. The sentence, in our opinion, is proper.

We reject the application, and confirm the conviction and sentence. The bail bonds will be cancelled on the accused surrendering himself to the jailor.

Broomfield, J.—I agree.

V.B./R.K.

Application rejected.

1930 Cr. Cases 610

(Bombay)

MIRZA AND BROOMFIELD, JJ.

In re, *Shekhanmian Jehangirmian*.

Criminal Revn. Appln. No. 481 of 1929, Decided on 13th February 1930, from order of First Class Magistrate, Dhandhuka.

Criminal P. C., S. 488—Mahomedan wife—Divorce—Wife is not entitled under S. 488 to claim maintenance beyond period of iddat from date of irrevocable divorce.

A talak when it becomes irrevocable puts an end to conjugal relationship which had subsisted between the parties, and the divorced wife would not be entitled to claim maintenance from her husband beyond the period of iddat from the date of such irrevocable divorce. S. 488 has in no manner abrogated this part of the personal law of the parties. The existence of conjugal relations in the case of Mahomedans has to be determined by reference to the provisions of the Mahomedan law and not by considerations of equity and good conscience as understood in any other system of law: 19 *All, 50, Foll.*; 8 *Cal. 736, Diss. from.* [P 611 C 1]

G. N. Thakur and P. A. Dhruva—for Applicant.

M. L. Seth for J. L. Shah — for Opponent.

P. B. Shingne—for the Crown.

Mirza, J.—The applicant applies for revision of an order of the First Class Magistrate, Dhandhuka, ordering him to pay maintenance to the opponent at the rate of Rs. 12 per month from 1st November 1927. The opponent applied to the Magistrate on 1st November 1927 under the provisions of S. 488, Criminal P. C., for an order for maintenance against the applicant, who, she alleged, was her husband. The applicant contended that he had divorced the opponent according to Mahomedan Law in the year 1914 and that if there was any doubt with regard to the factum or validity of that divorce, he had divorced her in open Court by pronouncing the word "talak" three times, thereby indicating his intention that the talak was to take effect immediately and become irrevocable.

The Magistrate has given no finding as to whether the alleged talak in 1914 had taken place. He considers that the alleged talak in 1914 as well as the talak pronounced in Court are immaterial having regard to the provisions of S. 488, Criminal P. C. He observes:

"Besides, the right to maintenance conferred by S. 488, Criminal P. C., is a statutory right which the legislature has created, irrespective of the nationality or creed of the parties, the only condition precedent to the possession of that right, in the case of a wife, being the existence of conjugal relation."

He holds on the strength of a ruling in *Luddun Sahib v. Mirza Kumar* (1), which related to the case of a mutta wife of a Shia Mahomedan, that a wife would be entitled to maintenance under S. 438, Criminal P. C. irrespective of the fact that she was not entitled to maintenance under her personal law. He also holds a custom proved by which no female belonging to the family of the Koreshis* to which family both the applicant and the opponent belong, can contract a second marriage. He holds, therefore, that the declaration of talak by the applicant does not debar the opponent from claiming maintenance under S. 488.

This finding of the Magistrate is contrary to the ruling in *Shah Abu Ilyas v. Ulfat Bibi* (2), and is opposed to the principles of the Mahomedan Law of divorce which is the personal law of the parties. A talak when it becomes irrevocable puts an end to conjugal relationship which had subsisted between the parties, and the divorced wife would not be entitled to claim maintenance from her husband beyond the period of iddat from the date of such irrevocable divorce. S. 488, Criminal P. C. has in no manner abrogated this part of the personal law of the parties. The existence of conjugal relations in the case of Mahomedans has to be determined by reference to the provisions of the Mahomedan Law and not by considerations of equity and good conscience as understood in any other system of law.

The Magistrate should have ascertained whether there was a valid divorce of the opponent by the applicant in 1914 as alleged by him. If he was satisfied that there was such a divorce

he should have held that the opponent was not entitled to any maintenance from the applicant under S. 488. If the Magistrate held that the alleged divorce of 1914 was not established to his satisfaction he could have held on the materials before him that an irrevocable divorce in the iddat form had been pronounced by the applicant in open Court, and would take effect immediately the pronouncement was made. In that case he could have made an order in favour of the opponent under S. 488, for maintenance from the date of her application until the expiry of her iddat after this divorce.

• We set aside the order of the Magistrate and remand the case to him for retrial according to law, in the light of our above observations.

V.B./R.K.

Case remanded.

1930 Cr. Cases 611 (Bombay)

MIRZA AND BROOMFIELD, JJ.

Keshavji Madhavji—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 455 of 1929, Decided on 7th February 1930, from decision of Presidency Magistrate, 6th Court, Bombay.

(a) Penal Code, S. 417—Giving of cheque—Presumptions from, enunciated.

The giving of a cheque on a bank as payment for goods, or in payment of a debt does not amount to a representation that the person giving the cheque has money to the amount in the Bank at the time, but does amount to a representation: (1) that he has authority to draw on the bank for that amount; (2) that the cheque is a good and valid order for the payment of its amount and that the cheque will be paid, i. e., that the existing state of facts is such that in the ordinary course the cheque will be met: 23 B. L. R. 340; A. I. R. 1925 Cal. 14 Dist.; *Queen v. Hazellon* (1874) 2 C. C. 134, *Foll.* [P 613 C 1]

(b) Penal Code, S. 417—Cheating by cheque—Duty of prosecution—Burden of proof ordinarily is on prosecution to prove that nonpayment was not accidental but intentional.

What the prosecution has to do in a case of cheating by means of cheque is to establish facts which point prima facie to the conclusion that the failure to meet the cheque was not accidental but was a consequence expected and therefore intended by the accused. It will then be for the accused to establish any facts there may be in his favour which are specially within his knowledge and as to which the prosecution could not be expected to have any information. [P 613 C 1, 2]

(1) [1882] 8 Cal. 736=11 C. L. R. 237.

(2) [1896] 19 All. 50=(1896) A. W. N. 173.

G. N. Thakor, R. M. Desai and H. R. Desai—for Appellants.

P. B. Shingne—For the Crown.

Broomfield, J.—The accused in this case, who are alleged to be partners in the firm of Keshavji Madhavji, dealers in gunny bags, etc., have been convicted by the Presidency Magistrate, 6th Court, of an offence of cheating under S. 417 read with S. 109, I. P. C. in respect of a sum of Rs. 2,000.

The facts of the case are by no means clearly stated in the judgment of the learned Magistrate. They are set out as follows in the deposition of the complainant Chunilal, who is also a merchant dealing in gunny bags. He states that he had dealings with the accused's firm to a considerable amount up to 9th September 1928, on which date the account was closed and nothing remained due to the accused. On 18th September 1928, accused 1 came to the complainant and said that he required a loan of Rs. 500, which would be repaid on the following day. The complainant gave him the money. On the following day, that is, 19th September accused 2 and 3 came to the complainant. Accused 2 asked the complainant to give him a cheque for Rs. 1,500 of that date, 19th September against a cheque of the accused's firm for the aggregate amount of Rs. 2,000 bearing date 20th September. According to the complainant accused 2 said at this time that he was expecting some cheques from Ahmedabad and that the cheque for Rs. 2,000 would be duly honoured. The complainant agreed to the proposal. Accused 3 drew a cheque for Rs. 2,000 on behalf of the accused's firm and signed it in the presence of accused 2. The complainant gave his cheque for rupees 1,500, which was paid into the accused's account and in due course cashed. The accused's cheque for Rs. 2,000, on the other hand was dishonoured when it was presented on 20th and has been never met. Having failed to get payment on 20th the complainant says that he made inquiries and learnt that the accused had absconded. The fact appears to be that accused 1 and 2 had gone away to Nasik, but accused 3 remained behind. Subsequently, on 2nd November 1928, the complainant gave information to the police which led to this prosecution.

Mr. Thakor for the appellants has pointed out that in the complaint there is no reference to the accused having represented that they expected cheques from Ahmedabad. That is so. But it was not necessary that the complaint should contain all details of the statements made by the accused and there does not seem to be any good reason for disbelieving the complainant's evidence on the point.

There appears to be some dispute between the parties as to the facts previous to the 19th. The complainant's evidence, as I have said, is that Rs. 500 were borrowed by accused 1 on the 18th. The accounts of the accused's firm appear to show that Rs. 1,000 were borrowed from the complainant on 15th, Rs. 500 repaid on 16th and then rupees 1,500 borrowed on 19th in the shape of the cheque. The probabilities of the case appear to be in favour of the complainant's version of the facts. There would seem to be no object in the accused borrowing a Rs. 1000 on 15th, repaying Rs. 500 of it on the next day and then borrowing a further sum of Rs. 1,500 on the 19th. But this difference is in any case of no material importance. It is admitted that on 19th September on which date the accused gave the cheque for Rs. 2,000 the sum of Rs. 2,000 was owing by them to the complainant, and the cheque was given in payment of that debt.

The offence with which the accused are charged is defined in S. 415, I. P. C. as the deceiving of any person and thereby fraudulently or dishonestly inducing the person so deceived to deliver any property. Illus. (f) to the section is:

"A intentionally deceives Z into a belief that A means to repay any money that Z may lend to him and thereby dishonestly induces Z to lend him money, A not intending to repay it, A cheats."

In support of his contention that the representation made by the accused in this case amounted to a dishonest inducement within the meaning of the definition the Government Pleader has relied on two cases: *Emperor v. Uttamlal* (1) and *Martindale v. Emperor* (2). We consider that these cases are of no real assistance to us, owing to the existence in them of a number of special circumstances which we do not find in

(1) [1920] 23 Bom. L. R. 340.

(2) A. I. R. 1925 Cal. 14=52 Cal. 347.

the present case and which must have affected the decisions. There is an English case, however, *The Queen v. Hazelton* (3) which is an old but a perfectly good authority for the proposition that the giving of a cheque on a bank as payment for goods, or in payment of a debt as here does not amount to a representation that the person giving the cheque has money to the amount in the bank at the time, but does amount to a representation (1) that he has authority to draw on the bank for that amount, (2) that the cheque is a good and valid order for the payment of its amount and that the cheque will be paid, i. e., that the existing state of facts is such that in the ordinary course the cheque will be met. It has not been disputed indeed by the learned counsel for the appellants that the effect of this transaction was that the accused promised to pay, and the complainant expected to be paid, the amount of Rs. 2000 on 20th September. It is perfectly clear that the offence of cheating is made out if the accused knew that the cheque would not be met. The contention of the defence is that the onus of proof in this respect is on the prosecution. According to Mr. Thakor it is for the prosecution to prove that the accused had no expectation that funds would be in the bank and that they did not intend to pay, and not for the accused to show that they had reasonable expectations of being able to meet the cheque or that they made any attempts to collect money for that purpose.

Now broadly speaking, as this is a criminal case, it is correct to say that the burden of proof is on the prosecution in the first instance; and clearly if the only facts proved by the prosecution were that the cheque was given on 19th and that on the 20th it was dishonoured, the accused could not be convicted of cheating or any offence. But the provisions of S. 106 as to facts specially within the knowledge of any person must be borne in mind. The prosecution cannot be expected and is not required to prove or disprove facts which are within the special knowledge of the accused himself. What the prosecution has to do, I take it, in a case of this kind

is to establish facts which point prima facie to the conclusion that the failure to meet the cheque was not accidental but was a consequence expected and therefore intended by the accused. It will then be for the accused to establish any facts there may be in his favour which are specially within his knowledge and as to which the prosecution could not be expected to have any information.

The facts on which the prosecution is entitled to rely in this connexion are mainly these. At the material time the accused's firm was admittedly in embarrassed circumstances. There was a cheque for Rs. 7,000 drawn by the accused's firm on September 16th in favour of one Kishorilal which had to be met. The credit balance in the accused's banking account carried over on 15th September was Rs. 1,192-6-6. 17th September was a bank holiday. The 18th though not a bank holiday, was a Jain holiday and no transactions appear to have taken place in the accused's account on that day. The opening balance on 19th was Rs. 1,038-1-3. In the course of that day sums amounting to Rs. 6,200 were paid in. This amount included the cheque for Rs. 1,500 obtained from the complainant. In this way the amount of Rs. 7,000 was made up and the cheque for that amount was paid on presentation, the result of this payment being that there remained a sum of Rs. 238-1-3 in the accused's account. The evidence also shows that on 17th September the accused's firm had purchased 15 bales of Hessian for which they had to pay Rs. 4,000. This amount they did not pay (see the evidence of witnesses Dovidas and Kanji, the latter a clerk in the accused's firm). From the account books of the accused's firm which have been put in, it appears that though there was a nominal balance of Rs. 16,842-5-9 on 19th September and a nominal balance of Rs. 16,142-5-9 on 20th September the actual amount of cash in the shop on the former date was Rs. 1,213-12-3 on the first date and Rs. 0-12-3 on the second date. Then, further, it appears that the accused's firm did no business after 20th September. As I have stated, accused 1 and 2 had gone away to Nasik and, though accused 3 remained behind, the shop was to all intents and purposes closed.

(3) [1874] 2 C. C. 184=44 L. J. N. C. 11=13 C. C. 1=28 W. R. 182=31 L. J. 451,

That is clear from the evidence of the two witnesses just mentioned, Devidas and Kanji, and also that of witness Narbheram. An important point to be noted in this connexion is that the complainant was not informed by the accused about their difficulties in meeting the cheque. They did not ask him for time or make any communication to him whatever. The accused's clerk Kanji has stated in the course of his evidence that on 20th September presumably before they went to Nasik, accused 1 and 2 had instructed him to deposit in the bank money received from people to whom it had been given as "Uplak," that is advanced on loan. The witness, however, also states that no money was received in this way either on the 19th or on the 20th and it appears from his evidence that no attempt was made or was directed by accused 1 and 2 to be made to collect any outstandings either to meet the cheque given to the complainant or for any other purpose. Lastly, it appears from the evidence of this witness and from the account with the bank that on 4th October the account was practically closed by drawing out the sum of Rs. 225 out of the balance of Rs. 238-1-3.

The facts on which reliance has been placed on behalf of the appellants are mainly these. The complainant has admitted in his deposition that his transactions with the accused's firm were on a large scale and that in the year 1984 Samvat, that is to say 1928, he had purchased goods from the accused's firm to the extent of Rs. 1,36,000. However as I have stated, whatever the previous business carried on by the accused's firm may have been, at the material time they were admittedly in low water and very hard pressed for money. It has also been urged that there had been previous instances of loans by the complainant to the accused. The complainant has denied this. But in the course of his evidence he had to admit that there was on one occasion, that is on 21st June 1928, a temporary loan of Rs. 700 to the accused which was repaid on 23rd June. There is also a transaction of 7th July 1928, an item of Rs. 2000 paid and debited to the accused which is alleged to have been a loan. The complainant's case is that this was the price of five bales of cloth which

the complainant purchased from the accused and which was delivered on 25th July 1928. It is not disputed that the accused did repay this amount of Rs. 2,000 by the delivery of the five bales of cloth, the value of which was Rs. 1,995-10-6, and by paying a small balance in cash. In support of the contention that the transaction was a loan it is pointed out that the complainant charged the accused a sum of Rs. 8-8-0 as interest on the sum of Rs. 2,000 for the interval between 7th and 25th July 1928. It is difficult to decide with confidence between these two contentions because there is on the one hand the word of the complainant and his accounts, and on the other the word of the accused and their accounts, in which the transaction is entered as though it were a loan. I think that on the whole the circumstances point to the conclusion that the Rs. 2,000 was not really a loan in the ordinary sense but was the payment in advance for the five bales of cloth. But in any case the question is not really at all material. Neither the transaction of Rs. 700, which was a temporary loan in the ordinary course of business, nor the transaction in connexion with the bales of cloth purchased from the accused, could possibly justify any inference as regards the intention of the parties at the time of the transaction with which we are concerned. In neither of those cases was there any question of a cheque being given and dishonoured, and the evidence relating to those transactions in my opinion does not in the least affect the proposition which I have already stated, and which is not seriously disputed, namely, that the effect of the transaction with which we are concerned was that the accused promised to pay and the complainant expected to be paid the sum of Rs. 2000 on 20th September.

Then considerable stress has been laid on the fact that this cheque for Rs. 1500 which the accused obtained from the complainant was used for the purpose of meeting the cheque for Rs. 7,000, to which I have already referred, and also on the fact that in the course of 19th September other sums were paid into the bank by the accused, making up, with the cheque of Rs. 1,500, the total of Rs. 6,200. The suggestion is that if the accused had a dishonest inten-

tion they would probably have allowed the other cheque, that is the cheque for Rs. 7,000, to be dishonoured, and further that, as considerable sums of money were paid into the bank on the 19th, other sums might have been expected to be paid in on the 20th. It is in connexion with arguments of this kind that I think S. 106, Evidence Act, is important. For anything we know to the contrary, there may have been special reasons why it was essential that the cheque for Rs. 7,000, should be met at all costs. As I have stated the cheque had been drawn on 16th September and it was therefore some days overdue. For anything we know to the contrary, the payment of these sums into the bank on the 19th in order to meet this urgent claim exhausted all the resources of the accused's firm. An examination of the accused's account in the bank strongly points to the conclusion that that was so. If it was not so, and if there really was any expectation or likelihood that payments would have been made into the bank after the 19th to enable the complainant's cheque to be met, then that could only be made plain by evidence within the knowledge of the accused themselves which they ought to have produced. Stress has also been laid upon the balance shown in the accused's account on 19th and 20th September, and on preceding days, which balances apparently included a large amount on account of outstandings. Here again in the absence of any evidence produced by the accused it is impossible for us to know whether these outstandings, which are described as sums lent on "chithis" were or were not recoverable either about 20th September or at all. All that we know is that the actual cash balance was what I have stated it to be, that no recoveries on account of outstandings were in fact made, and that no attempt was made to recover outstandings.

We consider that it is a fair conclusion on the above facts that at any rate accused 2 and 3, who were present when the cheque for Rs. 2,000 was drawn, had no expectation that it would be met if presented on the 20th, and in fact knew that it would not be met.

The question then arises whether all the accused have been properly convicted of the offence. It has been pointed

out that accused 1 was not present on the 19th when the cheque for Rs. 1,500 was obtained and the cheque for Rs. 2,000 given; also that accused 2, though he was present on the 19th, did not sign the cheque and had in fact no authority to do so. The learned Magistrate has found that all the accused were partners in the firm of Keshavji Madhavji. He has relied mainly on the evidence of the complainant, who, having had many dealings with the accused, ought to be in a position to know, and also upon a document Ex. H, which is a form of application for opening a current account in the Central Bank of India. The application has to be signed by "partners, directors, agents, etc.," and accused 1 and 3 signed the application under that description. I think that there may perhaps be some doubt as to whether all three of the accused are legally partners in the firm, but it is obvious that that is not a matter of much importance. The fact that they were all partners would not in itself render them all liable on this criminal charge. The fact that they may not be partners in the legal sense will not absolve them from the charge, if the evidence shows that they were all concerned together in the commission of the offence. The trial Magistrate has found, and we agree with him, that the evidence does make this perfectly clear. The complainant has stated that when accused 1 came to him on the 18th he promised to repay the sum of Rs. 500, which he borrowed, on the following day.

The visit of accused 2 and 3 on the 19th was clearly in continuation of the same transaction. The accused required the money to meet the cheque of Rs. 7,000, and the cheque for Rs. 2,000, which they gave on the 19th included the Rs. 500, borrowed by accused 1 the day before and Rs. 1,500, which they took for payment into their banking account. It is obvious that accused 1, who is admittedly a partner in the firm and according to his own allegation the sole partner, must have been aware of the circumstances of the transaction. Accused 1 in his statement says that accused 2 and 3 were his servants and not his partners but that they were doing business on his behalf. He alleges that he knew nothing about the facts of the case but that I think under the circum-

stances it is impossible to believe. Accused 2 in his statement says that he was working as a broker for accused 1 at the time in question. He goes on to say, however, that the transaction complained of took place between the complainant's firm and "ours," that is "our firm," in the ordinary course of business. As for accused 3, he admittedly has authority to sign cheques on behalf of the firm and it was he who drew and signed the cheque, with which we are concerned. We think there can be no doubt that the three accused acted in concert throughout this transaction and that the dishonest intention arising from the knowledge that the cheque would not and could not be paid on 20th September must be imputed to all of them alike. For these reasons we confirm the conviction and sentence in the case of all the three accused and dismiss the appeal.

Mirza, J.—I agree.

V.B./R.K.

Appeal dismissed.

1930 Cr. Cases 616

(Patna)

JAMES, J.

Thakur Sahu and others—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 90 of 1930, Disposed on 6th March 1930.

Criminal P. C., S. 421—Sessions Judge or Magistrate should, except in exceptional cases give reasons for summary dismissal of appeal.

It is true that where an appeal is summarily dismissed under S. 421, it is not necessary to deliver a formal judgment in accordance with the provisions of S. 367. But a Sessions Judge or Magistrate, whose orders are subject to revision by the High Court, ought, save in very exceptional cases, to give some reasons for his decision which will show that he had really considered the points raised by the appellant and the appeal actually is without foundation. 2 P. L. J. 695, *Rel. on.* [P 616 C 2]

H. L. Nandkeolyar—for Petitioners.

Judgment.—This is an application for revision of the order of the Joint Magistrate of Bhagalpur, summarily dismissing the petitioners' appeal from a conviction under S. 504, Criminal P. C., without recording any reason for his order. The explanation of the learned Joint Magistrate is that when an appeal is summarily dismissed under S. 421, Criminal P. C. it is not necessary to deliver a formal judgment in accordance

with the provisions of S. 367. This is true, but the learned Joint Magistrate should have remembered that, as was pointed out in *Gurubari Behera v. Emperor* (1), a Magistrate who summarily dismisses an appeal under S. 421 without giving reasons runs the risk of having the case remanded for a further hearing, if the High Court in revision is not satisfied that he had properly applied his mind to the case. A Sessions Judge or Magistrate, whose orders are subject to revision by the High Court, ought, save in very exceptional cases, to give some reasons for his decision which will show that he had really considered the points raised by the appellant and that the appeal actually is without foundation. If the appellate Court decides after hearing the appellant's pleader that there is no merit in the appeal, the position amounts to this, that the Court feels able to pronounce judgment at once without calling upon the other side for a reply; and when the Court is thus able immediately to pronounce judgment, the reasons for the decision should be given, just as they would be given if on the hearing of the appeal after admission, the Court should find it unnecessary to call upon the Public Prosecutor to reply to the arguments adduced on behalf of the appellant. This is the manner in which Sessions Judges ordinarily apply the provisions of S. 421 to appeals which are presented in Court by a pleader; and it is only in very exceptional cases that an order summarily dismissing an appeal without giving reasons can be justified.

The appeal with which I am here concerned necessarily involves the consideration of conflicting evidence and I am not satisfied that the learned Joint Magistrate has really applied his mind to the question of whether on a consideration of the evidence as a whole the conviction was justified. The order of the lower appellate Court is accordingly set aside and the appeal is remanded to the District Magistrate of Bhagalpur for re-hearing, either by himself or by any other Magistrate specially empowered under S. 407 (2), Criminal P. C.

P.N./R.K.

Case remanded.

* (1) [1917] 2 Pat. L. J. 695=43 I. O. 499=4 Pat. L.W. 153.

1930 Cr. Cases 617

(Sind)

RUPCHAND AND WILD, A. J. C's.

Umar and others — Accused — Applicants.

v.

Emperor—Opposite Party.

Criminal Revns. Nos. 295 to 297 of 1929, Decided on 18th February 1930.

Criminal P. C., S. 162—Mere fact that statement of witness before police does not in Magistrate's opinion contradict his evidence is no reason for refusing to grant copy of statement.

The copy of statement of a witness before police can only be refused, if the statement or statements contained therein are not relevant or their disclosure is not essential in the interests of justice or expedient to the public interests. The mere fact that the statement of the witness before the police does not in the opinion of the trying Magistrate contradict the evidence of the witness in the Court is no reason for refusing to grant the copy: *A. I. R. 1927 Pat. 325*; *A. I. R. 1929 Pat. 268* and *Other cases Referred*; *A. I. R. 1927 Cal. 514*; *A. I. R. 1928 Bm. 23* and *A. I. R. 1928 Pat. 215, Dist.* [P 617 C 2]

Hatim B. Tyelji and D. N. O. Sullivan—for Applicants.

Partabrai D. Pawani — for the Crown.

Wild, A. J. C.—These are revision applications by the four petitioners who were convicted with five others by the City Magistrate of Karachi of offences under Ss. 147, 324, 326 and Ss. 324 and 326 read with S. 149, I. P. C., and were sentenced to varying terms of imprisonment and to detention in a reformatory school. In appeal the co-accused of the petitioners were acquitted by the learned Judicial Commissioner and the petitioners whose appeals were dismissed come to us in revision.

One of the grounds of these applications is that the learned City Magistrate wrongly refused to give counsel a copy of the statement of the witness Parshotam made before the police under S. 161, Criminal P. C., and as it involves a question of importance we have taken time to consider it. The reason why the learned City Magistrate refused to grant the copy appears from the note made by him on the deposition of the witness Parshotam Ex. 11 and is to the following effect:

"Note.—The witness's statement to the police examined by the Court was under S. 162, Criminal P. C. As I find that there is nothing in it contradictory to the evidence

given in Court the request of the accused's counsel for a copy is refused as inadmissible."

Now, as the only use to which an accused can put a statement of a witness made to the police is to contradict such witness it would at first sight seem that if there is in fact no contradiction between the statement of the witness in Court and his previous statement before the police it would be reasonable for the Magistrate to refuse to grant a copy of the statement before the police. The wording, however, of S. 162, Criminal P. C., does not bear out this view. Proviso 1, sub-S. (1), S. 162, says that the Court shall on a request of the accused refer to such writing and direct that the accused be furnished with a copy thereof in order that any part of such statement if duly proved may be used to contradict such witness in the manner provided by S. 145, Evidence Act 1872. It is clear from the proviso 1 that on a request at the proper time the Court must refer to the previous statement of the witness, and direct that the accused be furnished with a copy thereof. This, however, is subject to proviso 2 which says that if the Court is of opinion that any part of any such statement is not relevant to the subject matter of the enquiry or trial or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest it shall record such opinion but not the reasons therefor and shall exclude such part from the copy of the statement furnished to the accused. From this it is evident that the copy can only be refused (1) if the statement or statements contained therein are not relevant or (2) their disclosure is not essential in the interests of justice and is inexpedient in the public interests. In this particular case the reason for the refusal to grant the copy is not that the statements contained therein are not relevant to the subject matter of the trial, nor was the copy refused because the disclosure of the statement would be inexpedient in the public interests. The mere fact, then, that the statement of the witness before the police does not in the opinion of the trying Magistrate contradict the evidence of the witness in Court is no reason for refusing to grant the copy. This view

was also taken in the case of *Chedi Prasad Singh v. Emperor* (1) and *Jhari Gope v. Emperor* (2) and in the latter case the facts were exactly similar to the facts here, the application for a copy being refused because there was no discrepancy between the statement of the witness before the police and his statement in Court.

It is no doubt true that where there are as a matter of fact no discrepancies between the statements made by the witnesses in Court and their statements before the police the granting of copies of those latter statements will not be of any apparent use to the accused. We have, however, to construe the words of S. 162, Criminal P. C., as they stand and the wording of that section does not in our opinion permit the refusal of copies because there are no discrepancies.

We have been referred to certain other rulings, that is to say, *Madari Sikdar v. Emperor* (3), *Emperor v. Usman Shaikh Umar* (4) and *Ramgulam Teli v. Emperor* (5), but these refer rather to the time at which the accused can be granted copies of the statements before the police of the witness whom he wishes to contradict in cross-examination.

We hold then that the learned City Magistrate was wrong in refusing to grant a copy of the statement of the witness Parshotam before the police.

Rupchand, A. J. C.—I concur.

Section 162, Criminal P. C., before it was amended, made it obligatory on the trial Court to refer to the statement of a witness recorded by the police under the preceding section when such witness was called as a prosecution witness, but vested the Court with a discretion to decide whether the copy of such statement should be furnished to the accused or not.

The section has now made it obligatory on the Court not only to refer to such statement if so required, but also to grant its copy to the accused unless the Court is of opinion that any part thereof is: (a) not relevant to the subject-matter of the inquiry or (b) that its disclosure to the accused is not essential

in the interests of justice and is inexpedient in the public interests. In either of these events, the only jurisdiction vested in the Court is to exclude such portions from the copy to be supplied to the accused after recording its opinion in writing to that effect, but not the reasons therefor.

It is to be noted that both under the old and the amended section, the only use which the accused could make of the copy of the statement supplied to him would be for the purpose of contradicting the witness in the manner provided by S. 145, Evidence Act, after it had been duly proved. But in the section as amended the question whether the copy could be used for the purpose indicated above or not, appears not to have been left to the Court but to the accused and for obvious reasons.

In almost every case, a prosecution witness when examined in chief, amplifies or varies to a certain extent his previous statement, and it is always a difficult question to decide by a mere comparison of the two statements whether the omissions and additions or variations, if any, in the two statements were intentional or otherwise. On the one hand, there is no prejudice to the Crown if the previous statement of the witness which is identical with that given by him in the examination in chief and cannot, therefore, be made use of for the purpose indicated by S. 145, Evidence Act, is given to the accused; on the other hand, if the copy is refused, the accused has every right to complain that he has not been given a fair trial.

In dealing with the legality of the order complained of, the learned Judicial Commissioner has observed :

"It is argued that this procedure is not correct. In connexion with this point reference has been made to *Ram Gulam Teli v. Emperor* (5). It is to be noted that, as stated in that case, the previous rulings, namely *Mudari Sikdar v. Emperor* (3) *Peramasami Rayudu, In re* (6) and *Sadat Mian v. Emperor* (7), were not followed, the Patna ruling *Saadat Mian v. Emperor* (7) being directly contrary to the subsequent Patna ruling *Ram Gulam v. Emperor* (5) mentioned above. It appears that *Ram Gulam v. Emperor* (5) has been followed in the later Patna case this year. In view of these contrary rulings, and the point being not free from doubt, I am not disposed to hold that the

(1) A. I. R. 1927 Pat. 325.

(2) A. I. R. 1929 Pat. 268=8 Pat. 279.

(3) A. I. R. 1927 Cal. 514=54 Cal. 307.

(4) A. I. R. 1928 Bom. 23=52 Bom. 195.

(5) A. I. R. 1928 Pat. 215=7 Pat. 205.

(6) A. I. R. 1926 Mad. 188.

(7) A. I. R. 1927 Pat. 243=6 Pat. 329.

learned City Magistrate was wrong on the point. Even, however, if it was not correct, still the procedure adopted is not such as to vitiate the trial, as it is evident that there were in fact no differences of any serious nature between Parshotam's statement to the police and his deposition before the Magistrate."

As pointed out by my learned brother, the conflicting rulings referred to above dealt rather with the time at which the accused could require the Court to refer to such statements for the purpose of granting copies to the accused and not to the grounds on which he could refuse them.

Such of the obiter dicta which might at first sight appear to support the contrary view do not seem to have been accepted in several later rulings.

The case of *In re, Paramasami Rayudu v. Emperor A. I. R. 1926 Mad. 183* does not call for any specific comment as it appears to refer only to the stage at which a copy of the statement could not be claimed by the accused as of right and nothing more.

In *Madari Sikdar v. Emperor A. I. R. 1927 Cal. 514*, two points were decided, first, with regard to the effect of the amendment of S. 162, Criminal P. C. In dealing with that point it was said :

"The effect of the amendment is to annul the Judge's discretion, and to make it obligatory on him to give the accused copies of the statements subject only to the exclusion of irrelevant matters which the public interest requires should not be disclosed."

The second point was with regard to the stage at which the accused was entitled to make his request for copies. In dealing with that point, it was said that this must be after the witness had been called for the prosecution and not before the commencement of the preliminary inquiry. That was all that was required for the purposes of that case. But their Lordships went further and said :

"This decision, as also the wording of S. 145, Evidence Act, makes it clear that it is at the time of cross-examination and not before that the previous statement of a witness can be put to him. But the cross-examination must lay the foundation for the suggestion that the evidence given by the witness in Court is contradicted by his statement recorded under S. 161, Criminal P. C., and it is only then that the accused is entitled to ask the Judge to refer to the writing and grant him copies."

These observations have been the subject of adverse comment in subsequent cases, e. g., *Usman Sheikh Umer v. Emperor, A. I. R. 1928 Bom. p. 23*, at p. 25, *Per Patkar, J., Ramgulam Teli v.*

Emperor, A. I. R. 1928 Pat. 215, *Per Ross, J., Jhari Gope v. Emperor, A. I. R. 1929 Pat. 268*, *Per Courtney-Terrell, C.J. and Fazl Ali, J.* In the recent case of *Babarali Sardar v. Emperor, A. I. R. 1929 Cal. 182*, while commenting on the above dictum, Rankin, C. J., said :

"If this case had turned upon the question whether the learned Judges, Chotzner and Duval, JJ., were right in the Calcutta case to which I have referred in saying that there must be a foundation laid by way of cross-examination showing that the statements are wanted to contradict the witnesses, I should have thought it necessary to refer this case to a Full Bench to have that question decided. As at present advised, I am not prepared to accept that as a possible interpretation of this section. I do not think that it was any part of the intention of the amended section that the Judge has to consider whether a foundation has been laid. In my judgment that part of that decision is open to criticism."

It is to be observed that in the case of *Madari Sikdar v. Emperor, A. I. R. 1927 Cal. 514*, their Lordships have not indicated how and in what manner the counsel for the accused was to lay the foundation for the suggestion that the evidence given by the witness in Court was contradicted by his previous statement made to the police, or how and in what manner, he was to get knowledge of the contents of the previous police statements before he could make such assertion.

Again, it is difficult to read into the section any words to that effect . . . If the object of the legislature in amending the section was to take away from the trying Magistrate his discretion to refuse the copies except on two specific grounds mentioned in the proviso, it would be going contrary to the intention of the legislature to impose this further condition that before a copy can be granted, the accused must satisfy the Court that he will be able to use the copy for the purpose indicated in S. 145, Evidence Act.

The last ruling referred to by the learned Judicial Commissioner is that of *Saadat Mian v. Emperor, A. I. R. 1927 Pat. 243*. In that case, the Court was moved to quash the commitment made by the Magistrate on the ground of non-compliance with certain provisions of law inter alia the refusal by the Magistrate to postpone the case to allow the accused to cross examine prosecution witnesses after obtaining copies under S. 162 which application had, as a

matter of fact, been granted and not refused. In the course of his judgment, Macpherson, J., said :

"In the first place, the question of furnishing to the accused a copy of the statement of a witness recorded by the police in the course of the investigation into an offence does not at all arise until the witness is called for the prosecution at the inquiry or trial in respect of the offence, and secondly the Court is not competent to direct that the accused be furnished with a copy of such statement unless it contains something which constitutes a contradiction to a statement made by the witness in his deposition at such inquiry or trial. These two circumstances must co-exist before an accused is entitled under the proviso to S. 162 (1) to such a copy."

These observations go much further than those in *Madari Sikdar's* case (3) and do cover the present case. But there is nothing in the section to warrant such observations and a contrary view has been entertained in the rulings of the Patna High Court referred to above, particularly the case of *Ramgulum Teli* (5) in which the judgment of Ross, J., had the concurrence of the same learned Judge, Jwala Prasad, J., who formed a Bench with Macpherson, J., but had in that case said nothing on this point.

In addition to the cases already referred to above, reference might be made to *Chedi Prasad Singh v. Emperor*, A. I. R. 1927 Pat. 325, where Sen, J., set aside an order passed by the trying Magistrate refusing to grant a copy of the previous statement of the witness on a similar ground, and the case of *Sulaiman Mahomed Bholat v. Emperor*, A. I. R. 1929 Rang. 87, which also supports the same view.

With all respect to the learned Judicial Commissioner, I am therefore of opinion that the Magistrate had no jurisdiction to refuse to grant the copy on the ground on which he has purported to do.

In view of the second reason given by the learned Judicial Commissioner, and the dictum of their Lordships of the Privy Council in *Abdul Rahman v. Emperor* (8), we have sent for the police papers and find that there are two statements of the witness Purshotamdas recorded by the police. The statement recorded by City Police Inspector Rimmer on 17th March 1929 describes him as Purshotamdas Bhagooram Kapur of Multan. The second statement recorded

on the following day by Sub-Inspector, Surajbali describes him as Purshotamdas Binjhumam Multani. Both of them appear to be statements of the same person who was called as a witness. There is to a certain extent a variation of the story given by him in the two police statements, and a further variation in the statement given by him in Court, and I am not prepared to hold that the said variations are immaterial or that they could not have been used by the accused for the purpose of contradicting the witness or that the accused have not been prejudiced in their trial by not being provided with copies thereof.

R.M./R.K.

Order accordingly.

* 1930 Cr. Cases 620

(Sind)

PERCIVAL, J. C., AND RUPCHAND, A.J.C.

Emperor

v.

Dipchand—Accused.

Criminal Appeal No. 180/6 of 1929,
Decided on 13th February 1930.

(a) Criminal P. C., S. 492—"In the absence of the Public Prosecutor" explained.

The words "in the absence of the Public Prosecutor" are very wide and include temporary absence of Public Prosecutor at the place and in the Court where the case is proceeding. [P 622 C 2]

(b) Criminal P. C., S. 494—(Per Percival, J. C.)—Mere fact that Magistrate does not give reasons for withdrawal is not sufficient for setting aside order granting withdrawal—Per Rupchand, A. J. C. — Though S. 494 does not require Magistrate to state reasons granting withdrawal it is desirable that he should do so.

Per Percival, A. J. C.—It is not "obligatory" on the Court to record reasons for permitting a withdrawal. That is to say the mere fact that the Magistrate has not recorded reasons for withdrawal of itself is not a sufficient ground for setting aside the granting of application for withdrawal and the acquittal of the accused. [P 622 C 1]

Per Rupchand, A. J. C.—There is nothing in S. 494 to require the Magistrate to record his reasons at the time of allowing the withdrawal of a case. But it is desirable that where a case is permitted to be withdrawn there should be some materials on the record of the case to satisfy the High Court that prima facie there was some good ground for the withdrawal of the case and that it was not left to the whim of the Public Prosecutor. Where the District Magistrate has been moved by an application from the accused to have the case withdrawn either the original application of the accused or an application from the Public Prosecutor stating briefly the reasons for withdrawal should be placed on the record or in any event the Court should in its own order give an indication as to the circumstances

(8) A. I. R. 1927 P.C. 44=5 Rang. 53=54 I. A. 96 (P.C.).

under which it grants its sanction. In the absence of such material on the record it is difficult for Government to decide if an appeal should be preferred or for the High Court to decide if the order sanctioning withdrawal is one which should not be interfered with.

[P 622 C 2, P 628 C 1]

* (c) Criminal P. C., Ss. 492 and 494—Case conducted almost to its finish by one Public Prosecutor—Then transfer of case to another place and no Public Prosecutor being available appointment of Sub-Inspector of Police to be Public Prosecutor by District Magistrate under S. 492—On application by accused District Magistrate orders the Sub-Inspector to withdraw case and the application of the Sub-Inspector to withdraw case was granted—Contention that District Magistrate alone had no power to withdraw case without consulting Public Prosecutor in charge of case from its commencement—Question raised is for executive authorities to decide and not legal.

A case was conducted almost to its finish from its commencement by one Public Prosecutor. Then the case was transferred to another place and there being no Public Prosecutor or his Assistants available at the time the District Magistrate appointed Sub-Inspector of Police under S. 492 to be Public Prosecutor. Subsequently on application by the accused the District Magistrate issued orders to the Public Prosecutor appointed under S. 492 to withdraw the case who in compliance with the orders applied for withdrawal and the application was granted. It was objected that the District Magistrate alone had no power to withdraw the case without consulting the Public Prosecutor in charge of the case from its commencement.

Held: that the question raised was rather a question for the consideration of the executive authorities than a legal question as the action of the District Magistrate was in compliance with Ss. 492 (2) and 494 though it is true that it is rather unusual for the District Magistrate to take action for the withdrawal without consulting the Public Prosecutor in charge of the case. [P 622 C:1]

C. M. Lobo—for the Crown.

Patrabrai D. Punwani—for Opponent.

Percival, J. C.—This is an appeal by Government against the order of the learned Sub-Divisional Magistrate Kotri, granting permission to the withdrawal of a case against one Dipchand and accordingly acquitting the accused. For the purpose of this acquittal it is not necessary to go deeply into the facts of the case. We have to consider chiefly the question whether the application for withdrawal was legal and whether the order of the Sub-Divisional Magistrate was correct.

The application for withdrawal of the case is as follows :

"In compliance with order No. S-168 dated 24th May 1929 of the District Magistrate,

Karachi to have the case withdrawn it is prayed that the Court may kindly grant permission to withdraw the case and acquit the accused."

The learned Public Prosecutor contends on legal grounds that there are three defects in this order of the learned Magistrate. In the first place he argues that the District Magistrate had no power to withdraw the case, because under S. 494 it is only the Public Prosecutor who can withdraw a case with the consent of the Court under that section.

This however brings us to the question :

• Was the Sub-Inspector of Police who was appointed public prosecutor for this case properly so appointed? If he was properly appointed as Public Prosecutor then he had the power to apply to the Court under S. 494 for the withdrawal of the case and in that case the Sub-Divisional Magistrate could grant his consent accordingly. We come then to the second objection urged by the learned Public Prosecutor which is that the learned District Magistrate had no power to appoint a Sub-Inspector of police as Public Prosecutor under S. 492. Criminal P. C. S. 492 runs as follows :

The District Magistrate . . . may in the absence of the Public Prosecutor or where no Public Prosecutor has been appointed appoint any other person not being an officer of police below such rank as the Local Government may prescribe in this behalf to be Public Prosecutor for the purpose of any case."

Now in this particular instance the case had been commenced in the Hyderabad District, and the learned Assistant Public Prosecutor, Hyderabad, was in charge of the case. Subsequently it was transferred to the Sub-Divisional Magistrate, Kotri, because he happened to be the Magistrate who had begun the case at Hyderabad. When the case came on in Kotri the "Public Prosecutor" would be the Public Prosecutor of Karachi or one of his assistants. Now there was no such Public Prosecutor at Kotri available at the moment therefore the District Magistrate was legally justified under S. 492, in the absence of the Public Prosecutor in appointing some other person to be a Public Prosecutor for the conduct of the particular case. I am of opinion therefore, that there was nothing illegal in the order of the learned District Magistrate ap-

pointing the Sub-Inspector of Kotri to be the Public Prosecutor in this case nor in the Public Prosecutor so appointed applying to the Magistrate to withdraw the case.

And we come to the further question whether the District Magistrate alone has to decide whether an application for withdrawal should be made or whether the Public Prosecutor in charge of the case should have any voice in the matter. We are informed that in this particular instance the Assistant Public Prosecutor who had been in charge of the case was not consulted by the District Magistrate before the application for withdrawal of the case was made. This seems to be a question rather for the consideration of executive authorities than a legal question for consideration by this Court, as legally the action taken by the District Magistrate was in accordance with the provisions of S. 492 (2) and 494, Criminal P. C. It may be observed, however, that it is rather unusual for a District Magistrate to apply for the withdrawal of a case without consulting the Public Prosecutor or Assistant Public Prosecutor in charge of the case.

There remains the third point that no reasons were given by the Magistrate for granting permission to withdrawal. In this connexion our attention has been drawn to *Rajani Kanta v. Idris Thakur* (1) in which it is stated that the reason for granting consent should be stated in order to enable the High Court in revision to determine the propriety of the exercise of discretion by the lower Court. On the other hand there are rulings to the contrary effect particularly 2 *Patna* 708 where it is stated that where the Court permits a prosecution to be withdrawn under S. 494, Criminal P. C., it is not necessary to record its reasons for permitting the withdrawal. It seems that an intermediary position between two somewhat conflicting views may be adopted and we may say it is not "obligatory" on the Court to record reasons for permitting a withdrawal. That is to say the mere fact that the Magistrate has not recorded reasons for withdrawal of itself is not a sufficient ground for setting aside the granting of application for withdrawal and the acquittal of the

accused. In the circumstances of this case and having regard to the fact that there is nothing illegal in the procedure of the District Magistrate or the Sub-Divisional Magistrate, Kotri, I do not think that it is necessary for this Court to interfere and I would, therefore, dismiss this appeal.

Rupchand, A. J. C.—I concur. The Public Prosecutor has raised the following four points :

1. That the appointment of the Sub-Inspector of Police as Public Prosecutor was bad. 2. That the Sub-Inspector although appointed as Public Prosecutor by the District Magistrate had no power to withdraw the case. 3. That the order of the Magistrate permitting withdrawal is illegal as it gives no reasons. And

Lastly (4) on the merits it is a fit case for this Court to interfere.

Now S. 492 of the Code apparently empowers the District Magistrate to appoint as Public Prosecutor any officer of the police not below such rank as the Local Government may prescribe in that behalf (a) in the absence of the Public Prosecutor and (b) where no Public Prosecutor has been appointed. I take it that the words "in the absence of the Public Prosecutor" are very wide and include temporary absence of the Public Prosecutor at the place and in the Court where the case is proceeding. S. 4, Cl. (t) describes the Public Prosecutor to mean any person appointed under S. 492 of the Code and therefore the Sub-Inspector was not only properly appointed as Public Prosecutor in the case but had power to withdraw it under the provisions of S. 494. There is also nothing in that section to require the Magistrate to record his reasons at the time of allowing the withdrawal of a case. It is no doubt desirable that where a case is permitted to be withdrawn there should be some materials on the record of the case to satisfy the High Court that *prima facie* there was some good ground for the withdrawal of the case and that it was not left to the whim of the Public Prosecutor. Where the District Magistrate has been moved by an application from the accused to have the case withdrawn either the original application of the accused or an application from the Public Prosecutor stating briefly the reasons for with-

(1) A. I. R. 1921 Cal. 259=48 Cal. 1105.

drawal should be placed on the record or in any event the Court should in its own order give an indication as to the circumstances under which it grants its sanction. In the absence of such material on the record it is difficult for Government to decide if an appeal should be preferred or for the High Court to decide if the order sanctioning withdrawal is one which should not be interfered with.

In this case it would appear that the application filed in Court by the Sub-Inspector acting as Public Prosecutor for permission to withdraw the case and the order passed thereon show that the Public Prosecutor had conveyed a mandate of the District Magistrate to the Court and the Court had given effect to it without applying its mind to the merits. The application and the order passed thereon are as under :

In compliance with order No. S. 168 dated 24th May 1929 of the District Magistrate, Karachi, to have the above case withdrawn, it is prayed that the Court may kindly grant permission to withdraw the case and acquit the accused.

Dated 25th May 1929 (Sd.) Illegible,
Sub-Inspector of Kotri.

ORDER

Permission for withdrawal granted.
Accused acquitted under S. 504, Criminal P. C.

D/- 25th May 1929 (Sd.) M. A. Hafiz,
Sub Divisional Magistrate, Kotri.

In my opinion the Court was not only entitled to but should have insisted upon a better and more reasoned application for withdrawal of the case than the above.

The complaint made by the learned Public Prosecutor for Sind that in the circumstances of this case specially when it had been proceeded with almost to its finish the Assistant Public Prosecutor of Hyderabad who was in charge of the case from its commencement should have been consulted and instructed to do the needful is not unjustified but this is a matter relating to administration and one in which the Local Government may if it thinks fit issue instructions but I am afraid by itself this is not a ground upon which we could interfere.

Speaking for myself I should have been inclined to interfere but for two

circumstances to which our attention has been drawn and which pertain to the last point in the case. We have been supplied with a true copy of the application made by the accused to the District Magistrate giving detailed reasons in which he moved the District Magistrate for withdrawal of the proceedings and in view of the facts stated therein, I am not prepared to hold that the order of the District Magistrate is so unreasonable as to merit an interference by this Court.

The other circumstance is the death of the principal offender namely the bailiff who is said to have allowed the present opponent who was co-accused in the case to abscond after his arrest. The bailiff is dead and so far as the present accused is concerned the case of the Crown is not absolutely clear. It is based upon an inference to be drawn from certain facts to be proved that the bailiff permitted the present accused to abscond after he had arrested him probably on receiving or in the hope of receiving an illegal gratification. But there is equally the other probability of the bailiff not having arrested him at all from a like motive.

Taking into consideration all the circumstances I agree with the learned Judicial Commissioner that interference should be declined.

P.N./R.K.

Revision dismissed.

1930 Cr. Cases 623

(Lahore)

ADDISON, J.

Sham Singh—Petitioner.

v.

Mt. Hakam Devi—Respondent.

Criminal Revn. Appln. No. 1815 of 1929, Decided on 28th March 1930.

(a) Criminal P. C., Ss. 488 and 489—Application under S. 488—Court should dismiss application if parties compromise, leaving them to enforce compromise in civil Court—Such compromise is bar to application under S. 489.

Where, in an application under S. 488, the parties arrive at a compromise, the proper course for the Court is to dismiss the application leaving the parties to enforce the compromise in civil Courts. Such a compromise is a bar to an application under S. 489. An order of maintenance passed in accordance with a compromise cannot be enforced by a criminal: Court 42 P. R. 1888 and 89 P. R. 1905 *Cr. Ref. to.* [P-624 C 2]

(b) Criminal P. C., S. 488—Party present in Court along with pleader—Ex parte order against him is not justified.

Where a party along with his pleader is present in the Court, an ex parte order against him without hearing him is not justified and should be set aside. [P 624 C 2]

Facts.—In November 1907 Mt. Hakam Devi applied to a 1st Class Magistrate Sheikh Rahim Bakhsh under S. 488, Criminal P. C., for maintenance against her husband Sham Singh. During the pendency of the application, parties compromised and Sham Singh agreed to pay Rs. 5 per mensem to the applicant irrespective of the fact whether she lived in his house or at her own parent's house. The Magistrate thereupon passed an order on 29th May 1908, fixing her monthly allowance at Rs. 5 under S. 488, Criminal P. C.

The present application heard by Lala Daulat Ram, Magistrate 1st Class, Gujranwala, was lodged by Mt. Hakam Devi on 19th January 1929, saying that she had received maintenance up to 7th April 1928 and praying that the amount due after that till 19th January 1929 be realized from the respondent Sham Singh. She also prayed that her father with whom she was living, having died since 1½ years, the rate of her monthly allowance Rs. 5 be increased to Rs. 15 per mensem. Notice was thereupon issued to respondent Sham Singh under S. 489, Criminal P. C. Sham Singh was not personally served for several hearings whereupon the Magistrate on 15th May 1929 passed an order of proceeding ex-parte against him. On a later hearings of the case on 12th June 1928 Sham Singh put in appearance along with his pleader, but the Magistrate being on leave that day, the case was postponed to 28th June 1929. On 28th June 1929, it appears that the Magistrate took up the case in the first portion of the day when Sham Singh respondent was not present, and passed an order that as there was great difference in prices of commodities between the years 1908 and 1929, the allowance of Rs. 5 per mensem should be increased to Rs. 10 per mensem from the date of the present application viz., 19th January 1929. That very day 28th June 1929, Sham Singh respondent put in an application saying that his defence should be heard and that he should not have been proceeded with ex parte. This application was, however, rejected. Sham Singh has now filed a revision to me against the

order allowing Rs. 10 per mensem as maintenance to Mt. Hakam Devi.

Report.—The proceedings are forwarded for revision on the following grounds : I have heard pleaders for both the parties and find that the Magistrate's order dated 28th June 1929 must be set aside. It appears from the file of the Magistrate that Sham Singh respondent along with his pleader was present in Court on 12th June 1929. The fact of his being present on 28th June 1929, also is borne out by his application of that date on file. The ex parte order allowing Rs. 10 per mensem as maintenance to Mt. Hakam Kaur without hearing the respondent is therefore not justified.

Besides, I am of the opinion that the original order of Sheikh Rahim Bakhsh Magistrate, dated 29th May 1908, is not good in law. The parties having compromised at that time the Magistrate should have better dismissed the application under S. 488, Criminal P. C., and left the parties to enforce the compromise in the civil Courts. The very fact of the compromise made at that time is again a bar to the present application made by Mt. Hakam Kaur under S. 489, Criminal P. C., (vide *Mt. Rahim Bibi v. Khair Din* (1) and *Rahem Ali v. Fateh Bibi* (2), which lay down that an order of maintenance passed in accordance with a compromise cannot be enforced by criminal Courts.

It has been urged by Mt. Hakam Devi's pleader before me that the fact of her father's death since a year or so is good ground for increase of her maintenance. The terms of the compromise of 1908, however, are clear that Rs. 5 would be paid monthly whether she lived with the complainant or with her father. I, therefore, recommend that the order of the Magistrate dated 28th June 1929 increasing the allowance to Rs. 10 per mensem be set aside and that the applicant Mt. Hakam Devi be directed to seek her remedy in civil Courts.

Order.—For reasons given by the learned District Magistrate, I set aside the order of the Magistrate, 1st Class, dated 28th June 1929, increasing the allowance.

R.M./R.K.

Order set aside.

(1) [1888] 42 P. R. 1888 Cr.

(2) [1905] 39 P. R. 1905 Cr.=2 Cr, L. J. 690=108 P. L. R. 1905.

1930 Cr. Cases 625

(Allahabad)

Full Bench

BOYS, BANERJI AND KING, JJ.

R. Saigal—Applicant.

v.

Emperor

Criminal Misc. Appln. No. 167 of 1929, Decided on 5th March 1930, under S. 99-B of Criminal P. C.

(a) Criminal P. C., S. 99-D —Government should begin — But both parties heard—Onus is immaterial.

It is manifestly most convenient that Government Advocate should begin and state the case in support of the Local Government. But where both parties have been heard fully the question of onus is of very little or no practical importance; *A. I. R. 1925 All. 195, Rel. on.* [P 626 C 1]

(b) Criminal P. C., S. 99-A — Document though advertisement can be forfeited under S. 99-A—However advertisement of forthcoming book unless seditious by itself cannot be forfeited because it is intimately associated with seditious book.

The mere fact that a document is only an advertisement of a forthcoming book is not sufficient to protect it from forfeiture under S. 99-A and in considering whether it is seditious or not the advertisement must be considered on its merits and not in the light of the forthcoming book. The intention of an advertisement of a forthcoming book is clearly primarily merely to further the sale of the book. It is a step in preparation in furtherance of the sale of the book which is to appear in the future and although it may be very intimately connected with the book and though it may be considered desirable to forfeit all the documents connected with and intimately associated with a book that has been found to be seditious there is no provision in the law either under S. 99-A or 124-A Penal Code to forfeit the advertisement for such reason alone. [P 626 C 2, P 627 C 1]

(c) Criminal P. C., S. 99-D—Two reasonable views—Benefit must be given to applicant.

Where a document admits of two reasonably possible views the applicant must have the benefit of that which is most favourable to him. [P 627 C 1]

(d) Penal Code, S. 124-A — "Duty of historian."

It is the duty of a historian to make an endeavour to be impartial and not to make a presentation only of the evil deeds of those with whom he is dealing. [P 627 C 2, P 628 C 1]

(e) Penal Code S. 124-A—Book is to be judged as a whole.

The book must be judged as a whole with its introduction and acknowledgment or dedication. [P 627 C 2]

(f) Criminal P. C., S. 99-F—Practice referred to is practice in miscellaneous civil proceedings.

The proceedings under S. 99-F are sui generis but the particular exclusion by S. 99-F of the practice in suits and the very provisions for an order for the payment of costs suggest that

regard is intended to be had to the practice in civil miscellaneous proceedings. It is therefore reasonable that the cost of the other side so far as it may be found to have been reasonably incurred should be paid by the person to whose action the incurring of those costs was due. [P 630 C 1, 2]

K. N. Katju, R. S. Pandit, Ajodhya Prasad and Kanhailal—for Applicant.

U. S. Bajpai—for the Crown.

Boys, J. — This is an application under S. 99-B, Criminal P. C., by which the applicant takes objection to orders of the Local Government under S. 99A, Criminal P. C., declaring every copy of a book and of the advertisement thereof forfeited to His Majesty.

The book is entitled "Bharat men Angarezi Rajya." The author is one Sriyut Sundar Lal, B. A., ex-editor of the "Karmayogi" and the "Bhavishya." The book is written in Hindi. R. Saigal is the printer and publisher, and it was published at the Fine Art Printing Cottage, 28, Elgin Road, Allahabad. In the advertisement of the book it is described as a :

"compilation from the English books "Rise of Christian Power in India," "The consolidation of the Christian Power in India," and "Ruin of Indian Trade and Industries" of the well-known historian Major Baman Das Basu, I. M. S., and from other authentic historical works."

The applicant before us is the printer and publisher R. Saigal, whose case has been put before us by Dr. Katju. The author Sundar Lal, has, so far as we are informed, taken no objection to the orders of Government passed under S. 99-A, and has not appeared before us in any way, or made any representation to us personally or through counsel.

The following facts are undisputed before us. The first advertisement of of the book in question appeared in the November issue of the year 1928 of the "Chand" magazine. The advertisement appears to have been of a two-fold nature: a brief one page advertisement such as is common in regard to many books, and a large fuller advertisement extending to a number of pages and containing a synopsis of many but not all of the chapters in the book.

On 10th December 1928, this November issue of the "Chand" was declared under S. 99-A, Criminal P. C. to be forfeited, but there was no parti-

cular reference to the advertisements with which we are now concerned.

On 18th March 1929, the book was published and the publisher proceeded to issue copies. On 19th March 1929, a police officer called at the office of the publisher and informed him that the Superintendent of Police desired to see him. On 20th March 1929 at this interview the Superintendent of Police informed the publisher that the advertisement of the book had been proscribed. He also warned the publisher that he would proceed to the publication of the book itself at his own risk. The publisher then informed the Superintendent of Police that the book had already been published two days previously.

Two days later, on 22nd March 1929, an officer of the Criminal Investigation Department informed the publisher that the book had been proscribed. The notifications proscribing the advertisement and the book are dated respectively 15th March 1929, and 22nd March 1929, and both appeared in the Gazette of 23rd March 1929.

It is against these notifications that the present application is directed.

At the commencement of the hearing before us the questions on whom the onus of proof lies and who has the right to begin were incidentally touched upon but no adequate reason was suggested why we should not follow the procedure adopted in *Emperor v. Baijnath Kedia* (1), and we found ourselves in complete agreement with the proposition there stated that the question of onus of proof is, after both parties have been fully heard, of very little or no practical importance and further we think that it is manifestly most convenient that the Government Advocate should begin and state the case in support of the Local Government's orders.

To deal first with the order of forfeiture in regard to the advertisement. Every document of this description must be dealt with on its own merits. We have carefully examined every word of the lengthy synopsis of the book contained in the advertisement. A summary is made of a number of chapters. The advertisement is silent as to some others. Taking isolated phrases, it is possible to pick out some that standing by themselves might be read

as having a bearing on the present British rule, but taking the advertisement as a whole we think that even those phrases must be read as bearing only on the undesirable feature of the administration by the East India Company. We shall hold later in regard to the book itself that there are in it *passim* passages having reference to the Government prevailing at the present day. But none of those passages appear in the abstract made for the purpose of advertisement and more particularly, we find in the advertisement no reference to the ideas which are given special prominence in the concluding chapter of the book. We do not think therefore that taking the advertisement strictly by itself as it existed at the time the order of forfeiture was passed, there is sufficient material in that advertisement to form the basis of an order of forfeiture under S. 99-A, Criminal P. C. Again we must emphasise, as indeed must be obvious, that we are speaking of this particular advertisement alone. It of course far from follows that the mere fact that the document is only an advertisement of a forthcoming book is sufficient to protect it from forfeiture under S. 99-A, Criminal P. C.

It has been suggested for the Local Government that the advertisement must be read in the light of the subsequent book. It is manifest that in some cases while a document may not strictly speaking by itself disclose seditious intent, it may be read in the light of other documents whether prior or subsequent in date and the seditious nature of the document in question may be apparent from those other documents. An illustration of this is to be found in the case of *Queen Empress v. Balgandhar Tilak* (2). Where an article has appeared in a paper the intention and the effect of that article may be gathered not only from the article itself but from other articles connected therewith appearing prior or subsequent to the date of the article in question. But manifestly the case of an advertisement may be quite different. The intention of an advertisement of a forthcoming book is clearly primarily

^{*} (1) A. I. R. 1925 All. 195=47 All. 298 (F. B.).

(2) [1898] 22 Bom. 112.

merely to further the sale of the book. It is a step in preparation in furtherance of the sale of the book which is to appear in the future. But it is not possible to read provision for this into S. 124-A, I. P. C., or S. 99-A, Criminal P. C. It is of course possible to contend that the advertisement is very intimately connected with the book and it might reasonably be considered desirable to make provision for declaring forfeited all documents connected and intimately associated with a book that has been found to be seditious but there is no such provision in the law which this Court have to administer.

We therefore hold that the contents of the advertisement did not themselves afford sufficient basis for the order of forfeiture and it is hereby set aside.

Before leaving this we are constrained to add that we think that the advertisement itself and standing by itself was very near the border line. Two views of it were reasonably possible but two views being reasonably possible, the applicant must have the benefit of that which is most favourable to him.

We now come to consideration of the book itself. A passing complaint was made by Dr. Katju suggesting that the Government had not given the book due consideration before it was prescribed. We have ourselves given it the very fullest consideration as must be manifest from the fact that the arguments and the placing of the book before us have occupied this Court for over seven days. We have had before us and counsel have also had before them full translation made of the whole book by Government and those translations have been accepted as fair by both the counsel before us, though, as was inevitable here and there, reference has been necessary to the original and one of us familiar with Hindi has followed the text of the original book while the translated extracts were being read. Dr. Katju has in his painstaking argument been handicapped to this extent that he has not had the assistance of the author. We have already noted that it is the publisher who has made application to this Court. We are assured that he has no interest other than financial in this book at all. We have no explanation before us of why

the author has treated with indifference the prescription of his book. But the fact remains that he has not made any attempt to justify it. Dr. Katju has urged that the book must be judged as a whole with its introduction and acknowledgment or dedication and we agree with him. In the case of a lengthy book such as this extending to nearly 1,700 pages of print it might be unfair, generally speaking, to pick out a sentence which might have found its way into the book by inadvertence and condemn the whole book on account thereof. We have therefore considered the whole book with its introduction and acknowledgment or dedication and drawn our conclusions from its general trend and not only from isolated passages.

It is contended for the applicant that the book was written and published in furtherance of the interest of vernacular education. If this were the sole motive there can be no doubt that it would be a laudable object and the last thing that anybody would desire would be to place obstruction in the way of that purpose, but whether or no that may have been one of the objects we are concerned with the means by which it was proposed to attain that object and the question whether there was or was not another illegal purpose as well.

It has been contended that the fact that the book was published at a price of Rs. 16 is an indication that no seditious purpose was intended; that a book at such a price could not possibly be intended to reach the multitude. There is no force in this contention. It is part of the applicant's case that 2,000 copies of the book have been printed at very great expense and it is impossible to suppose that this was done except in the hope of reaching a very wide market whether through individuals or through libraries.

It has been contended that it is not usual for historians to be impartial. It may be conceded that most students of history have formed some opinion of the circumstances with which and of the characters with whom they deal and such partiality is obviously not in itself criminal or even culpable but there is manifestly a vast difference between this and the deliberate setting out of only one side of the case. It is at least the duty of a historian to make an endea-

your to be impartial and not to make a presentation only of the evil deeds of those with whom he is dealing. In the book before us even institutions like those of railways are set out as merely unmitigated engines of oppression of the Indian and the country of India. Even the Penal Code is described as follows :

"The object of this law (the Penal Code) was to impoverish Indians, to demoralise them, to create in them the habit of dishonesty and litigation and to ruin them utterly."

It would serve no useful purpose and merely prolong this judgment to wholly unnecessary lengths were we to endeavour to reproduce in detail the passages to which we have been referred throughout this book and the arguments in reference to these passages. It is not necessary or desirable for us to do more than to state our definite and clear conclusions. We are fully satisfied :

(a) that the book that we have to consider can in no sense be regarded as merely "history" of the times with which it deals.

(b) That the book is not merely a compilation from other books but contains numerous passages which state the author's own views and his own ideas of the purpose to which Indians of the present day should direct themselves and of the means by which that purpose, the destruction of British rule in India, should be carried out. We may add that even if it was a mere compilation in the strictest sense of the term that would not be an adequate answer to the present charge.

(c) That there is passim propaganda directed to show that the evil state of affairs existing during the days of the East India Company continues to the present day. In the acknowledgment at the commencement of the first volume we find the phrase :

"In the introduction I think it necessary to present before the reader an account of the invasions of India before British advent, specially of the condition of India at the time of the coming of the British so that it may be easy for them to apprise correctly the beneficial or harmful consequences of British rule over their country,"

and again,

"It is to be hoped that this humble effort may help some fellow countrymen to ponder seriously over the deplorable condition of the country and its real remedies."

In the Introduction we find :

"On the basis of these statements by supporters of the British rule and by concealing from us the real form of the British rule we are as-

sured that the British administration is a very great blessing for India and that all our future progress and peace in the country depends upon the continuance of British rule."

And again :

"We should also like fully to examine. . . . what were the causes and methods which led to the establishment of British rule in India, what were its effects on India and what are the means by which it may be hoped to secure deliverance from it in future."

In Chap. 35 :

"It has, however, always been seen that the proportion in which the rights and aspirations of the people in England have increased the fetters to subject India have tightened. It is also natural, because the interest of the rulers and the ruled always clash under an alien Government. Prosperity of England lies in the impoverishment of India and the awakening of the latter means danger to the former. The more the rights of the people of England will increase the more will the number of those who practically rule over India multiply and the more will increase the dependence and indigence of the country."

In Chap 51 of the book, in speaking of the proclamation of 1st November 1858 the author says :

"Since then the British rulers in India have in practice never cared a bit for the pledges contained in it."

In his concluding remarks he says :

"The detailed history of the 70 years following the rebellion is outside the scope of this book but the tale is the same."

The tale to which reference is made is explained at p. 1655 of the book :

"Another question which arises is what would have happened if the rebellion of the year 1857 had not at all taken place. An account of the company's administration and of the means employed and the acts done by it from 1757 to 1857 has been given in this book. It is impossible and useless to repeat that tale of woe."

We invited Dr. Katju to tell us, in reference to his defence that Major Basu's books were the foundation of the present book, whether there was any idea of a tale of woe continuing to the present time in Major Basu's books and he was unable to say that any such could be found. The quotations that we have given, and these might be multiplied, are ample to show that the book is in no sense merely a history, though of course, it contains historical facts, but it teems with propaganda directed to the elimination of British rule.

(d) That the intention of this book was and the effect of it is and must be to excite disaffection towards the present Government. Even if the book was limited to a criticism of the East India Company it would not necessarily

follow that it was not a book calculated to create disaffection towards the present Government but in view of the actual nature of the book that is not a proposition which it is necessary now for us to consider further.

(e) That in the great majority of the cases in which we have been invited to examine the authorities on which particular statements are alleged to be based and in which we have succeeded in tracing the alleged authority we have found that authority more or less misquoted, always in the direction of exaggeration or embroidery of the evidence and conclusion stated by the author in the direction of increasing the gravity of the charges made, or the clearness of the evidence by which it is endeavoured to support those charges.

(f) That generally speaking there is nothing but black in the picture painted of any Englishman or any British measure and nothing but white in the picture of anybody else. This is in truth admitted by Dr. Katju to be a fact and his only answer on behalf of his client is that the present book is based on those of Major Basu. In this connexion too we have the picture in the introduction of a "Peaceful invasion by Mahomedans of India and the statement that they only furthered their own interests and those of Islam by peaceful persuasion," the intention manifestly being to predispose Mahomedans to the more ready acceptance of the teaching in the rest of the book. Further it is to be noted that where anything is actually said in criticism of other than Englishmen it is only with the object of having a peg on which to hang immediately a more severe criticism of Englishmen any institutions established by Englishmen.

(g) That there is no force in the argument that all that is aimed at by this book is furtherance of the idea of replacing the present form of Government by Dominion Status. This argument put forward by Dr. Katju at a late stage of the case after it had been brought home to him by repeated reference to passages in the book that his original contention that the book was only a history of the East India Company was wholly untenable. Even if this were the object of the book, it might still be directed against the Government established by

law, it is necessary to enter into this, for there is not, in fact, throughout the book a hint of the idea of Dominion Status or a hint that the author only desired to displace the present form of Government by Dominion Status. One conclusion and one only is possible from the very full consideration that we have had to give during these seven days to the book that the author aimed at the entire severance of the British connexion with India, and at bringing into contempt and hatred the Government established by law in British India.

Finally we have to consider the question of costs. This is of considerable importance to both parties for owing to the necessity of translating a very lengthy book the expenses incurred have been considerable, amounting to no less than Rs. 3,000 and this apart altogether from the question of the fees paid by either side. In view of our finding that the order relating to the advertisement must be set aside and the order relating to book maintained we have no difficulty whatever in holding that it will be reasonable to order that nine-tenths of the costs incurred by Government who have been successful as regards the book should be payable by the other side, but in the comparatively small matter of the advertisement the Government should bear its own costs, that is, the remaining tenth. The question, however, on what basis we should determine the amount of the costs is not so easy of solution. In the present Criminal Procedure Code it is laid down in S. 99-F that "every High Court shall, as soon as conveniently may be, frame rules to regulate the procedure in the case of such applications, the amount of the costs thereof and the execution of orders passed thereon, and until such rules are framed the practice of such Courts in proceedings other than suits and appeals shall apply, so far as may be practicable, to such applications."

The present application was filed on 10th May 1929. At that date no rules had been framed under S. 99-F, Criminal P. C. Similar provision to that which we have quoted was formerly contained in the Press Act. The rules framed as under that Act, however, are no longer in force and no steps were taken immediately to frame any rules under S. 99-F. The rules framed under the Press Act were revived in the shape of rules under S. 99-F in December 1929. Even those

rules we notice do not make any reference to exhibits filed on behalf of the opposite party but only to exhibits attached to the petition or filed by the applicant. We have, however, to consider what was the situation at the time the present application was filed and in accordance with S. 99-F the petitioner should have been guided by the "practice of the Court in proceedings other than suits and appeals." The proceedings under S. 99-F are sui generis but the particular exclusion by S. 99-F of the practice in "suits" and the very provision for an order for the payment of costs suggest that regard is intended to be had to the practice in miscellaneous civil proceedings.

As to what that practice is neither side gave us any assistance. The language of the Court is English and wherever there is any relevant provision made it is always to the effect that the person filing an exhibit must cause to be translated by a competent translator of this Court all such exhibits as he may desire to file.

Now in the matter of this petition the petitioner was directly alleging that there was nothing in his book which was seditious and, strictly speaking it was incumbent on the petitioner to file with his petition a copy of the book and a translation thereof. He did not do so. The translation in fact was made by the opposite party, the Local Government. It has been admitted on the part of the applicant that it is a fair translation. It is not a case where it would have sufficed to translate a few selected passages; the whole book had to be considered. If neither side had had a translation made we should undoubtedly have had to postpone the case until a translation had been made.

After the translation had been made by the Local Government at its expense both sides took advantage of it to read whole chapters to us.

The broad facts stand out, therefore, that the petitioner ought to have the translation made and that it was made and made satisfactorily, by the Local Government. Under circumstances we think that there can be no doubt that the only equitable course is to direct that the Local Government be recouped for such expenses as they have properly incurred, in the proportion that we have

already named. The only material question then remaining is whether the sum of Rs. 3,000 stated by the Local Government to be the cost of translating the book is excessive or not. That figure is supported by an affidavit. No materials are given us by the applicant, after three days to consider the matter, to show that the sum of Rs. 3,000 is excessive. Left without any assistance we have endeavoured to ascertain for ourselves what would be the appropriate figure. So far as we have been able to ascertain Rs. 3,000 is just about the sum that either party would have paid if, in accordance with the principle we have mentioned, the book had been translated by a qualified High Court translator. We have so far referred to the cost of translation but the figure named by the Local Government includes also the cost of typing of five copies running to something over 1,200 pages for each copy and there is further the typing of some 300 pages of selections from the book. The expense was incurred because the applicant took no steps to have the translation made and we have had no materials given to us to find it excessive. Even on the basis of broad principle alone it appears to us reasonable that the costs of the other side so far as they may be found to have been reasonably incurred should be paid by the person to whose action the incurring of those costs was due.

On the question of legal fees we are given no reason for departing from the practice hitherto of allowing the fees of the Government Advocate at the rate of Rs. 200 per diem for the seven and half days, namely, Rs. 1,500.

In conclusion we set aside the order declaring the forfeiture of the advertisement, we maintain the order declaring the forfeiture of the book and we direct that the petitioner do pay to the Local Government nine-tenths of the sum of Rs. 3,000 expenses of translation etc. and nine-tenths of Rs. 1,500 fees of the Government Advocate, i. e., a total of Rs 4,050.

V.B./R.K.

Order accordingly.

1930 Cr. Cases 631

(Allahabad)

DALAL, J.

Ratan Lal—Applicant.

v.

Hafiz Abdul Hai—Opposite Party.

Criminal Revn. No. 805 of 1929, Decided on 5th February 1930, from order of Temporary Addl. Sess. Judge, Meerut, D/- 30th August 1929.

Criminal P. C., S. 195 (3)—Determination of superior Court is not confined to decrees which are appealable.

The determination of the superior Court, is not confined to the decrees which are appealable. What is stated is that a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees. [P 631 C 2]

Saila Nath Mukerji and *P.L. Banerji*—for Applicant.

M. Walliullah—for the Crown.

K. O. Carleton—for Opposite Party.

Judgment.—This is a civil revision, so the only question which may arise is that of jurisdiction. On facts the decision of the Additional District Judge of Meerut is binding.

An Assistant Collector of the First Class granted sanction for the prosecution of Hafiz Abdul Hai under certain sections of the Penal Code. He appealed under S. 476-B, Criminal P. C., and filed the appeal in the Court of the Additional District Judge of Meerut sitting at Muzaffarnagar. That Judge allowed the appeal, and hence the complainant has come here in revision. Two points are raised to prove want of jurisdiction of the lower appellate Court:

1. That in a case like the present no appeal lay under S. 476-B; and 2. That the Additional District Judge of Meerut sitting at Muzaffarnagar had no jurisdiction to receive the appeal.

A third point was raised that the transfer to the Court of the Temporary Additional Judge was invalid. This argument may be easily disposed of. If the appeal was validly filed in the Court of the Additional District Judge, the District Judge of Meerut had authority under S. 24, Civil P. C., to transfer the appeal to the Court of the Temporary Additional District Judge.

An appeal is allowed under S. 476-B in every case in which a civil, revenue or criminal Court has made a complaint against any person. When such a right is given it must be presumed that the Court exercising such right is pro-

perly indicated in the provisions of S. 195 (3), Criminal P. C. According to those provisions, where appeals lie to a civil and also to a revenue Court, such Courts shall be deemed to be subordinate to the civil or revenue Court according to the nature of the case or proceeding in connexion with which the offence is alleged to have been committed. In the present case the suit was one for recovery of revenue under the Tenancy Act, and as appeals from decrees in such suits lie to the civil Court the Assistant Collector would be deemed to be subordinate to the civil Court for the purposes of this particular case. That was allowed by the applicant's counsel. His objection was that the suit was one in which no appeal lay to any Court, the valuation of the suit being less than Rs. 200. The determination of the superior Court, however, is not confined to the decrees which are appealable. What is stated is that a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees. If this Court passed any appealable decrees in matters relating to the recovery of arrears of revenue, appeals from such decrees would lie to the civil Court, and therefore, the Court under S. 476-B would be subordinate to the civil Court when a complaint is filed in any suit of this nature whether a decree therefrom be appealable or not. I feel no difficulty in interpreting the words of Cl. (3), S. 195 which must be construed in a way to permit appeals in every case under S. 476-B.

It was pointed out that the provisions of S. 21 (3), Bengal N. W. P. and Assam Civil Courts Act, (No. 12 of 1867), refer specifically to appeals from Subordinate Judges and Munsiffs, and, therefore, the District Judge cannot assign the receiving and hearing of revenue appeals to an Additional District Judge. This may be conceded so far as the provisions of S. 21 of the Act, are concerned. There is, however, another provision contained in S. 8 of the same Act, to the effect that Additional Judges appointed to any district shall discharge any of the functions of the District Judge which the District Judge may assign to them, and, in the discharge of those functions, they shall exercise the same powers as the District

Judge. The function of receiving and hearing revenue appeals has been assigned by the District Judge to the Additional District Judge of Muzaffarnagar with respect to all revenue appeals of the Muzaffarnagar District. I am, therefore, of opinion that the appeal was rightly filed in the Court of the Additional District Judge and it was not necessary that it should have been filed in the Court of the District Judge of Meerut and specifically transferred to the Court of the Additional District Judge. I dismiss this application.

V.B./R.K. *Application dismissed.*

1930 Cr. Cases 632 (Madras)

BEASLEY, C. J., AND
PANDALAI, J.

Sankaralinga Tevan—Accused—Appellant.

v.

Emperor

Criminal Appeal No. 541 of 1929, and Referred Trial No. 153 of 1929, Decided on 9th December 1929, against judgment of Sess. Judge, Tinnevely Division.

(a) Evidence Act, S. 157—First information report—Statements are admissible only for corroborating or contradicting witness and not as substantive evidence—Criminal P. C., S. 154.

Statements in first information report can be used for the purpose of corroborating or contradicting a witness but are inadmissible for the purpose of proving that the facts alleged therein are correct: 17 C.W.N. 1213; A.I.R. 1925 All. 308 and A.I.R. 1927 Cal. 17, *Foll.* [P 633 C 1]

(b) Criminal Trial—Evidence—Circumstantial evidence must be conclusive.

In criminal cases based only on circumstantial evidence that evidence should be so strong as to point very clearly to the guilt of the accused. [P 633 C 2]

K. S. Jayarama Ayyar for *J. S. Vedamanickam*—for Accused.

K. N. Ganapathi for *Public Prosecutor*—for the Crown.

Beasley, C. J.—The appellant was convicted by the learned Sessions Judge of Tinnevely of the murder of his father Thandava Thevan and sentenced to death.

Thandava Thevan was undoubtedly murdered on the night of 2nd June last. He was stabbed on the chest and died of that stab. He was aged 55 years. The accused, aged 24, is his only son. The deceased had a second wife, P. W. 2,

who is the stepmother of the accused. Both the accused and his father owned a bandy and earned their livelihood by letting it on hire and the motive for the murder is alleged by the prosecution to have been a quarrel between Thandava Thevan and his son on this night with regard to the collection of money due from persons who had hired the bandy. As a result of this quarrel it is alleged that the accused stabbed his father and ran away. He surrendered himself to the Magistrate of Srivaikuntam on 14th June.

The evidence against the accused is purely circumstantial. There are no eyewitnesses to the occurrence. The evidence against him is that of P. W.'s 2 and 3 coupled with his absconding from the village.

P. W. 2's evidence is that after she had served the evening meal to the deceased and the accused in the house which they all three occupied and the deceased and the accused had gone outside the house on to the pial, she bolted the door and remained inside. Some time later she heard the father and son quarrelling with each other about the collection of bandy hire. The deceased was accusing the accused of not accounting for the money collected by him from persons who had hired the bandy and pointed out the difficulty this occasioned in his maintaining the family. The accused retorted that he was not bound to account to him for the money whereupon the deceased said that the accused should not touch the bandy from the next day, that he would have no food at his house and that he must earn his own living. Then, according to her evidence at the Sessions trial, there was a lull lasting about a nalgai. At the end of that time she heard the cry of the deceased 'I have been stabbed.' She lighted a lamp, went outside and there found the deceased lying on the ground holding his side where the wound was and she supported him inside the house. Her foot, according to her, struck against a knife and its sheath on the floor. This knife and sheath, however, have not been proved to belong to the accused. Hearing the cries people came to the spot, amongst them being P. W.'s 3 and 4 and two others who did not give evidence at the sessions trial and some women.

P. W. 3 lives in a house just to the south of the deceased only a few feet away, a lane separating the northern side of his house from that of the deceased. His evidence is that he saw the deceased and the accused sitting on the pials outside the house, the deceased sitting on the eastern pial and the accused on the western. He went inside his house and later on, having occasion to go outside, he heard the discussion spoken to by P. W. 2 going on between the deceased and his son. He says he recognized their voices. Then he went ~~inside~~ and slept and after an interval which he states to be three naligais he woke up on hearing a cry "My son has stabbed," opened the door and came out and there saw the deceased lying wounded on the ground. P. W. 2 carried the deceased inside the house and put him on a cot.

Another witness P. W. 4 went to the scene of the occurrence on hearing cries. He immediately went to the village Magistrate to make a report. He reached the village Magistrate at about 2 A. M. and the village Magistrate took a statement from him, Ex. B, and then proceeded to the house of the deceased where he took a statement from P. W. 2. The statements of P. Ws. 2 and 4 are incorporated in the first information report.

That is the whole of the evidence in the case and we have got to consider whether, it being purely circumstantial evidence, it is sufficient to say that it proves the case against the accused beyond all reasonable doubt. The first point to be considered is, is it true that there was this dispute between the deceased and the accused on the pial that night? With regard to this, we have the evidence of P. W.'s 2 and 3 and we are satisfied that the evidence of P. W. 2 on this point is to be accepted and also that of P. W. 3. The next thing to be considered is—and it is the most important matter—whether there was any interval of time between the quarrel and the stabbing and if so what that interval was. P. W. 2 puts it at one naligai and P. W. 3 on the other hand puts it at 3 naligais. Even if it was one naligai, it is sufficiently long interval and the murder obviously could not have been in the heat of the moment. If the accused was the murderer, then

he must have sat for at least a naligai thinking about the matter, giving himself time to cool down or have gone away from the house and returned. But at the same time that interval of time does make it possible—we do not say probable—that some one else may have come to the spot and have committed the murder. If, on the other hand, the stabbing had followed the quarrel immediately, that, together with the absence from the village of the accused pointing to flight, would in our view, establish the case beyond all reasonable doubt. The circumstantial evidence would then be very strong indeed. It has been contended before us that P. W. 2 was trying to lighten the case against the accused at the Sessions trial and was giving incorrect evidence when she put this interval of one naligai between the dispute and the stabbing and the learned Sessions Judge has taken that view of her evidence. We have been asked to contrast that statement with the statement which was taken from her by the village Magistrate, Ex. E. After stating that the deceased told the accused that he should earn his living himself she stated in Ex. E that "at the time she heard the cry of, "he has stabbed," that she at once lighted the lamp from inside the house and came out with it."

That statement obviously means that the stabbing immediately followed the quarrel and, if we are entitled to treat that statement in the first information report as evidence upon this point of P. W. 2, then it is evidence of the very greatest importance. But the question is, are we entitled to make use of that evidence at all as substantive evidence? In our view, statements in the first information report can only be used for the purpose of contradicting or corroborating a witness and for no other purpose. If a witness in the Sessions trial makes a statement different to that attributed to the witness in the first information report, that discredits the evidence of the witness to that extent in the Sessions Court but does not make the statement in the first information report the evidence upon that matter in the case. We have been referred to three cases upon this point. The first is *Autar Singh v. Emperor* (1). On a diffe-

(1) [1918] 17 C.W.N. 1213=21 I.C. 882=19 Cr.L.J. 642.

rence of opinion between two Judges on this precise point, it was decided that the first information, although a document of great importance which is in practice always and very rightly produced and proved in criminal trials, is not a piece of substantive evidence and it can be used only as a previous statement admissible to corroborate or contradict the author of it. In *Emperor v. Chittar Singh* (2), it was held that a report of the commission of an offence made at a thana or even the deposition of a witness previously made would be admissible for the purpose of corroborating a witness or of throwing doubt on his statement in Court but would be inadmissible for the purpose of proving that the facts stated in it are correct. In *Azimaddy v. Emperor* (3), at p. 258 of 44 C. L. J., it was observed that first informations do not prove themselves but have to be tendered under one or other of the provisions of the Evidence Act. The usual course is for the prosecution to call the informant and the first information is to be tendered as corroboration under S. 157, Evidence Act. In this view, with which we agree, there is no evidence that the stabbing took place immediately after the quarrel ended. On the contrary the only evidence is that it took place either one naligai afterwards as P. W. 2 says or three naligais afterwards as P. W. 3 says. With regard to the evidence of the latter, we think that his statement that he heard a cry of "My son has stabbed" is not to be accepted as in his previous statement he stated the cry to be "I have been stabbed."

The defence set up by the accused, of course, is not a very satisfactory one because he has pleaded that he was at a place some 40 miles away collecting outstandings having been sent there by his father. He summoned five witnesses at the Sessions trial but his pleader did not examine any of them. Previously these witnesses were summoned to support his defence of alibi but they did not go into the witness-box to do so. He, therefore, set up an alibi which has not been supported by any evidence.

This is a case of very grave suspicion but it still leaves a loophole and that is the loophole provided by the interval of

time between the end of the quarrel and the stabbing. It is during that time that some one else might have murdered the deceased. In cases based only on circumstantial evidence, the circumstantial evidence should be so strong as to point very clearly to the guilt of the accused.

The appeal is allowed and the conviction and sentence are set aside and the accused is ordered to be set at liberty.

P.R.S./J.M.

Appeal allowed.

* 1930 Cr. Cases 634

(Calcutta)

PEARSON AND PATTERSON, JJ.

Government of Bengal—Appellant.

v.

Santiram Mondal—Respondent.

Government Appeal No. 2 of 1929, Decided on 27th February 1930.

* (a) Evidence Act, S. 163—Statements during departmental enquiry—Notice by defence to Crown to produce such statements—Statements inspected and used for cross-examining witnesses—Statements are in exclusive possession of Crown—Crown is entitled to have whole of statements as evidence.

Application of S. 163 is not restricted to civil proceedings only. It is applicable also to criminal trials and even though the Crown is the prosecutor. [P 637 C 2]

Where, therefore, notice to produce statements made to a Magistrate during departmental enquiries is given to the Crown by the defence and such statements are produced, inspected and used for cross-examination of several witnesses, the Crown is entitled to have the whole of the statements as evidence. The Crown as prosecutor is not a different person from the Crown that recorded the statement and the statements cannot be said to be not in exclusive possession of the Crown. [P 637 C 2]

(b) Evidence Act, S. 74—Statements during departmental enquiries by Magistrate are not public documents—Evidence Act, S. 163.

Departmental enquiry by a Magistrate in his executive capacity is not judicial enquiry and statements recorded therein is not evidence taken on oath. Such statements, therefore, are not public documents, and S. 163 can be applied to such statements. [P 638 C 1]

(c) Criminal P. C., S. 297—Case depending not on probative value of circumstantial evidence but of probative value of testimony of witnesses—Judge while charging jury saying that circumstances must be entirely inconsistent with innocence—No further explanation by Judge—This amounts to misdirection.

The correct principles in criminal trials are that in a case dependent upon circumstantial evidence the incriminating fact must be incompatible with the innocence of the accused and incapable of explanation upon any reasonable hypothesis than that of his guilt. Where

(2) A.I.R. 1925 All. 803=47 All. 280.

(3) A.I.R. 1927 Cal. 17=54 Cal. 287.

therefore, the Judge in a case depending not on the probative value of the circumstantial evidence but of the weighing of direct testimony of witnesses while charging the jury says "it should be established by the prosecutor beyond reasonable doubt that the circumstances are not merely consistent with the guilt of the accused, but entirely inconsistent with his innocence" without explaining to the jurors in the light of the principle above enunciated, it amounts to misdirection: 17 C. W. N. 379, *Expl.*; 80 C. W. N. 278, *Rel. on.*

[P 638 O 2]

(d) Criminal P. C., S. 297—Person prosecuted for giving false evidence—Case not depending on expert opinion—Judge directing that truth of the accused's statement must be impossible without explaining how far it affects his case—It amounts to misdirection.

In a case depending upon expert opinion no doubt the true rule is that no man can be convicted of giving false evidence except on proof of facts which if accepted as true show not merely that it is incredible but that it is impossible that the statements of the party accused made on oath can be proved. But where in a case, not dependent upon expert opinion, but of a different nature the Judge enunciated the above rule without explaining to the jury wherein and how far it can be said to apply to the evidence in the case before them there is misdirection to the jury: 11 W. R. Cr. 25, *Expl.*

[P 633 O 2; P 639 O 1]

(e) Criminal P. C., S. 423 (1) (a) — Trial by jury — Appellate Court having all materials before it can deal the case itself — It is not necessary to send it for retrial.

There is nothing in the language of the Code to differentiate the way in which the powers of the appellate Courts are to be exercised, according as it is a jury trial or not. The language is wide enough and comprehensive enough to enable the Court to deal with the matter itself on an appeal even in a jury trial. No doubt the action which the appellate Court should take depends upon the circumstances of the particular case but when all the materials are before the appellate Court and the case has prolonged for nearly two years and the verdict of the jury is erroneous owing to the misdirection by the presiding Judge it is in the interests of justice that the appellate Court should deal with the matter itself: 21 Cal. 955 and 25 Cal. 230, *Ref.*; 25 Cal. 711, *Rel. on.* [P 641 O 2]

Mritunjoy Chatterjee and Bhola Nath Roy—for Accused.

N. Sirkar, S. K. Sen and D. N. Bhat-tacharjya—for the Crown.

Judgment.—This is an appeal by Government against an order of acquittal passed on the unanimous verdict of a jury on charges under Ss. 194, 193 and 211, I. P. C.

To understand the question of law which has been raised, the facts out of which the appeal arises may be stated as follows. On 5th March 1928, a number of men employed in the Railway workshops at Lilooah under Mr. W. C.

Mould, Deputy Chief Mechanical Engineer E. I. Ry., went on strike. On 8th March the workshops were closed down. On 28th March the Agent E. I. Ry. received a deputation of strikers, but their demands were refused. In the afternoon a large number of strikers proceeded to Bamangachi, between Howrah and Lilooah, and the result of their attitude was that the police were obliged to disperse them by force. Rifle fire was opened and the result is said to have been that one person was killed, one died in hospital and two others were wounded: more, according to the assertion of the accused. After the dispersal, the District Magistrate Mr. G. S. Dutt was informed of the occurrence by Mr. Jones A. S. P., and came to Bamangachi, where he made enquiries and examined Mr. Jones, the accused Santiram Mondal and others. On 2nd April 1928 the accused lodged a complaint before a Magistrate of Howrah charging Mr. Mould and Mr. Jones, together with two other railway officials, Messrs. Withinslaw and Hitchcock, and Major Hewett, Officer in Charge of the E.I.R. Auxiliary Force, with offences under Ss. 147, 148, 149, 302, 304, 325 and 326, I. P. C., that is to say, putting it comprehensively, rioting and murder. The complaint contained the allegation, among others, that after Mr. Sturgis, Mr. Within Shaw, Major Hewett and Mr. Jones had taken over a rifle each from some of the Gurkha guards:

"Mr. Mould came running from the direction of the loco quarters and snatching off a gun from a Gurkha guard fired it without any previous warning at the strikers. One man was hit and fell down by the side of the road. Then Withinslaw, Hewett and Mr. Jones began firing at random. I saw seven or eight men lying on the ground wounded bleeding and insensible."

This complaint of Santiram Mandal was taken up by the District Magistrate, and on 9th May 1928 was dismissed by him under S. 203, Criminal P. C., after a judicial enquiry in the course of which Santiram was examined on oath. In the meantime, by 2nd April 1928, the District Magistrate, in the course of his departmental enquiry started on 28th March, had recorded the statements of Captain Christie of the Eastern Frontier Rifles, Mr. Jones, Santiram Mondal, Messrs. Vonnables, Hannay, Mould, Severs and others.

Following on the dismissal of that complaint under S. 203, Criminal P. C., Mr. Mould moved the District Magistrate under S. 476, Criminal P. C., praying that a complaint should be filed against Santiram Mondal charging him with offences under Ss. 211 and 193, I. P. C. The accused filed a petition in answer, showing cause. The complaint was made on 14th June 1928, and the accused was committed to the Sessions. He was tried by the Sessions Judge and a mixed jury of five persons, who on 23rd March 1929 found the accused not guilty and he was acquitted.

The case for the prosecution was that the allegations of Santiram Mandal against Mr. Mould and the others in his complaint and in his evidence were intentionally false, that Mr. Mould had not been at Bamangachi on 28th March at all nor participated in the incidents there, and that no firing had taken place except by the Gurkhas under orders of Captain Christie. In support of this various witnesses were examined, including most of those who had made statements before Mr. G. S. Dutt in the course of his departmental enquiry from 28th March to 2nd April.

On the question of law the main point argued before us relates to the procedure adopted at the Sessions trial with regard to these statements and the way they have been dealt with. Briefly stated, the matter stands thus. On behalf of the accused at the trial, notice was given to the Crown to produce them. They were called for, produced, and inspected: not only so, but the statements themselves were placed in the hands of the prosecution witnesses by the defence and they were cross-examined upon them. Nevertheless the Judge refused to admit them on the record with the exception of only a portion of Captain Christie's statement, and they were accordingly not before the jury.

The learned Judge in his charge to the jury, however, refers to these statements in what is said to be an objectionable manner. Take for instance the cross-examination of Mr. Venables, where a passage from the previous statement was put to him as being inconsistent with his evidence.

"Q. Did you in the departmental enquiry tell Mr. Dutt, that you were busy with a few constables in keeping the mob out from the compound?"

A. No, I did not.

Q. I put it to you that on the other hand you told Mr. Dutt this.

"I was all the time fully employed in trying to keep the workers inside the loco shed pacified and at work."

A. I did.

Q. Is that correct?

A. Yes.

Q. As a matter of fact to Mr. Dutt you did not say a single word about the firing.

A. No.

Q. I put it to you again that having been reminded of that, you will still swear that you were not in the loco shed and were engaged with constables on the compound.

A. Yes. I was not in the loco shed all the time."

This is referred to by the learned Judge in his charge in this manner:

"It has been brought to the notice of the jury by the defence that in his earlier statement before Mr. Dutt this witness stated that he was all the time fully employed in trying to keep the strikers inside the loco shed pacified and at work, and it is argued that his present version of keeping back the crowd from the compound was not mentioned before Mr. Venables explains that he was not in the loco shed all the time. Jury to consider."

The jury having been told to consider were, however, deprived of the assistance of the complete statement itself. The complete statement which has been placed before us shows the matter in another light, and the quotation referred to by the Judge may well be said to give a wrong impression, standing by itself, in forming their judgment. Similarly in regard to a witness named Gordon, who speaks to a meeting with Mr. Mould at Howrah, he is also cross-examined on his previous statement, and as to this, though the whole statement was not before the jury, the Judge tells the jury:

"The story of Mr. Gordon going to platform-1 was not given to the District Magistrate Mr. Dutt at the initial stage."

Then much was also made by the defence of an answer recorded in the re-examination of this witness, (a slip, according to the prosecution), which might suggest that on 28th the witness and Mr. Mould had travelled on the train only as far as Bamangachi. The whole earlier statement would have shown that the previous story was, and that it corroborated the evidence of this witness on the point. Then again another witness named Dunsdon, giving evidence as to a meeting with Mr. Mould at Howrah on 28th was cross-examined upon his statement to Mr. Dutt, in the following terms.

"Q. Did you then to Mr. Dutt say that you met Mr. Mould at Howrah station at 4-15 p.m.

A. It is extremely improbable that I said that I had met Mr. Mould at 4-15.

Q. Do you see that recorded in fact? (witness looks into the record and says).

A. Yes, I see it recorded.

Q. You signed that statement?

A. I signed it without reading it.

Q. Do you attach any value to your signature?

A. Yes.

Q. As Superintendent of way and works do you sign documents without knowing what you are signing?

A. No.

Q. Can you on that statement point out anything which you might describe as inaccurate?

A. No, as far as I can see, the rest is all correct. I notice at the conclusion of the statement it is recorded that the times I have mentioned are very approximate.

Q. Therefore you might have mentioned the time as 4-15 approximately.

A. I should say it was a mistake in recording."

The learned Judge deals with it in his charge thus:

"In this Court Mr. Dunsdon has said that he met Mr. Mould on platform No. 6 at about 5-15 p.m. In the departmental enquiry he said before Mr. Dutt that he met Mr. Mould at 4-15. It is argued by the prosecution that this might be a mistake on the part of the recording Magistrate as this timing does not fit in with other timings given by the witness in the same statement before Mr. Dutt Mr. Dunsdon in other portions of his statement before Mr. Dutt said that when going up to Bally in a train he passed through Bamangachi at about 4-10 p.m. and when he was returning by the train to Howrah he passed Bamangachi again at 5 p.m. It is argued by the defence that the witness was giving various stories and therefore got confused over the timings. Jury to decide what view they will take."

Obviously if the whole statement had been before the jury they would have been in a position to say for themselves whether the mistake was one of recording or not and how if at all it affects the credibility of the witnesses' story and the whole case. We have had the statement laid before us, and it is quite obvious from the other facts and times mentioned therein, that the witness is right in saying it is a mistake in recording. The jury could have seen that for themselves, had the statement not been kept from them.

As regards the efforts made by the prosecution to have these statements exhibited, these have not been denied, and they appear again and again in the Sessions record, usually after the statement had been put into the hand of witness 1 and questions asked upon

it in cross examination. A petition was submitted by the prosecution for the admission of these statements, on which the learned Judge passed an order dated 11th March 1929. From what is there stated it appears that the contention was that the defence was bound to tender the documents under S. 163, Evidence Act, upon which the learned Judge remarks:

"No case law in support of this proposition in a criminal trial in which the Crown is the prosecutor is placed before me or can be found in any of the commentaries. I hold that S. 163, Evidence Act has no application to the present case."

The learned Judge adds that it was not argued that the statements should be admitted under S. 74, Evidence Act, and he holds that these cannot be admitted in evidence as public documents. The opinion of the learned Judge touching the effect of S. 163, Evidence Act seems to be based upon the idea that the section can have no applicability to criminal trials, at any rate where the Crown is the prosecutor. There is, however, nothing to support this view, and no such limitation is to be found in the wording of the section itself. In the argument before us no such contention was sought to be upheld. The contention before us has been that S. 163 does not apply, having regard to the nature of the documents in question, though it is admitted that the other conditions specified in the section have been fulfilled. It is conceded that notice to produce was given to the Crown, that the defence called for the documents, and they were thereupon produced and inspected, and, it may be added, they were mostly used for cross examining the several witnesses. It is, however, said that the section does not apply to this kind of document but that it necessarily contemplates only that class of document to which the party calling for it would have no access unless his opponent produces it, which is inaccessible because in the exclusive possession of the other party. Then it is argued, these were not in the exclusive possession of the other side, because such statements, which were recorded departmentally by a public officer in his executive capacity, cannot be said to be in the exclusive possession of the prosecution. This is tantamount to saying that the Crown as prosecutor is a diffe-

rent person from the Crown that had recorded the statements, and there is no substance in such contention. The Crown undoubtedly has exclusive possession of such a document, whether it be in one department or another. We are of opinion that it was not a judicial enquiry, nor was the evidence given upon oath, and it seems to us that no question arises of these statements being public documents, but that they were documents in which S. 163, Evidence Act, could properly be applied, and that the defence were bound to put them in. The further contention is that if they are to be admitted, they cannot be put in or at any rate used without proof. But the section itself says that the party calling for it is bound to give it as evidence if required to do so, and that certainly means that it goes in as a record of the particular proceeding and that it can be looked at to see what it includes or omits. Moreover the writing of the statements and the signature by the Magistrate have been proved. It is not a sufficient answer to say that in certain cases the witnesses were asked certain questions based upon these statements when re-examined by the prosecution, and that therefore the prosecution could have got in the whole of the statements in that way as evidence. They were entitled to have the statements themselves in evidence, they made every effort to do so, and they could not foresee the manner in which the learned Judge would place the matter before the jury. Next, two further passages are objected to by the Crown as being misdirections in the charge. In dealing with the charge under S. 211 the Judge says:

"It should be established by the prosecution beyond reasonable doubt that the circumstances are not merely consistent with the guilt of the accused but entirely inconsistent with his innocence."

In point of fact this passage is to be found in a judgment of Mookerjee, J., in *Ram Prasad v. Emperor* (1), in deciding a case where two Judges of the Criminal Bench had differed, arriving at different conclusions on a view of the facts in the case, particularly the effect of an entry in an account book. Mookerjee, J. says that the vital point in the case was whether the petitioner was deprived of

a sum of Rs. 101 to which the entry in question related, and he came to the conclusion that the entry was not suspicious and that there was no reasonable ground for the theory that certain words had been added to the entry to corroborate the charge of theft. Having found that to be so it was unnecessary to do more than give effect to that finding: it would seem therefore that there is good ground for the contention of the Advocate-General that the passage objected to is obiter. The objection is to the words "entirely inconsistent" and we think that there was no need to have formulated the proposition in that way or to go beyond what was laid down in the Full Bench case *Hurjee Mull v. Imam Ali* (2), which laid down the test in other terms, that in a case dependent upon circumstantial evidence the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. It would perhaps not have mattered if the learned Sessions Judge in the present case had placed the passage in question before the jury and then proceeded to explain it to them further in the light of the principle enunciated in *Hurjee Mull's* case; but he has not done so. He might also have pointed out to the jury while dealing with this subject that it was not so much in the present case a question of the probative value of circumstantial evidence, but of the weighing of direct testimony of witnesses. Standing as it does, in the way in which the learned Judge has made use of it, it seems to us to amount to a misdirection.

The other passage is one taken from the case of *Queen v. Ahmad Ali* (3), where it is said that the:

"true rule is that no man can be convicted of giving false evidence except on proof of facts which if accepted as true show not merely that it is incredible but that it is impossible that the statements of the party accused made on oath can be true."

That passage again must be taken, in all fairness, with reference to the nature of the particular facts with which it dealt, and it will be observed that the main point in that case was whether a doctor in giving expert evidence of his opinion, might or

(1) [1913] 17 C. W. N. 379=17 I. C. 998=16 C. L. J. 453.

(2) [1904] 8 C. W. N. 278.

(3) 11 W. R. Cr. 25.

or might not be mistaken :

"The evidence of the medical man (at p. 27) or other skilled witness, however eminent, as to what he thinks may or may not have taken place under a particular combination of circumstances, however confidently he may speak, is ordinarily a mere matter of opinion. Human judgment is fallible. Human knowledge is limited and imperfect,"

and so on. Here again we think the passage objected to must be taken as a misdirection, not from anything wrong in itself, but from the use made of it by the learned Judge, without explaining to the jury wherein and how far it could be said to apply to the evidence in the present case, which is of a different nature and not dependent upon expert opinion at all.

Clearly the matters above referred to are misdirections upon essential points arising in the case, and as will hereafter appear from a consideration of the evidence, we think that the verdict is erroneous owing to such misdirections, and that such misdirections have in fact occasioned a failure of justice: also that if the rejected evidence had been received it ought to have varied the decision, the verdict of the jury and the order of acquittal based thereon should therefore in our opinion be reversed.

The charges which the accused had to meet were under Ss. 211, 193 and 194, I. P. C. Of these the Advocate-General does not press the charges under S. 194. The charge under S. 211 is :

"that you on or about the 2nd day of April 1928 at Howrah, with intent to cause injury to Mr. W. C. Mould filed a complaint under Ss. 147, 149, 302, 304, 325 and 326, I.P.C., before Mr. B. N. Mukherji, Deputy Magistrate, charging the said Mr. W. C. Mould with having committed the offence of rioting with murder etc. knowing that there was no just or lawful ground for such complaint."

The charges under S. 193 as to giving false evidence related to (1) a statement before the Deputy Magistrate on 3rd April 1928 in support of the accused's complaint :

"Then Mr. Mould came running from the Loco, snatched up a gun from a Gurkha and shot a man who was standing under a banian tree on the side of the road and the man dropped down and did not move again";

(2) a statement on or about the 7th April 1928 in the enquiry before the District Magistrate Mr. Dutt :

"I saw Messrs. Mould, Hewett, Withinshaw and Jones take a rifle each from the hand of the Gurkha Military Police riflemen";

(3) a statement on or about the 14th April 1928 in the course of deposition at

the enquiry by the District Magistrate Mr. G. S. Dutt :

"I said that Mr. Mould fired the very first shot and that the subsequent shots were fired by the other Europeans named by me."

Before going into the evidence, it is convenient to notice that at the scene of the occurrence, the railway runs in general direction of north and south while the bridge carrying the road way over it runs east and west. The bridge has an eastern approach from the Grand Trunk Road, while the western approach slopes down from the bridge into what is called the old Benares Road, having the loco shed immediately to the north, and a little further on, to the south, a walled enclosure called a graveyard, a latrine, and beyond that again a masjid with a banian tree. (The judgment then discussed evidence and proceeded). To summarise the evidence; the evidence of Captain Christie, Mr. Jones and Mr. Hannay, definitely states that the firing was done by the Indian rifle-men and not by Europeans. There is no half way house between this evidence being either true, or on the other hand calculated and deliberate perjury with a view to crush the accused. If false, it involves the formation of a conspiracy between all these persons: and it involves particularly the suggestion that Captain Christie had the readiness and presence of mind to concoct a false story straight away, and get it supported. His statement in Court as to the details of the occurrence is substantially and solidly supported in the essential points by the statement made to the Magistrate, Mr. Dutt, immediately after the occurrence and recorded by him on that very evening of the 28th March at which time it does not appear that the question of Mr. Mould's participation in the affair had become of importance though it does appear later, and it is obvious that the conspiracy must have already taken shape by the 2nd April by which time Messrs. Hannay, Christie, Venables, Mould, Dunsdon, Gordon and Jones had all given statements substantially in accord with their present testimony.

On the question of the absence of Mr. Mould from Bamangachi, the names of the various witnesses and the evidence they gave have already been referred to, and it is to be noticed especially that the definite suggestion through-

out has been that all these witnesses, not excluding Captain Christie and Mr. Hannay, are conspiring to perjure themselves with the object of keeping Mr. Mould out of it. That appears from what was put to Mr. Hannay in cross-examination, that he had himself removed Mr. Mould in his car; as also from the suggestion that it was the railway officials who did the firing, including Mr. Mould. The facts themselves really lie within a small compass. On the one side, repeated statements by the accused that Mr. Mould and others fired and killed; and against that a solid body of evidence to show that the firing was done only by the Gurkhas and not by any Europeans, including Mr. Mould who was not there.

Santiram's statement.

It will be convenient here to mention the different statements of the accused.

The first is his statement in the departmental enquiry by Mr. Dutt made on 29th March 1928. He deals first of all with the disturbance on the eastern approach, when he says Mr. Sturgis "snatched a rifle from a Gurkha. So did Mr. Withinshaw and Major Hewett and Mr. Jones." He then says that Mr. Sturgis turned back with the other Europeans, who went towards the western side of the bridge. He then goes on to say :

"I followed Mr. Sturgis up to the lamp post No. 219/7 on the (western approach). I then saw Mr. Mould, Mr. Hannay, Mr. Collett and other Sahibs came rushing from the loco yard on the north of the bridge western approach on to the west end of the approach."

Then he says the police and the Gurkha choukidars began to use their lathis and the crowd began throwing stones. He says, immediately that happened, rifle fire was opened. Shots were fired over the brick wall at the men standing behind the brick wall. Then comes the most important statement for the present case, his first recorded statement of the part taken by Mr. Mould and others :

"Mr. Mould, Mr. Jones, Mr. Withinshaw and Major Hewett rushed behind the crowd into the maidan beyond the public latrine with rifle in hand, and began to shoot people indiscriminately with their rifles at random. Altogether 14 or 15 shots were fired." Then Mr. Withinshaw came back from the maidan beyond the public latrine with a wound on his eye. I was standing all the time near Mr. Sturgis half way up the western approach of the bridge."

Let it be noted that here the place of firing is put in the maidan behind the crowd, indiscriminate shooting, and 14 or 15 shots fired.

Next in order comes the petition of complaint filed by the accused on 2nd April 1928. Here he says that after the affair on the eastern side, Mr. Sturgis, Mr. Withinshaw, Major Hewett and Mr. Jones ran across with rifles back to the western side, and he himself ran after them. Then he speaks of the fight between the crowd and the police with lathis, and then says that while all this was going on Mr. Mould came running from the loco quarters and :

"snatching off a gun from a Gurkha Guard, fired it without any previous warning at the strikers. One man was hit and fell down by the side of the road. Then Withinshaw, Hewett and Mr. Jones began firing at random. I saw seven or eight men lying on the ground wounded, bleeding and insensible."

This statement differs materially from the other, in that it is now suggested that Mr. Mould took his rifle from a guard, that Mr. Mould is credible with one shot which hit a man, while the others fired indiscriminately. There is no mention of the shooting on the maidan from behind the crowd, and the indication is rather that the firing was somewhere from the western approach, seeing that Mr. Mould and the others had got their rifles from the Gurkhas.

The next statement of the accused is his statement on solemn affirmation made on 3rd April when examined in support of his complaint. This is the statement containing the passage forming the charge under S. 193, that Mr. Mould came running from the loco quarters, seized a gun from a Gurkha, and shot a man standing under a banian tree at the side of the road, and the man dropped down and did not move again: then that Withinshaw, Jones and Hewett began to shoot at random and about 7 or 8 men were wounded. This again differs from the earliest statement very much as the last one did. Mr. Mould is credited with shooting a particular man instead of firing indiscriminately, and there is no suggestion of the shooting from the maidan behind the crowd: rather it is suggested from the statement that he followed Mr. Sturgis that the shooting was from the western approach.

The next statement is one before the Magistrate on 7th April and contains the statement forming the subject matter of the second charge. Here he states definitely for the first time that the Military Police did not fire a single shot: he still says he was near a particular lamp post on the western bridge approach near Mr. Sturgis when the firing took place. It is important to bear this in mind on the question of the possibility of bonafide mistake. He adds that 35 men were wounded and two died, in addition to three carried away by the Gurkhas and he clearly remembers seeing eight men hit with bullets. Then later he says that he saw Mould, Hewett, Withinshaw and Jones take a rifle each from the hands of the Gurkhas, and adds that Captain Christie was not there at the time of the occurrence, but arrived afterwards.

The fifth and final statement we have been referred to is Ex. B the petition by which he showed cause in the proceedings under S. 476, Criminal P. C., and which he puts forward as representing his case when in the Sessions trial whether he had anything to say. This also is important on the question of bonafide mistake, because it contains no suggestion of that kind, but on the other hand maintains the attitude of justification by the accused as a person present at the spot who saw Mr. Mould doing the acts in person. For instance, it states that Mr. Mould should consider himself fortunate to escape trial for murder: that he instituted no false complaint, and that to the best of his observation, knowledge and belief he saw Mr. Mould take the part ascribed to him: and that attitude of justification is maintained throughout the remainder of the petition.

In his argument for the defence in this Court based upon the whole of the evidence after it had been placed before us, Mr. Chatterji has not attempted to substantiate any such conspiracy (as referred to above) on the part of the prosecution witnesses. He recognizes that if the evidence of the prosecution witnesses in its essential points is accepted, as we do accept it, then Santiram's statements could not have been true. He does not say that Mr. Mould or any prosecution witness has perjured himself or deposed falsely, but he says that

he can suggest good reasons from the evidence why the jury and the Court could and should come to the conclusion that, at the worst, having regard to the circumstances attending the events of 28th March the statements of witnesses and Santiram's statements, the benefit of reasonable doubt should be given to the accused: or, as he subsequently put it, that from all the facts it cannot be said to be unreasonable for the jury or for the Court to say that it would not be quite safe to convict a man on these charges. Or, he says, the jury may have given effect to what they thought was a bona fide mistake on the part of the accused in the confusion and excitement of the moment, whereby he may have been led to confuse his impressions with direct knowledge. At any rate it is suggested that it would be not unreasonable for the Court or the jury to say that it was not satisfied that the prosecution had proved affirmatively that Mr. Mould could not have been present at the scene of the occurrence, or that the accused could not be under the honest but mistaken impression that Mr. Mould was there.

Some of the circumstances so relied upon have already been indicated in dealing with the evidence of the witnesses. It is, therefore, for instance, admitted that some European officers were at the scene of the occurrence, some of whom saw Santiram, and some of whom he must have seen. Then it is said that with reference to the evidence of Mr. Mould's movements on 28th, there is no corroboration of his statements as to his lunch at the Club; no one else speaks of it. Also there is no corroboration of the statement that he went to the Chief Mechanical Engineer's office after lunch. Then as regards the period after 3.30 it is said there was no necessity for his return to Head Office, and curious that if he did so, he should meet Mr. Hannay by chance and be told to go to Mr. Gumbrill, and that then he should have been directed into Mr. Sewer's room on the way. The interview with Mr. Gumbrill is one of comparatively late introduction in the case, and it is in evidence that this is the only draft notice or proclamation with which either Mr. Mould or Mr. Gumbrill ever had to do. Then as regards the

Howrah meetings, it is said that Mr. Mould had information of the disturbances (though not of the shooting) before he left, and though not strictly responsible for anything at Bamangachi because his place was at Lillooah, still he would naturally be anxious to avert any clash or catastrophe and give his assistance, besides having a natural human interest in the matter. Then it is said that it is unlikely that Mr. Mould should be in a position to remember the details of all his movements on the 28th, there are certain discrepancies in his long cross-examination, and he is not altogether candid in what he says about whom he asked to give evidence for him. Then again it is admitted that Mr. Sturgis in the affair on the eastern slope had taken over a rifle from one of the riflemen. The accused had started his accusations as soon as the District Magistrate arrived, and some of the persons mentioned have not been called as witnesses.

In considering and weighing the value of these suggestions as bearing upon the case, we cannot be blind to the fact that the essential facts of the prosecution case have been established by a compact and weighty body of testimony in regard to the events which took place at the scene of the occurrence itself. That testimony is clear that Mr. Mould was not there, that he did not participate in the firing, that the firing was done by the riflemen alone, and not by any European at all. It is corroborated in its essential details by the statements recorded by Mr. Dutt immediately after the occurrence in the case of the most important witnesses. The accused's case has been, not that there was room for a bona fide mistake on his part, but that as an eye witness on the spot he saw Mr. Mould, and saw him and the others fire, though no other witness has suggested any such thing. To say that the prosecution story has been displaced and proved to be untrue would be idle : and no such contention is put forward before us. To say that the facts or inferences above referred to so weaken the prosecution case that any question of reasonable doubt could arise in the minds of the jury or of the Court is in our opinion an untenable position. We have considered the matter with the most anxious care. If we accept

the evidence of the 'prosecution witnesses in the main essentials of the case as we do, that evidence is so overwhelming and so conclusive that there is no room for saying that the other facts relied on might have impaired or do impair the prosecution case to such an extent as to make it not unreasonable for the jury or for the Court to hold that there was a doubt and that it was not a case for conviction. Still less is there any foundation for suggesting that there is room to imagine that there was any case of honest mistake or bona fide confusion : that has never been the defence case, and there is no reasonable foundation for it in the record.

As already stated we have reversed the verdict of the jury and the order of acquittal based thereon. The question then is whether we should order a retrial, or whether we should proceed to dispose of the matter ourselves. For the defence it is argued that the alternative powers given to the Court for dealing with the case on appeal under S. 423 (1) (a), Criminal P. C., show that those powers are intended to be exercised according to the different circumstances prevailing in each case. In the present case it is said that, if certain evidence did not go to jury which should have gone, the proper course would be to send the case back to the jury for their verdict on the case with the additional evidence before them. Thus it is said that an order for new trial is the course which was followed in *Wafadar Khan v. Queen Empress* (4) and in *Ali Fakir v. Queen Empress* (5). On the other hand it is to be observed that there is nothing in the language of the Code to differentiate the way in which the powers of the Court are to be exercised according as it is a jury trial or not : the language is wide enough and comprehensive enough to enable the Court to deal with the matter itself on an appeal, though in a jury trial. If as we hold there has been misdirection, and the Court is of opinion that the verdict of the jury is erroneous owing to that misdirection, and that it has in fact occasioned a failure of justice, there is no reason why in a proper case the Court may not as-

(4) [1894] 21 Cal. 955.

(5) [1898] 25 Cal. 230.

sume to deal with the whole case itself, under the powers and duty conferred upon it by law : see *Taju Paramanik v. Queen Empress* (6). No doubt the action which the Court will be inclined to take will depend upon the circumstances of the particular case. To deal with the whole case itself, it would no doubt require to have all the materials before it, as we have in the present case. In the present case, also, it is nearly two years since the events out of which case arises, and in all the circumstances we consider it to be in the best interests of justice to deal with the matter ourselves. For the reasons stated above we find the accused guilty of the offences under Ss. 211 and 193 under which he has been charged and sentence him to 5 years' R. I. under S. 211, I. P. C. and three years under each of the charges under S. 193, I. P. C., all the sentences to run concurrently. The charges under S. 194 are not pressed : the accused is accordingly acquitted of those charges.

R.K.

Order accordingly.

(6) [1898] 25 Cal. 711=2 C. W. N. 369.

1930 Cr. Cases 643 (1)

(Calcutta)

C. C. GHOSE AND PEARSON, JJ.

Mani Krishna Sen Gupta — Petitioner.

v.

Emperor—Opposite Party.

Misc. Criminal Revn. No. 247 of 1929, Decided on 6th December 1929, against order of Sub-Divisional Magistrate, Rajshahye, D/- 21st October 1929.

Practice—Criminal Trial—Trying Magistrate should not make any suggestion or representation in his explanation submitted to High Court—Criminal P. C., S. 438.

The trying Magistrate is not entitled to make any suggestion or representation in the explanation which he may submit to the High Court of anything which is not founded on the record before him. The Magistrate is not the prosecutor. He must hold the scales evenly.

[P 648 C 2]

S. K. Sen and Indu Prokash Chatterji —for Petitioner.

Anil Chandra Rai Choudhari—for the Crown.

Judgment.—We have examined the record in this case and perused the explanation submitted by the Magistrate. It appears that a warrant for the arrest of this accused was applied for on 10th October 1926, and that he was

arrested on 12th October 1929. There is, therefore, no ground whatsoever for the suggestion made by the trying Magistrate in his explanation that this accused was absconding. In our opinion, such a suggestion ought never to have been made. Further, there is no warrant whatsoever for the Magistrate suggesting in his explanation that this accused's brother is a zamindar's Naisab at Kabilpur and is already trying to secure false evidence of alibi on behalf of the accused. The trying Magistrate ought to have remembered that he is not entitled to make any suggestion or representation in the explanation which he may submit in any case to the High Court of anything which is not founded on the record before him. The Magistrate is not the prosecutor. He must hold the scales evenly and a suggestion of the description referred to above to a very large extent prejudices his position as Magistrate. In this case, we direct that the accused be forthwith released on bail. The amount of bail should be determined by the Magistrate and it would be such as, in the opinion of the Magistrate would be sufficient to secure his attendance in the proceedings which may follow.

R.M./R.K.

*Order accordingly.***1930 Cr. Cases 643 (2)**

(Calcutta)

PEARSON AND JACK, JJ.

Emperor

v.

Chintamoni Shahu—Accused.

Criminal Jury Ref. No. 85 of 1929, Decided on 17th March 1930, under S. 307, Criminal P. C., by Addl. Sess. Judge, Hoogly.

Penal Code, S. 302.—Possession of stolen goods recently after murder is material evidence to support conviction.

The possession of stolen goods recently after the loss of them may be indicative not merely of the offence of larceny or of receiving with guilty knowledge but of any other more aggravated crime which has been connected with the theft; this particular fact of presumption forms also a material element of evidence in case of murder.

[P 646 C 1, 2]

The presumption is particularly applicable where there is satisfactory proof in case of a murder of a woman that the stolen articles were habitually worn by the deceased and that she was actually seen wearing it on the evening before the murder : 17 C. W. N. 1077, Ref. : A. I. R. 1926 Mad. 688 and A. I. R. 1926 Lah. 691, Dist.

[P 646 C 2]

Khondkar—for the Crown.

A. K. Dhar—for Accused.

Judgment.—This is a reference under S. 307, Criminal P. C., by the Additional Sessions Judge of Hooghly in a case where the accused was acquitted by the unanimous verdict of the jury upon charges under S. 302 and S. 392 read with S. 397, I. P. C., in connexion with the death of Gyanodamoyee Dassi.

According to the evidence for the prosecution one Kali Charan Ghose had a house at Moheshpur where he resided along with his mother Gyanodamoyee, the deceased, and the accused Chintamani who was their servant. The house consisted of two rooms and verandah; in one room Kali used to sleep, in the other his mother. There was also a corrugated iron cowshed, in part of which the accused used to sleep and a thatched cowshed and cookshed. On 24th April 1929, Kali with a neighbour Dulal Ghose went to the house of one Sarat Ghose in another village for a marriage ceremony and stayed the night, leaving his mother and the accused at home. On the following day Kali went to his father-in-law's house whither his wife had gone for her confinement, and stayed there for that night. On the morning of 26th he returned home and after making enquiries and finding the verandah doors locked, he sent a lad Amulya to obtain entrance to the verandah from the stairs leading to the roof. The dead body of Gyanodamoyee was then found in the verandah with most terrible injuries on her head and body, and blood stained katari near by.

The drain from the verandah had been blocked up by clothes from inside, and there were some cow dung cakes outside. The accused was not forthcoming, and certain properties were found to be missing. The chaukidar Rasu Keora was sent for and despatched to the thana 10 miles away with the first information which was recorded at 7 p. m., and would have been recorded earlier but for the fact that the Sub-Inspector in charge was not available at the time. The first information included statement that the deceased had a gold necklace on her neck, and a silver chain on her waist, which the thief had taken away, and it was also stated that

the perpetrator was the Ooriya servant. On 27th about 3 a. m. the Sub-Inspector went to the scene of occurrence and among other things obtained a list of the missing articles, which besides cash and certain dhoties were described as "Bichha har (necklace) of sovereign gold weighing 2½ tolas" value Rs. 50, and "Bichha waist chain of silver weighing 5 tolas Rs. 2/8." On 28th April, a telegram was sent by the Polba police to the police at Cuttack in the following terms :

"Daroga Manga Cuttack arrest murderer for gain Chintamani Sahu son of Nitai, Moyra village Tulsipur search his house stolen properties gold ghassa har silver gote churipar cloths cash Rs. 250 letter follows."

On that there is an endorsement of S. I. Town 10-15 p. m. :

"I don't know who "Daroga Manga" is. This refers to a murder case. Take action to-night according to this telegram. Confirmation of telegram will probably be received tomorrow."

The result of this was that on 1st May 1929, the head-constable of the Mohanga Thana (P. W. 14) went to the house of the accused and arrested him. He was accompanied by Bowri Bandhu Naik and Ananta Shau, both of whom have given evidence. One of the accused's boxes was opened by a key from the accused's possession and in it was bound a gold chain, said to be Ex. 1, since identified as the bichha har of the deceased. On this occasion, however, the head-constable says that he did not seize it, partly because the accused said it was brass and he had bought it in Calcutta for keeping his keys, and partly because the telegram referred not to a bichha har but to a ghassa har. It was not until 2nd June 1929 that a further search was made by this witness of accused's house in the presence of Bhagaban Sarman a Lakhinda Das and the chain was then taken not from the box but from the neck of the accused's wife. It was forwarded to the police at Chinsurah and on 3rd July the investigating officer said that he came to know the har had come, and he had a test identification. Meantime on 13th May the investigating officer had come to know of accused's arrival at Hooghly and on 17th May his statement had been recorded by the Magistrate. The accused's original statement says that two men whom he names gave him Rs. 5 and coerced him into leaving for

his native village: but in his statements in Court he simply pleads his innocence.

Admittedly the case against the accused must depend on the circumstantial evidence, and the question for consideration is whether the facts proved are incompatible with his innocence and not capable of explanation upon any other reasonable hypothesis than that of his guilt.

It has been proved by the witnesses Dulal Ghose, Charubala Dasi, Hari Dasi, and Jogal Ghose that deceased was alive up to about 11 p. m. on the evening before the discovery of the murder, and that the accused was living there up till then. There is also his statement which shows he was there. There is evidence that he was missing on the morning of 26th, and that he arrived at Cuttack two or three days afterwards. Then came the search on 1st May above referred to.

Then as regards the katari, it is identified by Kali Charan as the one belonging to the house, and the evidence is that it was kept in the corrugated iron shed along with other implements in the custody of the accused. It is also referred to by the investigating officer, and he says he saw implements of agriculture in the tinroofed cowshed.

Mention must also be made of the two cloths found in the machan, which are identified by Kali Charan as belonging to the accused, one of which as well as the katari was stained with human blood, according to the report of the Chemical Examiner.

Two witnesses, Dulal Ghose and Hari Dassi depose to the fact that on the evening before the occurrence the accused had made enquiries from Dulal as to when Kali Charan would return home.

Charubala Dassi has stated that the milk from the cows was kept in a sika in the verandah, and that she milked Kali Charan's cow the previous evening: while from the evidence of Monmotha Nath Ghose it appears that after the discovery of the murder the sika was in the cookshed. Too much must not be made of this because it was there also on the previous day, and it seems it would be left there if the verandah was not accessible.

Then as to the important questions of the necklace. It was mentioned in the first information as a gold chain, and the chowkidar who gave the first information says he was informed it was a bichha har. It also appears as such in the list furnished on 27th April of the missing article, and the investigating officer says he was told about it when he went to the spot. The head-constable who searched the accused's house had explained why he did not seize it in the first instance, and his story and explanation are substantially supported by the witnesses Bowri Bhandu and Ananto Shau who were present on that occasion. The witness Hari Dassi and Charubala Dassi say that the deceased always wore a chain for some time previously and that they saw her with it on upon the night of 25th; and they identify it. Kali also identifies it as the chain belonging to his mother. Then there is the evidence of the goldsmith who produces his book to show that the bichha har was ordered for the deceased by her uncle in Aswin 1332, as well as other articles on other occasions. He identifies the one in question, and his workman who actually made it does the same, though he admits there is no private mark on it: but he says he can recognize it from the style and the workmanship. Dulal Ghose also stated the deceased used to wear a gold chain on her neck. It has been argued for the defence that the identity of the har found with accused has not been established with that of the deceased.

It is pointed out that in the first instance it was considered to be brass, and it is not explained how the second search originated; while no attempt was made to conceal it between the first and the second searches. The delay in its arrival at Hooghly on 24th June is also pointed at as showing the possibility of substitution, and the weight in this malkhana register is somewhat different from that given by the goldsmith. Then P. W. 6 admits that she was shown the har by the Daroga before the test identification. The wife of the accused when examined says that when accused came he brought cloth and a chain, and after the search she says she kept the chain round her neck by request of her husband's brother; she adds-

that the jamadar asked her where the chain was; that he left previously and she then gave him the chain from her neck. She identified the chain in the Magistrate's Court, and though she does not identify it in her statement before the sessions, she does not repudiate it. Accused's brother also testifies that the har on the first occasion was like the har in question (Ex. 1) and that on the second occasion the accused's wife gave this har (Ex. 1) to the jamadar. Taking all these facts together we think that there can be no doubt upon the evidence that the necklace worn by the deceased was the one found in possession of the accused on 1st May and seized by the police on 2nd June and produced in Court as Ex. 1.

Next it is contended for the accused, that if the chain found with him was the biokha har of the deceased, the presumption arising from his possession not otherwise explained, does not go beyond a presumption against him as receiver of stolen property. Two cases were cited, namely, *Sogaimuthu v. Emperor* (1) where it was said that when the unexplained possession of stolen property is the only circumstance appearing in evidence against an accused charged with murder and theft, the accused cannot be convicted unless the Court is satisfied that possession of the property could not have been transferred from the deceased to the accused except by the former being murdered. But it was also recognized in that case that if there is other evidence to connect the accused with the death a jury might find upon circumstantial evidence that he was the murderer. The other case of *Gauns v. Emperor* (2) is merely an instance where circumstantial evidence, including the unexplained possession of jewellery belonging to deceased was held not sufficient to warrant a conclusion that the accused had committed the murder. The learned Judge in his charge has rightly referred to the principle cited in *Emperor v. Neamatulla* (3) that the possession of stolen goods recently after the loss of them may be indicative not merely of the offence of larceny, or of receiving

with guilty knowledge, but of any other more aggravated crime which has been connected with theft; this particular fact of presumption commonly forms also a material element of evidence in cases of murder, which special application of it has often been emphatically recognized. The presumption would be particularly applicable where, as in the present case, there is satisfactory proof that the necklace was habitually worn by the deceased and that she was actually seen to be wearing it on the evening before the murder.

Upon a consideration of the whole of the evidence above referred to and after giving due weight thereto and to the opinion of the learned Judge we accept the reference, set aside the verdict of the jury and find the accused guilty of the offences charged. In the circumstances of the present case we think we may recognize the verdict of the jury to the extent of refraining from the sentence of the extreme penalty, and accordingly we sentence the accused to transportation for life under S. 302, I. P. C. No separate sentence is necessary upon the other charges.

R.M./R.K.

Order accordingly.

* 1930 Cr. Cases 646

(Sind)

PERCIVAL, J. C., AND HAVELI-WALA, A. J. C.

Secy. of State—Applicant.

v.

Gobindram Jaichandrai—Opponent.

Criminal Revn. Appln. No. 28 of 1930, Decided on 17th March 1930.

(a) Criminal P. C., S. 439—High Court will not go into merits when it had no jurisdiction to revise order—Railways Act, S. 113 (4).

Per Percival, J. C.—A person travelled without a ticket but with guard's permission. He was asked to pay extra charge which he refused. Application to a Magistrate under S. 113 (4), Railways Act, was rejected. It was contended that though High Court were to hold that revision was incompetent still it should go into the merits of the Magistrate's order.

Held : that High Court could not go into the merits of the order when it had no jurisdiction to revise that order : 5 S. L. R. 54, Dist.

[P 647 C 2]

* (b) Criminal P. C., S. 439—No revision lies from order of Magistrate under Railways Act, S. 113 (4).

Order of a Magistrate under S. 113 (4), Railways Act, is merely an administrative or a ministerial order and the proceedings before him are not criminal proceedings in a criminal

(1) A. I. R. 1926 Mad. 638=50 Mad. 274.

(2) A. I. R. 1926 Lah. 691=7 Lah. 561.

(3) [1913] 17 C. W. N. 1077=21 I. C. 156=14 Cr. L. J. 556.

nal Court within the scope of the Criminal Procedure Code and is not subject to revision under S. 499: A. I. R. 1926 Sind 57; A. I. R. 1927 Sind 28, *Foll.*; *Other case law referred.*

[P. 648 C 2]

T. G. Elphinstone—for Applicant.

Motiram Idanmal—for Opponent.

C. M. Lobo—for the Crown.

Percival, J. C.—This is a revision application against the order of the City Magistrate, Hyderabad, rejecting an application under S. 113 (4), Act 9 of 1890, for the recovery of 8 annas from Gobindram, passenger as an extra charge claimed from him under Cl. 3 (a), S. 113 of the Act for travelling without a ticket, after notifying the fact that he had no ticket to the railway servant on duty with the train. Although the amount involved was 8 annas only, this application is made on behalf of the railway on the ground that the view taken by the learned Magistrate is likely to affect the railway administration prejudicially.

A preliminary objection is taken that no revision to this Court lies; and reliance is placed by Mr. Motiram for the opponent on the following cases namely:

Usifally Lukmanji v. Emperor (1) (*Port Trust case*), *Karachi Municipality v. Jafferji Tayabji* (2) (*Municipal case*), *Imperator v. Jaro* (3), *Emperor v. Ghulam Kalir* (4), *Bhanal Khan v. Emperor* (5) (*Upper Sind Frontier Regulation Act cases*), *Emperor v. Ma Kale Ma* (6), *Queen Empress v. Kutrapa* (7), *Queen Empress v. Subramanya Ayyar* (8) (*Railway cases*). Mr. Lobo, Public Prosecutor supports Mr. Motiram. Mr. Elphinstone for the railway on the other hand relies on: *Imperator v. Jaro* (3) *Bhimji N. Dalal v. B. B. & C. I. Ry. Co.* (9) at pp. 223, 225 and 228 (*of 50 Bom.*) *Queen Empress v. Ram Pal* (10), *Station Master, Ranghat v. Kabul Sheikh* (11) *Devkishandas*

(1) A. I. R. 1926 Sind 57=20 S.L.R. 63.

(2) A. I. R. 1927 Sind 29=21 S.L.R. 51.

(3) [1911] 5 S.L.R. 54=12 I.O. 646=12 Cr.L.J. 559.

(4) [1911] 5 S.L.R. 105=12 I.C. 656=12 Cr.L.J. 558.

(5) [1919] 13 S.L.R. 215=56 I.O. 769=21 Cr.L.J. 513.

(6) A. I. R. 1929 Rang. 11=6 Rang. 619.

(7) [1894] 18 Bom. 440.

(8) [1907] 200 Mad. 385.

(9) A. I. R. 1926 Bom. 266=50 Bom. 215.

(10) [1897] 20 All. 9=(1897) A.W.N. 193.

(11) [1920] 24 C. W. N. 195=55 I.O. 593=21 Cr.L.J. 321.

v. Emperor (12) and *Arthur Grey v. Empress* (13). (Chief Court of the Punjab of 6th June 1891) the last five cases being all railway cases.

We have carefully considered the above cases, especially those cited by Mr. Elphinstone, but do not find that they show that a revision application lies to this Court. In some of them the question of jurisdiction was not contested. Moreover in *Queen Empress v. Ram Pal* (10) for instance, the question was whether a person could be sentenced to imprisonment in default of payment of excess charge, and whether an order to that effect by a Magistrate was illegal.

On the other hand in *Usifally Lukmanji v. Emperor* (1) and *Karachi Municipality v. Jafferji Tayabji* (2) the question of jurisdiction was expressly considered, and it was held that no revision lay. The former was in connexion with S. 84, Karachi Port Trust Act, 1886, and the latter in connexion with S. 86, Bombay District Municipal Act 1901. But the wording of these two sections, especially that of the Port Trust Act, is very similar to the wording of S. 113 (4), Railways Act, so far as the question of the recovery of money is concerned. Following these two rulings, therefore, especially *Karachi Municipality v. Jafferji Tayabji* (2), we hold that no revision lies to this Court.

It is argued further on behalf of the applicant that even if this application is dismissed, still this Court should express its view on the question whether the learned Magistrate was justified in going into the merits of the excess charge or should merely have passed an order in accordance with the requisition of the railway; and in this connexion reliance is placed on *Imperator v. Jaro* (3). A reference to the judgment in that case, however, shows that it was an exceptional case. It seems to us that it would lead to greater difficulties in the long run if we were to hold that this Court has no jurisdiction and at the same time to go into the merits of the Magistrate's order. Without, therefore, going into the merits of that order we dismiss the application on the ground that no revision lies.

(12) A. I. R. 1928 Sind 291=23 S.L.R. 89.

(13) [1891] 26 P. B. 13.

Haveliwala, A. J. C.—In this case Mr. Gobindram Jaichandra, a member of the Bar, on 22nd March 1929 travelled from Shahdarpur to Hyderabad without a ticket but took Guard's permission while entering the train. On his arrival at the destination he was asked to pay Rs. 2-3-0 the single second class fare and annas 8 as the extra charge. He offered to pay the fare but refused to pay the extra charge. The applicant then applied to the City Magistrate, Hyderabad under S. 113 (4), Railways Act 9 of 1890, for the recovery of the extra charge. The Magistrate held that Mr. Gobindram was not liable to pay the extra charge and dismissed the application.

The applicant now applies to this Court to revise the order of the Magistrate under S. 439, Criminal P. C. A preliminary objection has been raised by Mr. Motiram on behalf of the opponent that no revision lies and this Court has no jurisdiction to entertain this application under S. 439, Criminal P. C., on the ground that the proceedings before the Magistrate were not criminal proceedings in a criminal Court and the Magistrate's action was a mere ministerial and administrative action and, therefore, not subject to revision by this Court. The question then, is, are the proceedings before a Magistrate under S. 113 (4), Act 9 of 1890, proceedings before a Magistrate in a criminal Court within the scope of the Criminal Procedure Code and as such, subject to revision by this Court? The point is rather important both from the public and the railway point of view and it is not covered directly by any authority.

Mr. Elphinstone has cited several rulings including *Station Master, Ranghat v. Kabul Sheikh* (11), *Queen Empress v. Ram Pal* (10), *Bhimji N. Dalal v. B. B. & C. I. Ry. Co.* (9), but in none of these cases a point of jurisdiction was raised, and argued and these cases do not help us much in deciding this point before us. On the other hand, Mr. Motiram has cited a number of cases bearing more or less on the question of the recovery of money under similar circumstances though, under different Acts:

Usifally Lukmanji v. Emperor (1), *Karachi Municipality v. Jafferji Tayabji* (2), *Emperor v. Ma Kale Ma* (3), *Queen*

Empress v. Kutrappe (7), *Queen Empress v. Subramama Ayyar* (8). In *Usifally Lukmanji v. Emperor* (1), a distinct point of jurisdiction was raised and considered. Here a notice of demand of money due to the municipality was served on one Jafferji under S. 82, District Municipal Act. The Magistrate took action under S. 86 of the Act. The Court held that the Magistrate was merely an appellate authority having jurisdiction given by the Act to deal with question of a civil liability. He was not acting as an inferior criminal Court and his order, therefore, could not be revised. Then again in *Usifally Lukmanji v. Emperor* (1), a sum of Rs. 68-12-0 was due to the Port Trust by one Issafally. As Issafally did not pay the amount the Port Trust applied under S. 84 to the Magistrate to recover the said amount. The Magistrate ordered the amount to be recovered as a fine under S. 386, Criminal P. C. Issafally then applied to the High Court to exercise its revisional jurisdiction. The Court held that under Karachi Port Trust Act, the order of the Magistrate was merely the consequential and executive order passed for the purpose of carrying out the effective order of the Port Trust, directing the applicant to pay a certain sum of money. The Court observed:

"But as regards the order which we are now asked to revise, our opinion is that it is not a judicial order but merely an executive order; and as such cannot, although for convenience, it has been given the form of a final order in proceedings between the parties, be treated as if it were an order in a judicial proceeding and subject to revision."

Now the wording of S. 113, Railways Act, is very similar to the wordings of the District Municipal Act and the Port Trust Act so far as the recovery of money is concerned. A close reading of the two rulings quoted above, leaves no doubt in my mind that the order of the Magistrate under S. 113 (4), Railways Act is merely an administrative or a ministerial order, the proceedings before him are not criminal proceedings in a criminal Court within the scope of the Criminal Procedure Code and not subject to revision by this Court under S. 439, Criminal P. C. The objection, therefore, is upheld and the application is dismissed.

P.N./R.K.

Revision dismissed.

1930 Cr. Cases 649

(Sind)

PERCIVAL, J. C. AND RUPCHAND, A.J.C.

Mohansingh and others—Appellants.

v

Emperor.

Criminal Appeal Nos. 267 to 278 of 1929, Decided on 14th February 1930, from decision of Addl. Sess. Judge, Hyderabad.

(a) Penal Code, Ss. 366 and 420—Conspiracy to bring girl to sell her alleging that she was relation of one of conspirators—Girl not kidnapped from lawful guardianship—Offence committed is one under Ss. 420 and 511 read with S. 120-B and not under S. 366 read with S. 120-B.

Where there is conspiracy between certain persons that a girl should be brought to Sind and sold there to some person who might be willing to buy her and that to such person it should be stated that the girl was a relation of one of the party of the conspirators and it is not proved that the girl was kidnapped from lawful guardianship the offence committed falls under Ss. 420 and 511 read with S. 120-B rather than under S. 366 read with S. 120-B.

[P 649 C 2]

(b) Penal Code, S. 361—It is not enough to show that mother of girl requested alleged guardian to take her under protection—He must be shown to have accepted the trust.

To bring a case within the purview of the expression "lawfully entrusted" in explanation to S. 361 it must be clearly shown that not only the mother of the girl requested the alleged guardian to take the girl under his protection but that he accepted the trust: 8 Cal. 971, *Ref.*

[P 651 C 2]

(c) Penal Code, S. 120-B—Recital of specific offences in conspiracy are surplusage and may be ignored.

Recital of specific offences committed in pursuance of a conspiracy are at most a surplusage any may be ignored: *A.I.R. 1926 Sind 171, Rel. on.*

[P 654 C 1]

Revachand V. Thadhani—for Appellants.

C. M. Lobo—for the Crown.

Percival, J. C.—This is an appeal against the conviction by the Additional Sessions Judge of Hyderabad, who convicted the 12 appellants, accused 1 and 2 under S. 366, and others under that section read with S. 120-B. The accused were all sentenced to three year's rigorous imprisonment except that accused 9 who was a woman was sentenced to 12 month's rigorous imprisonment. Mr. Rewachand appears for accused 3, 4 and 7, and he has argued the case on behalf of these appellants, though some of his arguments are applicable also to the other appellants, who have appealed from jail.

The first point that he raised is that the girl Mani who is said to have been abducted from Ahmedabad to Mirpurkhas in Sind, was a waif and not in possession of any guardian. The evidence shows that after the death of her father and mother she had lived with her brother who died 12 months before the alleged kidnapping, and the evidence of Rewo, the Patel of the village, is that she used to come to his house and have food there. He says that the mother of the girl had committed the girl to his charge when she died; but it appears that was some time ago, before the girl stayed with her brother, and so the actually taking charge of the girl by Rewo is not proved.

There is evidence, in addition to the evidence of Rewo, that of the girl herself, Mani, and of Madhavadas (Ex. 9) that Rewo did look after the girl. It is doubtful, however, whether he can be held to have been a lawful guardian for the purpose of S. 361, I. P. C. If it is held that it is not proved that the girl was kidnapped from lawful guardianship the question will still arise whether the accused could not be convicted under Ss. 420 and 511 read with S. 120-B, with which offences the accused had also been charged in this case. The conviction was for the more serious offence namely under S. 366 read with S. 120-B but the facts of the case contained the ingredients of the less serious offence namely that under Ss. 420 and 511, with S. 120-B.

The next point in the case is whether the joint trial of all the accused was legal. Now the facts of the case briefly are, according to the prosecution story, that there was a conspiracy between certain persons at Ahmedabad and certain persons at Mirpurkhas, and the connecting link between the two parties of persons was Manilal, accused 7. Even if there is a doubt about the conviction under S. 366, I am of opinion that there is sufficient evidence to show that there was a conspiracy between the two parties, namely Ahmedabad party and Mirpurkhas party, the conspiracy being that the girl should be brought to Sind and sold there to some person who might be willing to buy her and that to such person it should be stated that the girl was a relation of one of the party of the conspirators.

It has been suggested that there were two separate conspiracies one at Ahmedabad and one at Mirpurkhas. But it seems to me it can be held that there was one conspiracy only, namely, that, the girl should be secured with the intention of her being sold in Sind. As indicated above, it is the prosecution story that Manilal was the connecting link between the parties, as there were persons in Mirpurkhas, who were arranging about the sale in Sind. But, besides the evidence of the girl herself, Mani, there is an important document, which is a connecting link between the parties, namely Ex. 27, which was sent by Manilal with the accused 8 to Ahmedabad. In that letter Manilal says:

You will kindly give the bearer Sartanji, the fan with silver balls and packets of medicine." the letter being addressed to Jeewabhai Hussain of Ahmedabad.

It is contended on behalf of accused 7 that that was a genuine letter and that he was really sending for a fan and medicines; but the point has been dealt with fully by the learned Additional Sessions Judge in his judgment; and I think that, taking into consideration all the facts of the case in connexion with the document, one cannot come to any other conclusion than that the words "fan and medicine" were really sham and were intended to refer to the girl. As pointed out in the judgment accused 8 did not bring any fan or medicine, but instead he brought the girl.

I think, therefore, that it is clearly proved in this case that there was a conspiracy in Ahmedabad and in Mirpurkhas and its neighbourhood to decoy the girl and cheat the intending purchasers by passing her off as a person connected with the party of the conspirators.

As mentioned above, Mr. Rewachand appears for accused 7, 3 and 4. As regards accused 7 it appears to me clearly proved that he was one of the conspirators. As indicated above, he had connexion with the Ahmedabad conspirators and the girl when received was taken to his garden in Mirpurkhas. In fact so far from holding that he was not one of the conspirators, it appears to me that he may be regarded as the leading man amongst the conspirators. It cannot, therefore, be held that he is not guilty.

Turning now to the case of accused 3 and 4, the evidence against them con-

sists chiefly of the evidence of the girl herself Mani. In this connexion it may be mentioned that the girl herself has disappeared, and it has not been possible to cross-examine her, though she had been offered for cross-examination before the Committing Magistrate. That is a point of course that can be argued in favour of the accused. But in this particular case her evidence appears to be reliable, and in various particulars it is confirmed by the rest of the evidence.

As regards accused 3 and 4 the girl states that they visited the house of accused 1, where the girl was originally detained for 8 days; that they went with the other conspirators to the house of accused 5 Gouri Shanker, that they used to visit Gouri Shanker when the girl was there and that they went to see her off at the station. In addition to the evidence mentioned above, there is the fact that on Ex. 20, which was a deed between accused 2 and 5 regarding the disposal of the girl, there is the attesting signature of Mahomed. Accused 4 contends that he did not sign that document, and his name is really Mohomed-ali. There is, however, at any rate the fact that one Mahomed attested that document.

I am of opinion therefore that accused 3, 4 and 7 were members of the conspiracy.

Regarding the remaining accused, who have appealed from jail it is necessary only to briefly state the evidence against them, as they appear to be also concerned in the conspiracy.

Accused 1 was the person at whose house the girl was kept.

Accused 2 was the person who passed the document Ex. 20 to accused 5.

Accused 5 was the person in whose house the girl was confined and he also passed the document to accused 8.

Accused 6 and 8 were the persons who took the girl to Mirpurkhas.

Then the remaining accused were concerned in the attempt to dispose of the girl at Mirpurkhas. The evidence is to the effect that accused 9 passed herself off as the mother of the girl, and that accused 10 was engaged in trying to dispose of the girl, and that accused 11 and 12 also supported accused 9 in her false statements regarding the relationship of certain members of the party to the girl.

These persons were also conspirators in connexion with the disposal of the girl.

As indicated above, it appears to me that the case falls rather under S. 420/511, read with S. 120-B, than under S. 366 read with S. 120-B. I am of opinion, however, that it is not necessary to reduce the sentences on this account. The maximum sentence under S. 420 is seven years, and in view of the alteration in the conviction the maximum sentence permissible would be one of three and half years; and in this case the sentence of three years has been passed in respect of all the accused except accused 9 who is a woman, and in respect of whom a sentence of 12 months' rigorous imprisonment has been passed.

I would therefore alter the convictions to convictions under Ss. 420/511 read with S. 120-B, but confirm the sentences passed by the Additional Sessions Judge.

Rupchand, A. J. C.—The 12 appellants were charged for two offences, first conspiracy to kidnap Mani, a minor girl aged about 13 years, from the village of Hasole, four miles from Ahmedabad, with intent that she may be compelled to marry against her will, and secondly conspiracy to cheat Santumal and Lahorimal to the extent of Rs. 1,200 in respect of the said girl. Appellant 7 was also charged with the offence of concealing the said girl knowing that she had been abducted. The learned Additional Sessions Judge found them guilty of all the offences and passed sentences against all the appellants on the first charge. He did not consider it necessary to record a separate conviction and sentence in respect of the second charge. He has, however, recorded a separate conviction and passed a separate sentence against No. 7 in respect of the third charge but ordered both sentences to run concurrently.

The learned pleader for the accused has argued that Mani was an orphan and a waif and that the prosecution had failed to prove that she was under the lawful guardianship of any one at the time she is said to have been kidnapped. In my opinion there is a good deal to be said in favour of that view. Rewo in whose care she is said to have been entrusted by her mother at the time of her death proved hostile to the Crown while giving evidence before the Sessions

Court, and it was only he was confronted with the previous statement made by him before the Committing Magistrate that he admitted that the girl had been entrusted to his care. The learned Public Prosecutor does not seem to have pushed this point further by bringing out clearly on the record that not only the mother of Mani had requested Rewo to take the girl under his protection but that Rewo had accepted the trust so as to bring the case within the purview of the expression "lawfully entrusted" in the explanation to S. 361 of the Code: see *Empress v. Pamantile* (1). Even the exact words used by Rewo in his deposition before the Committing Magistrate have not been placed on the record, and it is difficult to know how the girl is said to have been lawfully entrusted to him. There is also evidence to prove that at the time of the death of Mani's mother, Mani had a brother who lived up to the age of 20 years. It would therefore have required serious consideration whether under the circumstance there was any occasion for Mani's mother to entrust Mani to the care of a stranger. But it is not necessary for me to consider this point further as, in my opinion, the only substantial charge in respect of which the accused should have been jointly tried and convicted was the second charge.

The object of a conspiracy in which this and several other hands operating in Sind join is to decoy and transfer marriageable girls from outside Sind to the villages in Sind where there is great scarcity of girls and to make money by selling such girls to intending husbands on the pretext that the girls offered in marriage are related to one or other of the co-conspirators. The whole object of the conspiracy is to make money by deceit and this nefarious traffic is carried on not only in respect of minor girls but also in respect of grown up girls. In such cases two separate charges, one of conspiracy to kidnap a minor girl and the other to cheat by attempting to dispose of the kidnapped girl for sale unnecessarily lays open the prosecution to an attack on the ground that the co-conspirators in each of the two conspiracies not being identical and the two conspiracies being presumably the result of two separate agreements or transac-

(1) [1892] 8 Cal. 971.

tions the trial of the accused is defective. (After examining the evidence, the judgment proceeded) The charge of conspiracy to cheat is therefore sufficiently made but against all the accused.

It is no doubt true that this charge is not so specific as it ought to have been. A conspiracy presupposes an agreement, and in a conspiracy of this nature the agreement is not to cheat any parotitular person or persons but one of the public who might fall into the clutches of the conspirators. But as pointed out in *Kishinchand v. Emperor* (2) recital of specific offences committed in pursuance of the conspiracy are at most a surplussage and may be ignored. The accused knew exactly what was the case which they had to meet and have in no way been prejudiced, by the frame of the charge. I would, therefore, convict the accused of the charge of conspiracy to cheat. At the same time I wish to point out the desirability of a definite and separate charge for conspiracy being framed in such cases in conformity with the section and the observations made in *Kishinchand v. Emperor* (2).

The learned Sessions Judge has not passed a separate sentence in respect of this charge but I agree with the learned Judicial Commissioner that all the accused should be convicted under S. 120-B read with Ss. 420/511 in respect of this charge and that they should undergo the same sentence which was awarded to them by the lower Court under the first charge.

I accordingly concur that the conviction in the case of each accused should be altered to one under this section, namely, S. 120 B read with Ss. 420/511 I. P. C. and that the same sentences be maintained. With regard to the conviction and sentence on accused 7 on the third charge, it will stand and this sentence will run concurrently.

In the end we wish to observe that special credit is due to Jethmal, Head Constable of Mirpurkas for making a thorough and careful investigation resulting in conviction of this gang.

R.M./R.K.

Order accordingly.

1930 Cr. Cases 652

(Madras)

PANDALAI, J.

Golusu Appalanarasiah—Petitioner.

v.

Emperor

Criminal Revn. No. 669 of 1929 and Criminal Revn. (Petn. No. 605 of 1929, Decided on 22nd January 1933.

(a) Cr. P. C. Ss. 198 and 200—Magistrate proceeding without complaint and without examining complainant in case of defamation—Objection to procedure by accused at earliest stage—Proceedings are vitiated.

Where in a case of defamation the Magistrate proceeded without a complaint and without examining the complainant on oath issued process against the accused and the accused pointed out the irregularity to the Court at the first opportunity but the objection was disallowed.

Held: that there was no acquiescence by the accused in the procedure followed and that the proceedings were vitiated by the irregularity. [P 653 C 2]

(b) Cr. P. C., S. 500—Magistrate trying case transferred to another without retransfer to his own file—Proceedings are void.

The proceedings of a Magistrate trying a case transferred by him to another Magistrate but which has not been retransferred to him are without jurisdiction and altogether void: 30 Cal. 419; 32 Cal. 788 Appr. [P 654 C 1]

V. L. Ethiraj and A. S. Sivakaminathan—for Petitioner.

K. S. Vasudevan—for the Crown.

Order—This is a petition to revise the conviction of the petitioner for defamation of the complainant recorded by the Sub-Divisional Magistrate of Vizagapatam in C. C. 33 of 1928 and upheld by the learned Sessions Judge of Vizagapatam on 16th November 1928.

Objection is taken to the legality of the conviction on the ground that the proceedings before the Sub-Divisional Magistrate were vitiated by one of two alternative grounds: (a) that there was no complaint before the Magistrate on which he could take cognizance of the case and that the Magistrate, though informed of this defect at the very outset and objection was taken to his proceeding further with the case, brushed aside and took cognizance of the case i. e. issued process against the accused; (b) if the proceedings before the Sub-Divisional Magistrate be regarded as a continuation of those which were started by a previous complaint instituted by the complainant, the said complaint had been transferred by the Sub-Divisional Magistrate himself to the Sheris-

tadar, First Class Magistrate of Vizagapatam and was pending before him and had not been withdrawn from that file to the file of the Sub-Divisional Magistrate.

To appreciate these objections it is necessary to state that the proceedings against this petitioner originally started upon a complaint filed before the Sub-Divisional Magistrate on 21st December 1927. This complaint was transferred to the Court of the Huzur Sheristadar First Class Magistrate of Vizagapatam and was filed there on 27th December 1927. As shown the order in C. C. 1 of 1928 of that Magistrate that complaint embraced two distinct matters (1) theft or robbery on 14th December 1927 by the present petitioner and others of a brass vessel and a cloth and (2) defamation of the complainant by this petitioner on and after 18th December 1927, by the pasting of defamatory leaflets and handbills. At the trial of this complaint the present petitioner took objection to the trial of both matters going on together as they constituted distinct offences. On this, the complainant's vakil in the words of the order in C. C. 1 of 1928 dropped that portion of the complaint which relates to the offence of defamation punishable under S. 500, I. P. C. The trial proceeded on the charge of theft and ended in a discharge dated 25th February 1898. Thereupon on 17th April 1928, Mr. Narasimha Rao, pleader for the complainant, put in a petition to the Sub-Divisional Magistrate accusing the former vakil who had conducted the complainant's case in the Huzur Sheristadar Magistrate's Court of having improperly added a charge of robbery into the complaint and of having dropped the charge of defamation, stating that the same complaint is still pending and that therefore no new complaint is necessary and praying for process on the charge of defamation. The complainant did not sign this petition nor was she examined on oath. But the Sub-Divisional Magistrate on 18th April 1928 passed this order "Take on file under S. 500 I. P. C." and posted the case to the 2nd May 1928. On that day the accused through his vakil put in a long petition pointing out the irregularity, that there was no complaint and that there was no case and that the

Court had no jurisdiction to proceed. The pleader Mr. Narayana Rao for the complainant answered these objections and as far as can be gathered, the petitioner's objections were overruled and the trial proceeded and ended in a conviction under S. 500 and a sentence of a fine of Rs. 100.

From the above facts it is quite clear that treated as a new case started before the Sub-Divisional Magistrate there was in C. C. 33 of 1928 no complaint nor was the complainant examined on oath. This is certainly a grave irregularity. Whether it might have been cured or not by acquiescence, there was certainly no acquiescence. This was immediately pointed out but was brushed aside. I can therefore see no ground for saying that this objection was waived or acquiesced in. This would in itself be a sufficiently grave irregularity to vitiate the subsequent proceedings.

The only way in which that objection could be met is by supposing that there was originally a complaint including the charge of defamation, namely, the one made on 21st December 1927. But this supposition only involves a still greater error because in that case the Sub-Divisional Magistrate would have no jurisdiction to proceed with that complaint because it was transferred to the Huzur Sheristadar, First Class Magistrate and had not been recalled. Several decisions have been cited to me to show that once a case is transferred by a Sub-Divisional Magistrate or District Magistrate to another, a Subordinate Magistrate, he cannot proceed with that case without withdrawing or transferring it back again. It is only necessary to refer to *Radha Bullar Roy v. Benode Behari Chatterjee* (1) and *Ajab Lal v. Emperor* (2). That proposition appears to me not to require any authority for its support and it has not been stated by the Public Prosecutor that there was any order by the Sub-Divisional Magistrate withdrawing the complaint from the Sheristadar Magistrate to himself. It was suggested by the learned Public Prosecutor that that also was a curable defect and must be held to have been cured in this case because that objection was not taken in that form in the Courts below. In the first

(1) [1903] 30 Cal. 449. *

(2) [1905] 32 Cal. 753=9 C. W. O. 810.

place I am not at all sure, because no authority has been cited for that proposition, that it is a curable defect. If a Magistrate having no jurisdiction to try a case does so, his proceedings are void (See 530, Cl. p) and a Magistrate trying a case which has not been taken cognizance of by him or has not been sent to him in the proper way or withdrawn by him in the proper way has certainly no jurisdiction to try it. Then assuming it was curable there is nothing in the case to show that it was cured or was acquiesced in. On the contrary at the earliest possible moment the Sub-Divisional Magistrate was informed of the defect that there was no complaint in the case. That was quite sufficient to put the Court and the opposite party upon notice of the objection which went to the root of the case. It could only have been met by the answer that there was a previous complaint in the case which itself would have been met by the still more fatal objection that that complaint was pending in another Court. It seems to me that the prosecution in this case is on the horns of a dilemma as has been stated above and the learned Public Prosecutor has not satisfied me how he can escape from the one or the other horn of this dilemma. The proceedings in the lower Courts must therefore be set aside as without jurisdiction. The complaint was started by a private party and it is not therefore right that I should not allow her after all this time, further opportunity to prove her case, if she desires it, to the satisfaction of the Magistrate. The records will be sent back to the Huzur Sheristadar first Class Magistrate before whom the first complaint is pending for disposal according to law. The fine, if paid, must be refunded.

P.R.S./J.M. *Proceeding set aside..*

1930 Cr. Cases 654

(Sind)

PARCIVAL, J. C. AND HAVELIWALLA,
A. J. C.

Billu and another—Appellants.

v.

Emperor

Criminal Revn. Appl. No. 301 of 1930,
Decided on 19th March 1930

(a) Evidence Act, S. 24—Confession excluded by trial Magistrate wrongly or rightly

under S. 24, cannot be relied on in revision.—Criminal P. C., S. 439.

Where confession of an accused has been excluded by the trial Magistrate under S. 24, it cannot be taken into consideration in revision even though such confession may be excluded wrongly. [P 655 C 1]

(b) Penal Code, S. 411—Accused knowing where stolen property was buried and producing it but falsely stating that they did it under instructions from police who themselves had buried it—Their knowledge is not innocent—Such production warrants conviction under S. 411.

Whether the fact of the accused pointing out stolen property is or is not evidence of possession is a question of fact. [P 655 C 2]

Where the accused know that a considerable amount of stolen property is buried in the ground and concealed from the public view in a certain field and produce the same but falsely state that they had pointed out the property on the instructions to do so by the police who had themselves buried the property there, their knowledge cannot be held to be innocent knowledge and such production is sufficient for conviction under S. 411 : 5 S. L. R. 257, *Rel. on* ; 3 S. L. R. 186, *Considered*. [P 655 C 2 ; 653 C 1]

Nihchaldas C. Vazirani—for Appellant.

C. M. Lobo—for the Crown.

Percival, J. C.—This is a revision application against the order of the Additional Sessions Judge, Hyderabad, who maintained the conviction passed by the First Class Magistrate, Shahbunder on the two applicants, Billu and Hassan but reduced the sentence in the case of each of the accused from two years' to nine months' rigorous imprisonment. We had issued notice in this case because the procedure of the lower Courts has raised some difficulty. In the first Court the learned Magistrate excluded a confession made by the accused to one Tolaram, on the ground that the confession was inadmissible in evidence because it fell within the provisions of S. 24, Evidence Act, but at the same time he referred to the confession as one of the reasons for upholding the conviction. In the appellate Court the learned Additional Sessions Judge held that the confession had been wrongly excluded and he convicted the accused on the confession together with the production of the property to the extent of Rs. 673 odd by the two accused ; but he further observed :

"Mera production of property from another man's field is not sufficient to warrant a conviction under S. 411, I. P. C. according to the ruling in *Queen Empress v. Gorinda* (1)."

(1) [1895] 17 All. 576—(1835) A. W. N. 226;

Now in regard to the exclusion of confession I am of opinion that confession cannot be taken into consideration in this revision application because whether the learned Magistrate excluded it rightly or wrongly it was in fact excluded, therefore, the accused do not deal with the confession or explain what was the effect of it. In fact the learned Public Prosecutor observes that, if in the opinion of this Court the rest of the evidence is not sufficient for maintaining the conviction, then he does not ask this Court to rely upon the confession, but suggests that there should be a retrial in order that the Magistrate may again consider whether the confession should rightly be excluded or not. I am, however, of opinion that even if the confession is excluded still the conviction can properly be maintained on the strength of the production of the stolen property by the two accused. The evidence regarding the production of property is described in the judgment of the first Court, which shows that a large amount of stolen property was produced by each of the accused; moreover the accused in turn showed a place in the river where a box which was part of stolen property was found by the diver. The latter piece of evidence in fact tells only against Hassan, because he was the first person who showed the place in question. As against Billu this evidence should in my opinion be excluded because he showed the place only after it had been already shown by Hassan. But as regards the production of rest of property as stated in the judgment of the first Court:

"the accused Hassan first took the mashirs to a pit and took out from underneath the pit a bag wrapped in the silken shirt containing notes, cash and change valued at Rs. 327-15-9. The shirt and the bag were recognized by the complainant. Then Billu took them to another pit. He took out from underneath the pit a green turban in which a small cloth bag was wrapped containing rupees, notes and change worth in all Rs. 347-0-0. The turban and bag were recognized by the complainant."

It is mentioned in the evidence that this pit though it was in the field of one Ali Mahomed was underneath a bush and the property was buried and concealed in the pit. There is no doubt from the evidence that a considerable amount of stolen property was buried in the ground and concealed from public

view in a certain field and that it was produced by the two accused.

Now it is argued by the learned pleader for the applicants that the evidence regarding the production of property is not sufficient for a conviction under S. 411 and certain rulings have been cited in support of this view. I am of opinion, however, that undue distinction is made in certain rulings between the production of property in one's own field and the production thereof in another man's field provided of course the property is buried in the ground to such an extent as it cannot be seen by outside persons. It seems to me after considering the various rulings that the most appropriate ruling out of those included in the *S.L.R.* in the case reported as *Emperor v. Photo* (2), of which the latter part of the head-note runs as follows:

"Whether the fact of the accused pointing out stolen property is or is not evidence of possession is a question of fact."

Moreover in the course of the judgment it is stated as follows:

"It is argued that mere production does not raise a presumption of guilt. This, however, is merely a question of fact. Does the production or the pointing out indicate that accused was in possession or that he had innocent knowledge that the articles had been left there by someone else? The latter inference is negated by the fact that the accused falsely denied having pointed out the property."

In the present case the defence taken up by the accused was that the police had buried the property there and had then taken them to the place and made them to produce the property. He also said that he had paid Rs. 600 only to the Sub-Inspector. Now this portion of the evidence had been disbelieved by both the Courts, the Additional Sessions Judge observing that the defence story is most absurd; and I see no reason why we should believe it. If, however, it is disbelieved we arrive to the position that the accused knew that the stolen property was buried there, that they produced the same and that they have made a false statement regarding the manner in which the property was buried and how they came to know of it. In *Emperor v. Photo* (2), the wording used was:

"The latter inference is negated by the fact that accused falsely denied having pointed out the property."

(2) [1912] 5 S. L. R. 257=15 I. O. 801=13 Cr. L. J. 529.

In the present case the accused did not falsely deny that they pointed out the property but they falsely stated that they had pointed out the property on the instructions to do so by the police who had themselves buried the property there. That is to say, they made a false statement regarding the pointing out of the property and there was nothing in their statements which supports the view that :

"they had innocent knowledge that the articles had been left there by someone else."

It may be noted that the defence of the two accused was throughout the same. Following therefore the latest ruling in the *S. L. R.* namely 5 *S. L. R.* 257, I am of opinion that the conviction should be confirmed.

Out of the Sind cases a reference is made by the learned pleader for the applicant to *Emperor v. Umar* (3). That however, was previous to *Emperor v. Photo* (2). Moreover the ruling is simply, as the head-note shows :

"the mere fact that the accused knew where the stolen property was concealed did not establish that they were in possession of the same."

It will be observed that the wording is "the mere fact that the accused knew" but the question is whether the inference in any particular case is that there was "innocent knowledge" or whether the inference is that the property had been placed there by the accused themselves. *Emperor v. Photo* (2) therefore explains and amplifies the ruling in *Emperor v. Umar* (3). It shows that the correct inference to draw from the production of stolen property depends upon the facts of each particular case. In accordance therefore with the ruling in *Emperor v. Photo* (2), the convictions and sentences are confirmed, the revision application is dismissed.

P.N./R.K. *Revision dismissed.*

(8) [1909] 3 *S. L. R.* 136=4 *I. O.* 481=11
Cr. L. J. 4.

1930 Cr. Cases 656

(Rangoon)

BAGULEY, J.

Maung Ko—Applicant.

v.

Maung Set—Respondent.

Criminal Revn. No. 103-B of 1929, Decided on 21st August 1929, from order of First Addl. Special Power Magistrate, Mandalay, D/- 22nd March 1929.

Criminal P. C., Ss. 203, 200 and 202—Magistrate examining complainant and then dismissing complaint under S. 203 on result of previously made police enquiry—His order dismissing complaint is against procedure and cannot be sustained.

Under the Criminal P. C., unless the Magistrate dismisses complaint at once after perusing the complaint itself and the examination of the complainant made on oath, he is bound either to issue process against the accused or else to hold an enquiry himself under S. 202 or direct an enquiry to be held under the section. When a Magistrate examines the complainant and then dismisses the complaint under S. 203 on the result of a previously made police enquiry, the order dismissing is incorrect as there is no provision in the Code for this being done. [P 657 C 2]

Sanyal—for Applicant.

Basu—for Respondent.

Judgment.—The applicant Maung Ko filed a complaint before the First Additional Magistrate, Mandalay, charging the respondent with the dacoity. The Magistrate examined him on oath, having done so instead of proceeding along recognised lines, he recorded a diary order. "Inform D. S. P. and call for police papers. For further orders on 19th March." On 19th March he noted that he had received the police papers but had not gone through them and the case was put off to 22nd March. On 22nd March he passed orders, professing to act under S. 203, Criminal P. C. The applicant then applied in revision to the District Magistrate against the order of dismissal. The diary order signed by some officer for the District Magistrate runs: "Call for proceedings and put up on 27th June 1929." Apparently it was not put up on that date but on the next day 28th June 1929 the District Magistrate recorded a diary order.

"I too have seen the police papers. I consider the action taken by the First Additional Magistrate to be correct. The application for an order for further enquiry under S. 486, Criminal P. C., is summarily dismissed."

Apparently neither the applicant nor his advocate was given an opportunity of being heard. Against this order the applicant now comes to this Court in revision.

The Criminal Procedure Code is quite clear with regard to what has to be done when a complaint is filed before a Magistrate under S. 200. The first thing the Magistrate has to do is to examine the complainant on oath and the substance of the examination must be reduced into

writing and it must be signed by the complainant and also by the Magistrate. This was done in the present case. S. 200 would not apply to this case. The next section is 202. This authorises a Magistrate after the complainant has been examined, to postpone the issue of process for compelling the attendance of the person complained against and either enquire into the case himself or direct enquiry or an investigation by any Magistrate Subordinate to him, or by a police officer, or by such person as he thinks fit. The Magistrate in this case did not take any action under S. 202. The next step is under S. 203, the Magistrate may dismiss the complaint after considering the statement on oath, if any, of the complainant and the result of the investigation on enquiry if any under S. 202, if there is in his judgment no sufficient ground for proceeding. It appears therefore that a complaint can be dismissed under S. 203, if the Magistrate is satisfied that there is no sufficient ground for proceeding, after considering the statement on oath of the complainant and the result of the investigation or enquiry, if any under section 202. As I have said no action was taken under S. 202, and therefore, the Magistrate had only the complaint and the statement of the complainant on oath to consider. So far as I can discover there is no provision in the Code which authorizes a Magistrate to send for the result of a previously made enquiry and dismiss complaint on that. There is a case quoted in "Sohni's" Code of Criminal Procedure, to which I am unable to refer, which is summed up as follows:

The reasons for dismissing a complaint should be based on inferences of fact arising from or disclosed by

- (1) The complaint,
- (2) The sworn statement of the complainant and,
- (3) The investigation, if any, made under S. 202.

This provides a wide field; anything outside it is extra judicial and must be discarded.

The same rule is laid down in *Dr. H. P. Sandyal v. Kungeshwar Misra* (1) and in *Umar Ali v. Safer Ali* (2). It is laid down:

"He is bound to examine the complainant and then can either issue summons to the accused or order an enquiry under S. 202, or dismiss the complaint under S. 203."

In the present case, the Magistrate examined the complainant and then dismissed the complaint professedly under S. 203, on the result of a previously made police enquiry. There is no provision for this being done. So far as I am aware, under the Criminal P. C., unless he dismissed the complaint at once after perusing the complaint itself and the examination of the complainant made on oath, he was bound either to issue process against the accused or else to hold an enquiry himself under S. 202, or direct an enquiry to be held under the section. I therefore, set aside the order of discharge passed by the First Additional Magistrate, and direct that the complaint be properly dealt with on the lines laid down in the code by such other special power Magistrate as the District Magistrate may transfer the case to for disposal.

P.N./R.K.

Order set aside.

1930 Cr. Cases 657

(Calcutta)

PEARSON, AND MALLIK, JJ.

Manohar Mandal & another—Accused.

v.

Emperor—Opposite Party.

Capital Sentence Case No. 6 of 1929 and appeal No. 918 of 1929, Decided on 11th March 1930.

(a) Evidence Act, S. 114 Illus. (b)—Case against accused depending upon whether approver's story is corroborated in material particulars—Most careful investigation is required with regard to identity of accused person.

Where the case against accused depends on the view taken as to the corroboration of the approver's story in material particulars, and whether it is such, taken along with the other facts and circumstances, that it can be relied upon as bringing home the guilt for the crime, the corroboration of the approver's story requires most careful investigation upon the question of the identity of the accused persons as participators in the occurrence.

[P 659 C 1]

(b) Criminal P. C., Ss. 297 and 298—Simple language should be used by Judge while charging jury—If opinion is expressed by him jurors should be made aware that they are sole judges of facts.

The duty of a Judge is to help the jury to arrive at a proper verdict of the facts, and with that in view it is far better to use the plainest and simplest language in his charge. Also if he does express his opinion on the facts he should do it in such a way as makes it quite clear to the jurors that he is not in any way seeking to usurp their functions or to interfere in matters the decision of which is exclusively within the competence of the jury itself.

[P 659 C 2]

(1) [1912] 16 C. W. N. 148=18 I. C. 781=13 Cr. L. J. 125.

(2) [1886] 13 Cal. 384.

S. C. Taluqdar and Nakulsswar Shome—for Accused.

Khundkar and Anil Chandra Roy Chaudhuri—for the Crown.

Judgment.—This is a reference under S. 374, Criminal P. C., in the case of accused 2, Monohar Mandal and Kalicharan Mandal; the former was charged with the offence of murder of one Ratikanta Biswas under S. 302, I. P. C., and Kali Charan under S. 302/114, I. P. C. The jury found unanimously that both Monohar and Kalicharan instigated the murder and were present at the place of occurrence: a majority of 5 found that Monohar actually shot at and committed the murder of Ratikanta while the minority of 4 gave him the benefit of the doubt as to whether he actually fired the shot which caused the death. The occurrence took place after nightfall somewhere about 8 or 8 30 p. m. on 11th May 1929. For the details the prosecution must needs depend on the statement of the approver one Santosh Bain who was present.

According to Santosh, Monohar had approached him in Magh with information that Kalicharan was offering 60 for obtaining a gun and Rs. 140 for the murder of Ratikanta. Accordingly one Harekrishna of Bhalua was approached but he declined to make over his gun and a similar attempt from one Sukhlal came to nothing. Then the approver goes on to say that in Falgun he accompanied Monohar to the house of one Ram of Barakhalsi, and from him stole a gun which they proceeded to conceal in a hay stack of one Hiralal Bairagi. Monohar then gave Santosh 6/. Thereafter powder was purchased and three lead bullets prepared by Monohar. Then one day they set off to effect their purpose but on the way Monohar thought the gun was overloaded and the head of the ramrod broke off in the barrel, so it had to be fired off to clear it, and the result was a crack in the stock. Nothing was done on that occasion and the gun was hidden in the old place. Then Monohar made two more bullets and put a new head on the ramrod. On two other occasions they set out with the gun powder and bullets but nothing came of it.

Then on Saturday the day of the occurrence Santosh says he was summoned by Monohar and found Kalicharan

there. A little after sunset they two went to Hiralal's bari, got the gun and set out. they crossed the Khal by a bamboo bridge and met Kalicharan near the house of one Nim Chand. Monohar loaded the gun, while Santosh spent 3 or 4 matches trying to light a cigarette. Then the three of them went to Ratikanta's bari near by. Ratikanta was at the time busying himself about the needs of his guest in the outer house. Then Ratikanta returned and sat on the floor of his hut with his feet on the verandah. He began to smoke and a lamp was near by. Then the three advanced to the cover of a ruined hut with a mat screen distant only 5 or 6 cubits from where Ratikanta was. Then Monohar fired the gun and shot Ratikanta who died practically at once. The three then fled. Kalicharan going off towards his house, while Manohar and Santosh taking the gun swam over the khal and hid the gun in the stack of one Harobola and also buried the powder flask in Santosh's bari. The neighbours collected on the spot and the first information was given at the thana, 2 miles away, at 10 p. m. that evening by a man named Mandar Tarafdar. The case against the accused depends on the view taken as to the corroboration of the approver's story in material particulars and whether it is such taken along with the other facts and circumstances that it can be relied upon as bringing home the guilt for the crime to the two accused persons.

As regards some particulars there is undoubtedly corroboration. The gun and powder flask were produced following the statement of Santosh. There is a crack in the stock which had become larger, according to the owner, since the gun left his possession. There was the new ramrod head. The bullets were recovered in and just outside the hut, and the gun expert says they must have been fired from a close range of about six yards from a single barrelled gun. We have also the F. I. R. dated 5th March 1929, given by Ramcharan Mandal about the theft of his gun: some pieces of lead discovered in Monohar's house; and some matches picked up where Santosh said he had lighted a cigarette.

It is upon the question of the identity of the accused persons as participators

in the occurrence that the corroboration of the approver's story requires most careful investigation. In one matter regarding dates there are certain inconsistencies or contradictions in his statements (Here the judgment discussed evidence and then proceeded) As presented to us in the argument, the case against the accused really turns upon whether there should be considered to be sufficient corroboration of the approver upon the question of identity of the accused, and upon a careful weighing of the matters above mentioned we are of opinion that the proof is not sufficient to exclude a reasonable doubt. Both the accused are acquitted and we direct that they be forthwith set at liberty.

We cannot leave this case without pointing out to the learned Judge that in some particulars his charge has laid itself open to attack in this Court. It has been described to us as dogmatic, as couched in highflown language and as calculated to prevent the jurors from performing their duty as Judges of fact. In certain passages it reads more like a judgment than a charge, and in others appears to be a downright imposing of the Judge's opinion upon the mind of the jurors. For instance upon the question of the variations in the evidence as to the time when the attempt to bring in Harekristo was first made a difference of two months the learned Judge says:

"It serves to demonstrate how confused persons of the rank and status of Santosh and Harekristo may be in respect of time."

Again, some point was made by the defence that the two mistresses of Monohar and Santosh were not called as witnesses: the learned Judge in dealing with this does not refer to the presumption that the jury might draw if witnesses were not called who ought to have been called, but puts it to the jury in this way:

"If it is true that the former were the mistresses of Santosh and Monohar and that Hiralal tolerated the visitations at his house the presumption surely is that they would be hostile to the prosecution and not likely to support any case tending to cause restriction of the liberty of the two persons."

Then again there are portions of the charge where the language is, to say the least, imaginative and fanciful. That appears in the opening portion of the charge and in charging the jury as to

the benefit of the doubt, the learned Judge concludes his remarks by saying:

"You will notice the use of the term, . . . 'reasonable.' It is possible, gentlemen, to doubt anything, the revolution of the earth around the sun or on its own axis, that life itself is nothing more than a vain chimera or that a deity exists, but the doubt contemplated in this principle of law is one that is reasonable, that is, where definite choice after due meditation is not possible, the doubt which is akin to the conclusion arrived at in a syllogistic dilemma"

That is more likely to confuse the jury than to assist them, even if it was properly translated to them. The learned Judge should bear in mind that his duty is to help the jury to arrive at a proper verdict of the facts, and that with that in view it is far better to use the plainest and simplest language; also that if he does express his opinion on the facts he should do it in such a way as to make it quite clear to the jurors that he is not in any way seeking to usurp their functions or to interfere in matters the decision of which is exclusively within the competence of the jury itself. The reference is, accordingly, rejected and the appeal allowed,

S.N./R.K.

Conviction quashed.

1930 Cr. Cases 659

(Calcutta)

SUHRWARDY AND GRAHAM, JJ.

Prahlad Barman and others — Petitioners.

V.

Emperor — Opposite Party.

Criminal Revn. No. 1267 of 1928, Decided on 25th March 1929.

Penal Code, S. 498—Legal proof of marriage is necessary to support conviction—it must be shown that marriage other than that under general law could be effected in particular way.

Among Hindus there are forms of marriage called customary marriages which are in the nature of exceptions to the recognized forms of marriages. There must be satisfactory and sufficient evidence on record that a marriage other than that under the general law may be effected in a particular way.

A complaint under S. 498 was made by a low caste Hindu. He alleged that he had married the woman enticed away in 'nika' form. The only evidence of marriage that was adduced was that the complainant put vermilion on the forehead of the woman and that there was a feast of the caste people.

Held, that the evidence of marriage was legally insufficient for a conviction, under S. 498. [P 660 C 1]

Girija Prosanna Santhal and Bijutt Bhusan Santhal—for Petitioners.

Suhrawardy, J.—This rule has been issued on the ground that the evidence is legally insufficient for a conviction under S. 498, I. P. C. The complainant belongs to a low caste Hindu sect known as Rajbangshi. His case is that he had married the woman said to have been enticed away in the form which is known among them as nika marriage, that is, marriage with a widow. The point that has been urged before us is that there is not sufficient evidence on the record of legal marriage. It is not necessary to consider the circumstances under which the witnesses for the prosecution were not cross-examined by the defence because on the evidence as it stands, the marriage between the complainant and the woman has not been proved. The only evidence of marriage that has been adduced in this case is that the complainant put vermilion on the forehead of the woman and that there was a feast of the caste people. There is no evidence that any mantra was recited or whether there was any priest who officiated and solemnized the marriage. According to the Hindu Law certain ceremonies have been laid down as necessary for a valid marriage. There is no evidence that any such ceremony was observed on the occasion of this marriage of the complainant with the woman. But among the Hindus there are forms of marriages called customary marriages which are in the nature of exceptions to the recognized forms of marriage. They deviate a great deal from the orthodox style; but as it is observed in Sir Gooroo Das Banerjee's Tagore Law Lectures (The Hindu Law of Marriage and Stridhan, Edn. 3, p. 236) the customary rites must be strictly proved; in other words there must be satisfactory and sufficient evidence on the record that a marriage other than that solemnized under the general law may be effected in a particular way. There is no evidence in this case that among the caste to which the complainant belongs it is enough for a valid marriage to put vermilion on the forehead of the wife and give a feast to the people. The fact that the woman lived with the complainant for a long time and bore children is not evidence of a valid marriage. In this view I hold that the evidence of marriage in this case is insufficient for the purpose of S. 498, I. P. C. We accordingly set

aside the conviction of and the sentence passed on the petitioners and direct that they be discharged from their bail bond.

Graham, J.—The rule was issued to show cause why the conviction and sentence passed on the petitioners under S. 498, I. P. C. should not be set aside on the ground that the evidence is legally insufficient for a conviction under that section.

The main contention is that there is no proof of a valid and legal marriage, and that therefore the conviction cannot be supported. It is well settled that in cases, where marriage is an ingredient of an offence, the fact of marriage must be strictly proved. Is there any such proof here? The evidence on the point is given by the complainant and two witnesses and is to the effect that the marriage, a nika marriage was solemnized by applying 'vermilion' to the forehead of the bride followed by a feast. It is also said a barber was present.

The two witnesses referred to above were not cross-examined, so that their evidence is un rebutted. But is it sufficient? It seems probable that the fact of the marriage was not seriously disputed at the trial, but the prosecution was nevertheless bound to prove that a valid marriage had taken place. No doubt among the poor and ignorant classes the same importance is not attached to forms and ceremonies as among the upper classes. But it is also to be borne in mind that loose unions without any sort of marriage at all are not uncommon among the lower orders. It is essential in such cases that the fact of marriage be proved, and I am not prepared to hold that the meagre and unsatisfactory evidence which has been adduced in this case was sufficient to discharge the onus of proof. The barber referred to as having been present at the marriage was not called as a witness, and no explanation of this omission has been given. Some evidence too might have been given to establish that the marriages of this particular class of people are validly performed in the manner described by the complainant and his two witnesses. No such evidence is forthcoming.

I agree therefore that the rule should be made absolute.

R.M./R.K.

Rule made absolute.

CRIMINAL CASES

JOURNAL SECTION

1930]

[JULY

THE PLEA OF INSANITY IN CRIMINAL CASES

By

AMOLAK RAM KAPUR, B.A. (HONS.) LL.B., *Vakil High Court, Lahore.*

(Continued from Journal, p. 21)

defence of insanity upon arguments merely derived from the character of the crime.

Similarly in *Reg v. Stokes* (35) Rolfe, B., said that it would be a most dangerous doctrine to lay down that because a man committed a desperate offence, with the chance of instant death and the certainty of future punishment before him, he was therefore insane, as if the perpetration of crimes was to be excused by their atrocity.

The Indian Courts have also held that it is an established rule of law that the mere absence of motive for the perpetration of crime is not sufficient in itself to raise an inference of the existence of a powerful and irresistible influence of homicidal tendency (36), nor is the enormity, extreme moral perversion or apparent purposelessness of the crime itself, without any further evidence, sufficient to establish the plea of insanity (37), for, our not knowing the motive does not prove that there was no motive (38 & 39).

But the absence of all motive for a crime, when corroborated by independent evidence of the prisoner's previous insanity, is not without weight (40). So where he entertained delusions as to dangers which threatened his wife (41), and where the evidence showed that the prisoner was known as mad Nga Pyan, that immediately before he committed the offence he was noticed by persons to

be in one of his mad fits, that he was under a delusion that the Phongy whom he attacked was keeping his sisters and daughters in the monastery and that the act was utterly unprovoked and motiveless (42), it was held that the facts proved unsoundness of mind which prevented the accused persons from knowing the nature of their acts, and that S. 84 applied.

Similarly where there was evidence that the father and grandfather of the accused had been, at one time or another, insane, that before the murder committed by the accused, she was subject to occasional fits of insanity, that shortly after the murder and for several months subsequently she was insane and when there was no motive for murder, it was held that she was not accountable for her action. Half-witted attempt made by her to conceal the murder was not held sufficient to show that she was sane when she committed the crime (43); but [see (44)] where it was held that though the accused was of unsound mind at the time he committed the murder he knew perfectly well that he was doing a wrong thing. It is submitted that this view seems to be incorrect and vague.

In a case where similar circumstances as those in (41) and (42) above were proved to exist, but where the accused confessed the crime to the village Magistrate and answered the questions put to him rationally, but before the committing Magistrate and the Sessions Judge he denied that he had killed the child, it was held that he was not proved to have been by reason of unsoundness of mind incapable of knowing the nature

(35) 3 O. & K. 185. See also *Reg v. Haynes*, 1 F. & F. 666.

(36) *Sobha v. King-Emperor*, 40 P. R. 1905 Cr.; *Queen Empress v. Venkatasami*, 12 Mad. 459.

(37) *Nota Ram v. The Crown*, 56 P. R. 1866 Cr.; *Ramzan v. Emperor*, 30 P. R. 1918 Cr. 48 I. C. 492=20 Cr. L. J. 1; *Vithoo v. Emperor*, 7 N. L. R. 185=13 I. C. 916=13 Cr. L. J. 164.

(38 & 39) *Vithoo v. Emperor*, 7 N. L. R. 185=13 I. C. 916=13 Cr. L. J. 164.

(40) *Queen v. Sheskh Mustafa*, 1 W. R. 19 Cr.

(41) *Dil Ghazi v. Emperor*, 34 Cal. 686=6 Cr. L. J. 232.

(42) *Nga Pyan v. Emperor*, 4 Bur. L. T. 267=13 I. C. 895=13 Cr. L. J. 49.

(43) *Emperor v. Mt. Anandi*, A. I. R. 1923 All. 327=45 All. 329.

(44) *Lachhman v. Emperor*, A. I. R. 1924 All. 413=46 All. 242=5 L. R. A. Cr. 67=22 A. L. J. 116.

of his act or that he was doing what was contrary to law; and the conviction was upheld, (45). So also in (46).

DRUNKENNESS AND DRUG HABIT

Sections 85 and 86, I. P. C., lay down the rule of law applicable to persons under the influence of intoxication, and are outside the scope of the present article; but there are some cases which fall within the purview of S. 84 as well and deserve to be considered. It is a firmly established principle of law that voluntary drunkenness and drug taking is never an excuse for crime, and the fact that a man was drunk at the time of committing an offence, makes no difference, per se, to the question of his criminal liability; but involuntary drunkenness, as a ground of exemption, is treated in just the same way as insanity, the accused being liable to show that he was so drunk that he did not know (1) the nature of the act, (2) that it was wrong, or (3) that it was contrary to law (47).

If voluntary drunkenness causes a disease which produces incapacity to know the nature of the act committed or that it is wrong or contrary to law, then the case is covered by S. 84, I. P. C. (48); the reason being that a person who is of unsound mind should be judged by the ordinary rules in regard to insanity, no matter whether the insanity arose from disease of the brain or from persistent indulgence in intoxicating drugs or liquor (49).

BURDEN OF PROOF AND EVIDENCE

The law provides that where a person is accused of an offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions, is upon him and the Court shall presume the absence of such circumstances (50). In the undermon-

tioned American case (51) it was laid down that the presumption of law that every one is sane merely authorises the jury to assume at the outset that the accused is criminally responsible for his acts, but the accused is entitled to be acquitted of the charge if, upon all the evidence, there is reasonable doubt whether he was capable in law of committing crime.

In a very important recent *Allahabad* case (52) it has been held that the rule of law that the accused must prove that he comes within the exception does not mean that he must lead evidence; and where it is apparent from the evidence on the record whether produced by the prosecution or by the defence that the general exception would apply, the presumption is removed and it is open to the Court to consider whether the accused comes within the exception. In (53) Sadasiva Aiyar expressed the opinion that homicidal mania need have no motive to perpetrate the crime, and the chief evidence of the existence of insanity appears to be in the act itself. But see (9), (10), (11), (12) and (13), p. 15.

The evidence relating to the mental condition of the accused must be given in open Court—a mere written certificate of a Medical Officer that a prisoner is of unsound mind, is not sufficient evidence of the prisoner's insanity. The Medical Officer should be called as a witness, and personally and carefully examined (54); but he should give opinion as to the state of mind, not as to the responsibility of the prisoner, the latter should be left to the jury under the direction of the Judge (55).

- (45) *Empress v. Venkatasami*, 12 Mad. 459.
- (46) *Ram Sunder Das v. Emperor*, 29 C. L. J. 209=28 C. W. N. 621=50 I. C. 991=20 Cr. L. J. 388; see also *Muhammad Hussain v. Emperor*, 15 O. C. 321=18 I. C. 641=14 Cr. L. J. 81.
- (47) *Warsi Ali v. Emperor*, 7 N. L. R. 180=13 I. C. 919=18 Cr. L. J. 167; *Vithoo v. Emperor*, 7 N. L. R. 185=18 I. C. 916=13 Cr. L. J. 164.
- (48) *Emperor v. Bheleka Aham*, 29 Cal. 493; see also *Queen Empress v. Sakha Ram*, 14 Bom. 564.
- (49) *Vithoo v. Emperor*, 7 N. L. R. 185=13 I. C. 916=13 Cr. L. J. 164.
- (50) Indian Evidence Act, S. 105, and illustrations thereunder, as also *Queen*

- Empress v. Irapa, Ratanlal's Unrep. Cr. Cas.* 818; *Chandu Lal v. Emperor*, A.I.R. 1924 All. 186=21 A.L.J. 776, *Ram Sunder Das v. Emperor*, 29 C.L.J. 209=28 C. W. N. 621=50 I. C. 991=20 Cr. L. J. 388; *Mantanjali v. Emperor*, 55 I. C. 477=21 Cr. L. J. 317; *Muhammad Hussain v. Emperor*, 15 O. C. 321=18 I. C. 321=14 Cr. L. J. 81; *Mt. Anandi v. Crown*, A.I.R. 1928 All. 327=45 All. 329. See also *Reg v. Stokes*, 3 Carr. & K. 185; *Reg v. Layton*, 4 Cox. C. O. 149.
- (51) *Davis v. United States*, published in 6 M. L. T. 1896, on p. 95.
- (52) *Mt. Anandi v. Emperor*, A.I.R. 1928 All. 327=45 All. 329.
- (53) *In re, Vaithinatha Pillai*, (1912) M. W. N. 825=20 I. C. 721=14 Cr. L. J. 435.
- (54) *Queen v. Ram Ruttan Dass*, 9 Wr. 23 Cr.
- (55) *Reg. v. Richards*, 1 F. & F. 87.

Where an accused person is supposed to be insane, a medical man, who has been present in Court and heard the evidence, may be asked, as a matter of science, whether the facts stated by the witnesses, supposing them to be true, show a state of mind incapable of distinguishing between right and wrong (56).

PRACTICE AND PROCEDURE

A perusal of the Indian Case law (57) shows that although the Courts have always required a strict proof of the existence of insanity exempting an accused person from punishment, yet they have also held that mental derangement falling short of unsoundness of mind contemplated by S. 84, Penal Code, is an extenuating circumstance affecting the sentence. In such cases it has been the usual practice of the High Courts to send up the records to the Local Government for necessary action under S. 401, Criminal P. C.

Youth by itself (59), mental weakness caused by disease (59) and insobriety caused by excessive drinking (60), have also been held to be extenuating circumstances requiring consideration; but a deaf and mute person will not be excused simply because of his inability to hear and speak, if his mind is sound, for want of speech and hearing do not imply want of capacity either in the understanding or memory, but only a

difficulty in the means of communicating knowledge (61). In this case the view of the Punjab Chief Court (62) that a deaf and mute person who is unable to understand the proceedings in Court should be dealt with as a lunatic, was dissented from.

The procedure to be followed in cases where there is reason to believe that the accused, when he is produced or brought before the Court for trial, is of unsound mind and incapable of making his defence, has been prescribed by Chap. 34, Criminal P. C., Ss. 464-75. A person acquitted of the offence alleged to have been committed by him, on the ground of insanity is to be detained in safe custody and his case is required to be reported to the Local Government for action (63). Such a person, if declared fit may be released by the Local Government (64) or delivered to the care of a relation or friend on good and sufficient security (65).

When an issue is raised as to the soundness of mind of an accused person, the Court is bound to enquire it before it begins to record evidence, whether the accused is or is not incapacitated by unsoundness of mind from making his defence. If it fails to do so, the subsequent enquiry about soundness or unsoundness of mind does not cure the defect. The question, whether an accused person is entitled to an acquittal, under the general exception of insanity as defined by S. 84, can only arise when the procedure laid down by Ss. 464-65, Criminal P. C., was fully followed (66).

(56) *Reg. v. McNaghten*, 10 Cl. & F.

(57) *Lachman v. Emperor*, A. I. R. 1924 All.

413=46 All. 243=5 L. R. A. Cr. 67=81

1. C. 171=22 A. L. J. 116; *Nga Khan Hla*

v. Emperor, (1914) U. B. R. II 28=16 Cr.

L. J. 92=26 I. C. 1007. *King-Emperor v.*

Tincouri, Dhapi, 27 C. W. N. 290; *Queen*

Empress v. Venkatasami, 12 Mad. 459;

Chhajju Mal v. King-Emperor, 94 P. L. R.

1903=4 I. C. 985=6 M. L. T. 101; *Queen*

Empress v. Lakshman Dagdu, 10 Bom.

512; *Queen Empress v. Kader Masyer*,

23 Cal. 604; *Queen Empress v. Nepal*,

Ratanlal's Unrep. Cr. Cas. 229.

(58) *Nga Khan Hla v. Emperor*, U. B. R.

(1914) II 28=26 I. C. 1007=16 Cr. L.

J. 92.

(59) *Queen Empress v. Nepal*, *Ratanlal's*

Unrep. Cr. Cas. 229.

(60) *Jainal Singh v. The Crown*, A. I. R.

1923 Lah. 294.

(61) *Nga San Myin*, U. B. R. (1910) I, 57=4 Bur.

L. T. 150=11 I. C. 250=12 Cr. L. J. 886.

(62) *Atu Ram v. Emperor*, 84 P. R. 1885 Cr.

Emperor v. Gahna, 87 P. R. 1889 Cr.;

See also 22 W. R. 35 Cr.

(63) Ss. 470-71, Cr. P. C.

(64) S. 474, Cr. P. C.

(65) S. 475, Cr. P. C.

(66) *Jhabba v. Emperor*, 18 A. L. J. 5; *Pala*

Singh v. The Crown, 54 P. R. 1905 Cr.

Queen Empress v. Kasima, *Ratanlal's*

Unrep. Cr. Cas. 882; Queen Empress v.

Nepal, *Ratanlal's Unrep. Cr. Cas. 229;*

Queen Empress v. Noorkhan Chowdry,

1 W. R. 11 Cr.; *Queen Empress v. Kalai*

Sheikh, 3 W. R. 57 Cr.

Object of Cross-examination

"The object of cross-examination," says Johnson, K. C., "from a litigious stand point, not from the high moral ground of getting at the real truth and

exposing falsehood and all that, but from the purely litigious, professional stand point, may be stated as follows: First, it is to get something, no matter

how small, to help your own case. If you fear further examination is dangerous and absolutely fruitless, far better leave it alone, far better to stop the witness if you feel that what you are getting is not, as a fact aiding or assisting your client in the litigation. Another object is when you cannot get that which helps your client, try to get something to weaken "your opponent," but that is got by a different process entirely; and the third is to endeavour, if you can, to separate the truth from the falsehood, more particularly if the truth told by your opposing witnesses would be of assistance to your case; for no cross-examiner is a common prosecutor to discover wrong doing. Now, how should we best attain this object; in what way are we going to further the interests of cross-examination? In order to give an answer to that it will be necessary to consider, that evidence is not facts, but is the impression of facts, and the result of certain facts or certain things which have happened. Now, the object of cross-examination is to reform these impressions, to minimise them, to explain them, to question them if you will, to doubt them if you will. But the facts themselves are something quite apart from the evidence. There are no facts in evidence at all, because evidence is merely and mainly a record of facts expressed through the witness-box. In law and in the trial of a case, facts are the result of evidence and are found independently of witnesses or anybody else; that is, the Judge or the jury has the mental impressions given by the witness of what he saw or heard and given to the best of his ability. The tribunal then finds the facts upon these impressions conveyed through the witness-box. Now, it is important that these impressions should be watched closely in the trial of every case, and the impression of every witness in regard to the way in which he records and expresses his facts. These impressions, in the aggregate, enable, as I said, the tribunal to get at the facts and it is the duty of the cross-examiner, it is, indeed largely the only object of the cross-examiner, to ascertain just what the condition was, and how it was affected by the surrounding circumstances.

I can give you an example. A great many years ago when I was much younger at the Bar than I am to-day and it illustrates my point, perhaps better than anything I can say, there was a case tried before the late Mac Dougal, J. The man was charged with burglary. Now here were the facts presented by the witnesses: A man was seen coming from the back door of a place in Toronto late at night within the burglarising hours; his identification, there was not much question about that; his manner and conduct were such as to cause comment by the officers who took him in charge; he was evidently in great haste to escape from the house; he was arrested, unable to give any satisfactory account of himself at the moment, and some tool or other was found in his coat pocket and the man was arrested, charged with burglary, the case of the Crown apparently absolutely complete. Now that man might have been convicted and might have served his term; a perfectly plain case, but it developed on the cross-examination of certain witnesses for the Crown, and upon the evidence which was given for the defence that this was what happened: that this man was a friend of the servant of the house, that he had been in spending the evening, and by some accident or another he had left the door open, that he was a man of very excitable temperament and that he had, just before leaving, a row with this servant; he was running to catch a car because it was late at night, and he had to catch one before a certain time, that he was a machanic, and he had a certain implement, a wrench or something of that kind in his pocket at the time of his arrest.

In the witness-box the witnesses swear to damaging evidence and the outward facts seemed to be perfectly honest, but they were at the wrong angle; the witnesses had received these impressions through a wrong perspective, and, the result of it was, as I understand the case, that if it had not been for the righting of the evidence in that way or in some other way the man would have been convicted."

1930 Cr. Cases 661

(Rangoon)

BAGULEY, J.

K. C. V. Reddy

v.

Emperor.

Criminal Appeal No. 1305 of 1929, Decided on 14th November 1929, from order of Dist. Magistrate Rangoon, in Criminal Regular Trial No. 59 of 1929.

(a) Criminal P. C., Ss. 195 and 476—Examination on oath of Income-tax Officer making complaint regarding false return is unnecessary.

When an Income-tax officer makes a complaint under S. 476, in respect of a false return his examination on oath as an ordinary complainant is unnecessary and is a mere superfluity. [P 662 O 2]

(b) Criminal P. C., Ss. 476 and 476 (b)—Recording of finding under S. 476 is discretionary—Mere fact that complaint is made gives right of appeal under S. 476 (b).

It is discretionary with the Income-tax officer making a complaint in respect of false return to record a finding that he is of opinion that an offence referred to in S. 195 is committed. Under S. 476 (b), the mere fact that a complaint has been filed opens the way to an appeal. An appeal can be filed as soon as the complaint is made and the appeal would be not against the finding but against the filing of the complaint. [P 663 O 1]

(c) Criminal P. C., S. 537—Charge vague—But accused and his counsel knowing real nature of charge and no failure of justice—Vagueness of charge is cured by S. 537—Criminal Trial.

When the charge is on the face of it meaningless and ununderstandable, but where the accused and his counsel know the nature of the offence the accused is charged with, and no failure of justice has resulted the vagueness or incomprehensibility of the charge is cured by S. 537. [P 665 O 2, P 666 O 1]

Delanville and Gregory—for Appellant.

Gaunt (Offg. Govt. Advocate)—for the Crown.

Judgment.—The appellant, K. C. V. Reddy, has been convicted under two charges under S. 193 I. P. C., and S. 177, I.P.C. On the first charge, he was sentenced to three months' rigorous imprisonment and a fine of Rs. 16,000, and on the second charge he was sentenced to three months' rigorous imprisonment and a fine of Rs. 1,000, or in default two months' rigorous imprisonment, the sentences of imprisonment to run concurrently. Against this conviction he now appeals. The facts that gave rise to the prosecution are as follows: K. C. V. Reddy is the senior member of a partnership which for se-

veral years has held a contract for the supply of labour both to the Port Trust for wharf coolies and also to the British India Steam Navigation Company for the supply of coolies for working on their ships. For many years the Income-tax Department paid no attention to the accounts kept by the firm, but assessed them to income-tax arbitrarily, guessing the profits as being 10 per cent. of the total payments from these two bodies. For the year 1927-28, however, they appear to have wished to proceed on a more exact basis and they called upon the firm to furnish a return of income for the past twelve months in the usual form. A return was furnished in two portions because the constitution of the partnership had changed in the course of the year. The two returns together showed a loss for the year of between Rs. 25,000 and Rs. 26,000. The Income-tax Department were not satisfied with this return and called for the production of books. Some books were sent to the office and then in consequence of what came out in what have been referred to in this case as the Port Trust defamation cases, an enquiry was instituted by the Criminal Investigation Department with the result that many further books were seized. These books are now before the Court and no dispute has been made to the allegation that they are books kept up by the firm. In the end, the Income-tax Department decided that the business so far from being run at a loss, had been run at a very large profit and an arbitrary assessment was made by the Income-tax Department upon which the firm has been assessed to income-tax. In addition to this, the present appellant together with his other partners was prosecuted. At first there were four persons accused but in the course of the trial, proceedings against three of them were dropped or transferred to other cases and charges were framed against the present appellant alone.

In this appeal, questions of law have been raised and also questions of fact. I will first deal with the law points. The first objection on legal grounds can be easily dealt with. The appellant has been sentenced to three months' rigorous imprisonment and a fine of Rs. 1,000, or in default two months' rigorous imp-

rissonment under S. 177, I. P. C. S. 177, I. P. C., consists of two paragraphs and it is obvious that he has been convicted under para. 1. Under this paragraph only simple imprisonment may be imposed and the maximum sentence is six months. Consequently, the sentence of three month's rigorous imprisonment could at worst be only three months' simple imprisonment and the maximum substantive term of imprisonment under the paragraph being six months the maximum sentence of imprisonment in default of payment of fine is six weeks. The Crown did not contest this portion of the appeal.

The next ground of appeal is that the procedure of the Income-tax Officer in filing the complaint was irregular and this irregularity completely vitiates the proceedings. Under S. 195, Criminal P. C., these offences could only be dealt with off the complaint of the public servant concerned and S. 476, Criminal P. C., prescribes how that complaint is to be initiated. It is not contested that the Income-tax Officer in an enquiry of this nature is acting as a revenue Court, and S. 476, omitting the unnecessary words, runs as follows :

"When any Revenue Court is of opinion that it is expedient in the interests of justice that an enquiry should be made into any offence referred to in S. 195, sub-S. (1), Cl. (b) or (c) which appears to have been committed in or in relation to a proceeding in that Court, such Court may, after such preliminary enquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of the Court and shall forward the same to a Magistrate, etc."

In the present case, the Income-tax Officer concerned was Mr. F. C. Fischer. When he had satisfied himself that an offence or offences had been committed, he first of all, as was required by the Income-tax Act, communicated with the Assistant Commissioner of Income-tax and received directions from him that the firm should be proceeded against under S. 52, Income-tax Act, that being the section which has to be called into play when anybody files a false return for income-tax purposes. Having got this direction, he filed a complaint direct to the District Magistrate, Bangalore, appeared before him and was examined on oath as an ordinary complainant. This examination on oath was unnecessary, because, when a public

servant files a complaint under this section, it is not necessary that he should be examined on oath like an ordinary complainant, but this examination on oath being a mere superfluity it is impossible to hold that the appellant was in any way injuriously affected by it, and, therefore, this examination on oath may be disregarded. Complaint, however, is made that there is no finding recorded by the Income-tax Officer that it is expedient in the interests of justice that an enquiry should be made and that there was no preliminary enquiry, and that by the absence of these two things the appellant has been injuriously affected. As regards the preliminary enquiry, it is obvious from the wording of S. 476 that no preliminary enquiry is necessary for the section itself refers to "such preliminary enquiry, if any, as it thinks necessary."

That other omission requires more consideration. It is argued that as there is no finding recorded that further enquiry is expedient in the interests of justice, the appellant was deprived of his right of appeal which he would get from S. 476-B, Criminal P. C. It is said that unless and until a finding has been recorded, he could not possibly file an appeal because there was nothing to appeal against. A close scrutiny of S. 476-B, however, does not appear to show that it is necessary for a finding to be recorded in writing in order that an appeal may be filed. S. 476-B, omitting the unnecessary words, states :

"Any person on whose application any revenue Court has refused to make a complaint under S. 476 or against whom such a complaint has been made, may appeal to a Court to which such former Court is subordinate, and the superior Court may thereupon direct the withdrawal of the complaint."

This does not say that an appeal has to be filed against the finding. The mere fact that a complaint has been made opens the way to an appeal under this section, and on the wording of S. 476-B it seems that the appeal could be filed as soon as the accused became aware of the fact that a complaint had been filed. Another point which has to be noticed is this, that S. 476, Criminal P. C., does not state that if the Court finds that further enquiry is expedient it shall record a finding that further enquiry is necessary in the interests of justice. The word used is "may." In

Sohni's Criminal Procedure Code, an extract is given from the proceedings of the Select Committee which revised this section, and they draw attention to the fact that they have substituted the word "may" for "shall"; and when a "shall" is altered into a "may," the deduction which is usually made from this change is that whatever it was said shall be done before was compulsory, whereas the alteration of "shall" to "may" makes the action discretionary. If, however, there were any doubt in the matter one has to see whether by any chance the accused has been injuriously affected by the irregularity in the procedure. In this case, what is complained of is that the appellant owing to there being no finding recorded lost his right of appeal. As I have said, in my opinion he did not lose the right of appeal. He could have filed an appeal as soon as the complaint had been filed and his appeal would have been not against the finding but against the filing of the complaint. The Court to which he would have to appeal would be the Court to which appeals ordinarily lie from the revenue Court which filed the complaint. The Income-tax Officer when examining the return made for the purpose of income-tax was subordinate, in that appeals from his decisions would lie to the Assistant Commissioner of Income-tax. The Assistant Commissioner of Income-tax as it happened was the same officer who directed the Income-tax Officer to file the complaint, so that the appellant, had he lost a right of appeal, lost the right of appealing to the officer who was really directing his prosecution. It is somewhat strange that this should be the result of reading together the various Acts which appertain to this case, but that is the result. His appeal would lie to the same officer under whose orders the Income-tax tax Officer was acting when he filed the complaint. This right of appeal certainly appears to be of practically no value.

Only one case has been quoted to me on that point on behalf of the appellant *Kalisadhan Addya v. Nani Lal Harra* (1), but this does not appear to me to be directly to the point, and I do not think it necessary to deal with the various rulings put forward on behalf of the Crown, as the point appears to

me to be sufficiently clear in this particular instance. I am unable to agree that the appellant has been in any way injuriously affected by the failure to record a finding to the effect that it was expedient in the interests of justice that further enquiry should be made and I must hold this law point against the appellant.

The next point is with regard to the charge. This case, as I have said, started with four accused persons, all the four partners of the firm. It was begun before Mr. Collis, then District Magistrate, Rangoon. He recorded a certain amount of evidence and then he was succeeded in his office by Mr. Martin, who recorded the rest of the examination-in-chief and examined the accused. Then he framed charges against the present appellant on 19th August 1929. The case came up for hearing again on 22nd August but on that date Mr. Martin was already under orders to make over charge of his post and he took no further action. The case was called the next day when it was dealt with by Mr. Collis, who had again become District Magistrate, Rangoon. He notes that a de novo trial was not claimed. He then proceeded with the further cross-examination of the prosecution witnesses. He further examined the accused, heard the defence witnesses, and, after hearing counsel on both sides, passed orders. The actual wording of the charge framed is as follows:

(I only quote the first head of the charge because the appellant has been acquitted on the second head and there is no complaint of any ambiguity about the third head.)

"That you, K. C. V. Reddy, in August 1928, fabricated false evidence for the purpose of being used in a judicial proceeding, to wit, income-tax return of K. C. V. Reddy & Co. for the year 1927-1928.

The wording of this charge is most unfortunate, because when closely examined, it does not seem to mean anything at all. The charge literally is one of fabricating false evidence to be used in a judicial proceeding, to wit, in the income-tax return. An income-tax return is not a judicial proceeding and therefore on the face of it the charge is more or less meaningless. If the idea was that the false evidence referred to was the income-tax return itself, then the first head of the charge overlaps the

(1) A. I. R. 1925 Cal. 721=52 Cal. 478.

third head of the charge, because the third head deals with the making of a false return for the purpose of income-tax and again there would be no point in the first head of the charge. One would naturally have expected counsel for the accused when this charge was framed to have objected and said at once that his client was being charged with something entirely meaningless. No objection was raised at this time. It may have been that the charge had not been carefully studied at the moment it was framed. This, as I have said, was on 19th August. By the time 22nd August came when appellant's counsel should have been ready to cross-examine the prosecution witnesses, he certainly should have studied the charge to see exactly the points which he had to bring out in cross-examination. Apparently he did not do so. Had he done so, it was his duty to object on the next day when a new Magistrate took up the case again. If the objection had been made and disallowed, he could at once have claimed a de novo trial, and a de novo trial would have rendered necessary the framing of a new charge, and the new Magistrate most probably would have preferred to frame a charge in his own words which would have been more comprehensible. Again no objection of this kind was raised, but the appellant's counsel cross-examined Mr. Fischer with a view to elucidating exactly what the charge was based upon and he got this information from Mr. Fischer. The case went on further and it was not until appellant's counsel was actually addressing the Court at the close of the case that he professed his inability to understand the charge and urged that his client did not know what charge he was meeting. I am told by the Bar that when at this late stage he raised the objection he was told that he must be held to know perfectly well what the whole case was about and that S. 537, Criminal P. C., would cure any defect in the charge. S. 537 provides that "no finding, sentence or order . . . shall be reserved on appeal" on account of :

"any error, omission or irregularity in the . . . charge . . . unless such error, omission or irregularity has in fact occasioned a failure of justice."

It is perfectly clear and must have been known to all the parties concerned in the trial of this case that the appel-

lant was being charged with making a false income-tax return and with fabricating false evidence for the purpose of being used in a judicial proceeding, namely, the enquiry by the Income-tax Officer into this income-tax return. As I have said, the documents before the Court were the income-tax return itself and the books kept by the firm. The business of this firm was a large one. The total receipts from the Port Commissioners and British India Steam Navigation Company were in the neighbourhood of six lakhs of rupees per annum and naturally a business of this kind requires a considerable amount of account keeping. The income-tax return was based presumably on the ordinary ledgers and cash books. These ledgers and cash books have not been mentioned before me, but what have been dealt with at considerable length are the books from which the ledgers and cash books were compiled. (The judgment then dealt with Exs F. and G. marked as "wharf coolies payments books Exs. J., the Daily Labour Register Ex. S. series, small blank note books containing names of ships, maistries' names, hours of work etc and Ex. T. the books with counter-rolls and proceeded.)"

The allegation made on behalf of the Crown is that the firm was engaged in swelling their expenses for income-tax purposes in order to show a reduced profit or as it happens in this particular case, an absolute loss instead of profit. They say that the procedure was that the books showed payments to maistries for work which they never performed and the maistries themselves were dummies. One witness Velegala Veera Reddy (P. W. 14) gives a whole series of names which he says were dummies, many of them are not maistries at all. The allegation is that when the Daily Labour Register had been entered up with the names of maistries actually employed ; some of these dummies were added to the names of the maistries who actually worked and corresponding charges were placed in the book. The Coolies Payments book was written up from the Daily Labour Register and consequently these dummy names would appear again in the Coolies Payments book. The sums entered against the dummy names would be added into the total expenses

and from there would find their way into the main books of account of the firm. To account for these dummy names in the Daily Labour Register, false books of the Ex. S series were made up, and to correspond with them a false series of the Ex. T books were also made. In all 40 Ex S books have been produced, of which 39 are said to be false, S-to S-39, and one only Ex S 40 genuine, Exs- S 39 S 40 overlap as regards dates and show some striking divergencies, there being more names of maistries employed in S. 39 than there are in Ex S-40, and Ex. S-40 is said to be the true book. In the genuine Ex. T book, all of them have the counterfoils written through a carbon sheet, while on the other hand the false Ex. T books are all written directly in pencil and have no serial numbers; whereas all the carbon Ex. T books have serial numbers. It is said by one of the witnesses that this was done to save time in writing up the false Ex. T books, and the absence of any serial number is also striking. It would be of importance for the genuine Ex. T books to have serial numbers entered because then at the fortnightly settlement when any maistry came for payment with his bundle of foils they could be quickly checked against the corresponding counterfoils remaining in the books, which would no doubt be preserved in the office for purposes of checking.

It will thus be seen that supposing the Daily Labour Register had been doctored in this manner and corresponding series of Ex S books and Ex. T counterfoil books had been prepared to support it, the next step would be to transfer the dummy names to the wharf coolies payment book. This would be all right so far as genuine maistries were concerned. They would get their money and duly sign or put their thumb marks on the corresponding receipt stamp. But for the dummy maistries, there would be no one to sign a receipt. The allegation is that various odd men were picked up to come and put their thumb marks in acknowledgment of receipt of the money.

Having set out the facts in this manner all of which were before the Court and had been made clear at latest by the time the prosecution witnesses

had been cross-examined, it is perfectly certain that the appellant or at any rate his counsel must have known exactly what offence he was being charged with. In fact, when Mr. Fischer was recalled for cross-examination after the framing of the charge for the last time, the question was put to him to which he gave the following answer :

"Another book I would rely on is the thumb impression books (Exs. F, G and J.) They are important. The case is based on these and the Ex. S series. I do not know who put the thumb impressions. . . ."

With that answer given to him on 4th September the appellant's counsel must have known that his client was being charged with producing a false income-tax return and fabricating false evidence to support that return which would have to be used at the judicial proceeding, namely, the enquiry by the Income-tax Officer into the income-tax return of K. C. V. Reddy & Co. I am unable to accept the contention that the defence were wandering in a fog all the way through the case. Even when arguing this appeal, learned counsel suggested that his client even then did not know what the charge meant, and it was not until he was replying to the reply of the Assistant Government Advocate that he then put forward the theory that the word "in" occurring in the phrase "to wit, in the income-tax return" was a typo error due to the Magistrate beginning to write the word "income-tax" before the word "the.". It seems to me quite possible that Mr. Martin when framing this charge had not got a thorough grip of the case, and it was contended that if this Magistrate thought one thing and the accused thought another he was liable to suffer an injustice. But this really in my opinion is not to the point. The actual trial of the present appellant must be held to have begun with the framing of the charge. Up to that point there were four accused in the dock and the investigation was to a certain extent preliminary. It was after the framing of the charge that the real trial began with a further cross-examination of the prosecution witnesses, and whatever may have been in Mr. Martin's brain at the time he framed the charge, what really matters is what Mr. Collins thought the charge meant when he dealt with it. If he was thinking of the

charge on the same lines as the accused was and has convicted him of an offence on which he was actually engaged in defending himself, there can be no plea of a failure of justice, and S. 537, Criminal P. C., will cure the vagueness or incomprehensibility of the charge. As soon as Mr. Fischer had been recalled for further cross-examination and had told the appellant's counsel exactly the books on which a charge was based, the appellant had no further grounds for pleading that he did not know what charge he was called upon to meet. It would, I must say, have been much better if Mr. Collis, when his attention was drawn to the wording of the charge in the appellant's counsel's final speech, had re-drafted that charge to make it apply exactly to the facts of the case. He could have done so then as the trial was not complete and it would have been better to have done that than to have adopted the slightly strained interpretation that he has placed upon it in his judgment, in which he regards the income-tax return itself as being a summary of the fabricated accounts and therefore fabricated.

It would have been much better to have cleared the air by pointing out that the income-tax return was not evidence but was simply the basis on which the judicial proceeding was founded and that the evidence which the accused was charged with having fabricated was the actual books produced to support that income-tax return at the judicial proceeding held by the Income-tax Officer. As I have said, the appellant's counsel was very late in raising the objection which should have been raised directly the charge was framed by Mr. Martin or which should have been raised when Mr. Collis took charge of the case again, and if that objection had been unsuccessful, he still had the remedy of a *de novo* trial. Instead of that, he preferred to hold his peace and then try and score a technical success at the last moment. It is true that counsel for an accused has no duty except to his client, but even a prosecution is entitled to fair play and to produce this point at the very last moment in the hope that it might be overruled and thereby the accused might get a technical victory in his appeal is not in my

opinion treating the prosecution fairly (After discussing evidence, his Lordship proceeded). The appellant puts up no active defence. His one plea is that he knew nothing of what was going on; that throughout practically the whole of 1927-28 the business was in the hands of his partners; that in the middle of 1928 he was busy with his litigations, which apparently consisted of the Port Trust Defamation cases and the Port Trust Bribery enquiry; and that he signed some papers blank and knew nothing about the rest. In fact he says he was a mere nominal figure-head and a dummy. He blames impartially his partners and his clerks. He does not profess to name anybody in particular. He just says it must have been one or the other. It will be noted, however, that the first question put to him in his examination was:

"It is said that you are the principal partner of K. C. V. Reddy & Co., Labour Contractors" and his answer was "Yes, I am the first partner."

It is in evidence that he is the man who has worked up the business to its present position. He was originally the chief member of the partnership. The contracts were obtained by him. His name is the only one to appear in the firm name, and although there is an arrangement of dividing up the profits of the partnership in certain fractions, he, as the leader of the partnership gets a special payment of Rs. 250 a month. It is true that although the deed of partnership says he gets this as Managing Partner the payment was continued to him even when he was away in India and it appears to have been to a certain extent in the nature of a payment for the goodwill of the use of his name. A man does not get Rs. 250 a month for the use of his name unless he is either a really leading man in his particular line of business or else he has a title or some dignity which the remaining partners of the firm think will bring lustre and profit to the firm. The appellant does not come under the second category, therefore he must come under the first. Except when he was in India he was never anything in the nature of a sleeping partner like one of the men originally accused with him, who was proved to be illiterate and fully occupied with

a business of his own at a mill on the other side of the river. The appellant was undoubtedly a working partner. As regards his allegation that the clerks wrote these things down, with his implication that they must thereby have swindled him and his other partners, I need only mention that the total which appears in these dummy names is very considerable indeed. In fact it is worked out at something like 30 per cent. of the gross receipts of the business. A businessman who has worked himself up in the business on a large scale may perhaps, when his head is full of big schemes lose his grip on the details and thereby allow his clerks to swindle him with regard to a few petty sums, but no man who has carried on business and made a big success of it has ever done so while allowing his clerks to swindle him out of 30 per cent. of his gross receipts, the suggestion that his fellow partners were swindling him seems quite unacceptable. The present working partner appears to be Dana Reddy and if he were the man who was engaged in feathering his own nest out of the firm's money it would seem exceedingly unnecessary for him to do what he appears from the evidence to have done, and that is to double cross his partners and try and get this contract for himself. There is evidence that Dhana Reddy went behind his partners and tried to get the contract for himself. Why should he do so, if he were absorbing all the profits of the business and a bit more?

If the books are true and the labour contracting business resulted in a loss of Rs. 25,000 or so in a year, it would be a cause of wonderment as to why there has been such competition to get the contract and why the present appellant the moment his contract with the Port Commissioners had come to an end did not close down. As it is, he says that the contract has been extended six months at a time and surely he would not have taken an extension of a losing business merely to oblige the Port Commissioners.

Another argument which was put forward for the appellant is that he really had no further interest in this business, because he was so heavily indebted to the other partners that all his share of the profits would be taken by

them to pay his debts. Undoubtedly the man is in debts. There is one letter on the record showing that he signed promissory notes to the extent of more than a quarter of a lakh in July 1928 and until those had been paid off there is little doubt that he did not stand to get any cash profit out of the firm. Still he was interested in getting these debts paid off and there can be no doubt whatsoever that he was interested to show that as much profit as possible was being made out of the business in order that he should get his liabilities discharged as quickly as possible.

*With regard to the actual signing of the income-tax return he says he signed it without looking at it. Had this been the case, he cannot be said to have signed it, believing it on any substantial ground to be true, and a man who signs a document which is false and which he does not believe to be true is as liable as though he had made a deliberately false statement. This when he is bound by law to say the truth.

Another point raised was that the appellant could not be found guilty of fabrication of false evidence, because there is no proof, in fact no serious suggestion, that he actually wrote up any of the books or registers that are the subject matter of the trial. That he did not do so is quite clear but this is one of the cases to which the maxim "*Qui facit per alium facit per se*" applies. So far as the Cooly Payments Book and the Daily Labour Register are concerned it is more a matter of making the books false, than of making false book. There is little or no evidence as to whose hand wrote the books, and there were many people who put their thumb marks to the cooly payments book, and many of these latter put their marks bonafide in acknowledgment of actual sums of money actually paid to them, and yet they were engaged in helping to make a false book. These books were made false owing to a system which was applied to them. I doubt that it was the brain of the appellant that devised that system, but it would never have been applied without his direct approval and orders, and for that reason I would hold that it was the appellant, possibly alone, possibly with the aid and connivance of his partners and others, who caused the books

to become false books and therefore, as a principal party fabricated false evidence.

To sum up, we have here in the appellant a man who in the past has been the successful head of a big business. He sends in a demonstrably false return of income to the Income-tax Office. He does not say that he had any reason to suppose it was true when he signed it. He says he signed it blindly. He was bound to furnish information on the subject to a public servant as such. The information which he furnished showed that the business was running at a loss, whereas it was undoubtedly running at a profit. Had he merely given a wrong figure for the profit it might have been argued successfully that he had not got all the books before him at the time he signed it but he had reasonable grounds for thinking that the profit was what he stated. As it was, when the return was put up to him showing a loss of a quarter of a lakh, he must have had reason to believe it to be false because he had been enjoying profits from that business. Then we have, with regard to the first charge, the fact that when this income-tax return was put in there was in the office a complete set of books which were false in material particulars and which must have been deliberately manufactured to dovetail into each other. He says he knew nothing about this. He trusted the cashier and the cashier must have let him down. He says that none of the partners ever checked the books. This is not the way, particularly in this country, in which successful businesses are built up and it is against human nature and particularly against the nature of this particular class of Indian. These books were evidence intended to be used to support the false income-tax return and therefore I hold that the appellant was correctly convicted under S. 193, I. P. C., and under S. 177, I. P. C.

I was particularly addressed on the question of sentence. The learned Magistrate in addition to imprisonment sentenced the appellant to a fine of Rs. 16,000. The sum is a somewhat peculiar one and no reasons were given as to how it was arrived at. In a connected case, however, the same Magistrate gave his reasons as to why he fixed on that sum. It was that in his opinion

the correct assessment which the income-tax authorities might have put upon the appellant was Rs. 16,000 and as they were entitled under the Income-tax Act as a penalty to exact double the assessment, he fined the appellant the amount which the Income-tax Department might have mulcted him as a penal assessment. I am not altogether in favour of the criminal Courts being used to assist in the collection of revenue. If the income-tax authorities had wanted a penal assessment, they could have done it themselves and I think in a case of this nature the Courts might well confine themselves to inflicting a penalty of imprisonment, if they think that is necessary, together with making the accused contribute reasonably towards the costs of his own prosecution. In this country there is no power to direct that an accused be made to pay the costs of the prosecution and so the Courts must make an estimate themselves. In this matter I understand that the fees of the Government Advocate were paid by the Department. The actual costs of the trial, the witnesses' expenses, investigation by the Criminal Investigation Department, etc., were, I presume, paid by the Local Government.

I therefore confirm the convictions and direct that the appellant do suffer on the first charge three months' rigorous imprisonment and pay a fine of Rs. 10,000 or in default a further nine months' rigorous imprisonment, and on the second charge I direct that he suffer three months' simple imprisonment, the substantive sentences to run concurrently. I inflict no fine with regard to the second charge. Of the fine, if realized, half will be paid to the Income-tax Department as compensation towards their share of the costs of the prosecution.

P.N./R.K.

Convictions confirmed.

1930 Cr. Cases 669

(Allahabad)

DALAL, J.

S. F. Rich—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 46 of 1930, Decided on 2nd April 1930, against order of Sess. Judge, Meerut. D/- 6th January 1930.

(a) Criminal P. C., Ss. 179 and 181 (2) — Provisions of Chap. 15-A are not independent of each other and S. 179 applies to cases of breach of trust and cheating.

The provisions under Chap. 15-A are not separately independent of one another so that if one provision applied, the other would not so apply; and consequently merely because there are certain provisions with regard to places of inquiry, in a case of criminal breach of trust under S. 181 (2) it does not follow that S. 179 would not apply to that enquiry. S. 179 does cover that offence as also cheating under S. 408, Penal Code: 19 *All.* 111, *Rel. on.*; 32 *All.* 397; 33 *All.* 29; A. I. R. 1924 *All.* 77, *Ref.*; 34 *All.* 487, *Dist.* [P 669 C 2]

(b) Penal Code, S. 408 — "Cheque" is property.

Cheque is property within the meaning of S. 408. [P 670 C 2]

Kumuda Prasad and Benod Behari Lal—for Applicant.

M. Waliullah—for the Crown.

Saila Nath Mukerji — for Opposite Party.

Judgment.—One Mr. Rashid Ahmad filed a complaint in the Court of a Magistrate of the district of Meerut against Mr. Rich, Manager of the French Motor Car Company, Delhi, for an offence under S. 408, Penal Code. On behalf of the defendant the question of jurisdiction was raised and both the Magistrate and the Sessions Judge have decided it in favour of the complainant. What was complained of was this. The complainant had negotiations with the defendant for the purchase of a lorry of which the body was afterwards made at Meerut. The entire lorry with the body was delivered to the complainant at Meerut when he made over to the driver of the lorry for Mr. Rich a cheque for a sum to cover the price of chassis and insurance not only for the chassis but for the body as well. When the lorry happened to be burnt it was discovered that the body costing Rs. 500 had not been insured by the defendant who was alleged on these allegations to have committed a breach of trust with respect to the money

which he received through his driver at Meerut by a cheque. The cheque was drawn on the Dehra Dun branch of the Imperial Bank and was cashed at Delhi.

The learned Judge has held that the Meerut Court had jurisdiction both under S. 179 and S. 181 (2), Criminal P. C. S. 179 runs as follows:

"When a person is accused of a commission of any offence by reason of anything which has been done and of any consequence which has ensued, such offence may be inquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done or any such consequence has ensued."

The learned Judge has argued that the thing was done in Delhi by Mr. Rich in omitting to insure the body of the lorry, though, according to the allegation of the complainant, he had received money for such insurance also. The doing of the thing brought into play the jurisdiction of the Delhi Court, but the consequence which was the loss by the omission of insurance to the complainant was suffered by the complainant in Meerut, and, therefore, the jurisdiction of the Meerut Court did arise. To meet this contention the applicant Mr. Rich's learned counsel quoted the ruling in the case of *Girdhar Das v. Emperor* (1), by a single Judge of this Court. Personally I am not clear whether the learned Judge desired to rule that the provisions of S. 179 would not apply to a case of criminal breach of trust because there were certain other provisions under S. 181(2) which would apply to criminal breach of trust. I do not remember it to have been held in any case that the provisions under Chap. 15, are all separately independent of one another, and if one of the provisions apply another would not. It is apparent that if such was the desire of the learned Judge to make a pronouncement, he has made that pronouncement in conflict with a continuous opinion of this Court ever since 1896. The first case to which my attention has been drawn is that of *Queen-Empress v. O'Brien* (2). An employee of a company, the office of which was at Cawnpore, was charged with the offence punishable under S. 408, I. P. C. The complainant alleged that B being in charge on behalf of the company, at a place in Bengal, of certain goods belonging to the company and being ordered to

(1) A.I.R. 1924 *All.* 77.

(2) [1896] 19 *All.* 111=(1896) A.W.N. 121.

return the same goods to Cawnpore, never did so, and failed to account for the goods or their value, to the loss of the company. On this allegation the learned Chief Justice held that the Court at Cawnpore had jurisdiction to inquire into the charge, because the consequence of B's acts, namely, the loss to the company, occurred in Cawnpore. Reference is given in the judgment to the provisions of S. 179, Criminal P. C.

The next is that of 1910 : *Emperor v. Mahadeo* (3). The case of *O'Brien* was followed by a learned Judge of this Court. These two cases were followed by another learned Judge in *Langridye v. Atkins* (4). Another ruling of 1912 quoted by the learned counsel for the applicant is distinguishable: *Ganeshi Lal v. Nand Kishore* (5). In this case the complainant firm had a branch shop at Gauriganj and the criminal breach of trust was committed at Gauriganj. For this reason a learned Judge held that the direct consequence happened in Gauriganj where the complainant firm had a shop, and the subsequent consequence of a loss at Cawnpore should not be taken into account to give the Cawnpore Courts jurisdiction. In this case the learned Judge specifically relied on the provisions of S. 179, Criminal P. C., but he did not think that in that particular case the direct consequence of loss ensued at Cawnpore. He was of opinion that the consequence ensued at Gauriganj where the complainant had a shop and a subsequent consequence of loss to the main firm would not give jurisdiction to the Courts where the main firm was situated. So far without any reference to the provisions of S. 181 (2) I hold that the Meerut Court had jurisdiction in accordance with the provisions of S. 179, Criminal P. C. Coming to S. 181, the learned Judge was correct in pointing out that jurisdiction must follow the complaint and not the final decision.

In the present case the allegation is that part of the property which is the subject of the offence was received in Meerut. It was argued that the cheque was not payable in Meerut ; nor was it

cashied at Meerut. The cheque, however, was property as understood in S. 408. According to the definition, moveable property is intended to include corporeal property of every description (S. 22, I. P. C). Under both sections, therefore, the criminal Courts at Meerut had jurisdiction to take cognizance of an offence under S. 408. The complaint is filed under that section. It is not very clear from what point of time a charge of cheating was started. As to cheating also the provisions of S. 179 would cover the offence and give the Court at Meerut jurisdiction.

I dismiss this application. The stay order shall be discharged.

V.B./R.K. *Application dismissed*

1930 Cr. Cases 670

(Allahabad)

BOYS AND YOUNG, JJ.

Ramnath—Appellant.

v.

Emperor

Criminal Appeal No. 273 of 1929, Decided on 11th June 1929, against order of Addl. Sess. Judge, Allahabad, D/- 15th February 1929.

Criminal P. C., S. 465—Demeanour of accused raising suspicion as to sanity and capability to make defence—Court must come to definite finding on point—Absence vitiates conviction and sentence.

Where there is something in the demeanour of the accused which would raise or raised doubt in the minds of Judge, jury or assessors or both, the Court cannot proceed with the trial unless the Court comes to a decision and is satisfied that the accused is not of unsound mind and consequently not incapable of making his defence under S. 465. The absence of any proper trial and finding as to the question of accused's capacity to make his defence vitiates conviction and sentence.

[P 671 C 2; P 672 C 1]

M. Waliullah—for the Crown.

Boys, J.—*Ramnath*, the appellant, was put on his trial on a charge under S. 302, I. P. C., of having murdered his wife on 26th August 1928. We have read the judgment of the learned Additional Sessions Judge and the material evidence and, as the learned Additional Sessions Judge says in his judgment, the facts are not in dispute. We need not therefore recapitulate them further than is necessary for the purposes of the present judgment. On 28th July 1928, *Ramnath* made a confession which was recorded under S. 164, Criminal P. C.

(3) [1910] 32 All. 397=6 I.C. 563=7 A.L.J. 819.

(4) [1913] 35 All. 29=17 I.C. 792=10 A.L.J. 431.

(5) [1912] 34 All. 487=15 I.C. 319=10 A.L.J. 45.

It is only necessary to read that statement to appreciate that Ramnath was at that time either wandering in his mind or shamming. The committing Magistrate, however, who heard the witnesses and who again had of course to take the statement of Ramnath, recording it under S. 364, expressed in his commitment order the view that whether or no Ramnath was at the time of committing the offence of unsound mind, he was at the time of the inquiry before the committing Magistrate capable of making his defence. He found as follows :

"From the statement of this very witness (Bachchoo) it appears that there is a history of accused having gone mad at one time some two years ago. He is, however, quite fit to make his defence, gave quite rational replies to all questions put to him by the Court at the inquiry."

. The case apparently came before the Additional Sessions Judge and the assessors for the first time on 13th October 1928. The learned Additional Sessions Judge on that date took the statement of Dr. Gade, an Assistant Civil Surgeon, who furnished a certificate (Ex. K) to the effect that in his opinion the accused was not insane. Dr. Gade further stated on oath that he had had the accused under observation for three days from 10th October to 12th October, that Ramnath answered questions rationally, looked sane and slept well and showed no signs of insanity. He stated that he thought that Ramnath could understand the nature of the proceedings and that if the three days' observation had indicated any suggestion of insanity he would have kept the man under observation longer. Ramnath was also examined by the Court and he made a statement which again clearly indicated that his mind was wandering or that he was pretending. All three assessors thought, on hearing the doctor's statement and the evidence of an uncle of the accused and what the accused had to say, that the latter was "sanki," which the learned Judge says was stated to mean "a state of mind when a man ceases to act like a responsible agent." We think that both the Judges and the assessors were right, on the materials at any rate that they then had before them, in not being satisfied that the accused was capable of defending himself. The learned Judge said that

he thought that it was desirable that Ramnath should be kept under observation in a hospital for at least three weeks before he could be certified to be in a fit state of mind to stand his trial. The case was adjourned until 12th January 1929, but owing to the absence of two out of the three assessors had to be adjourned again to 6th February. The order-sheet shows that in the interval an Assistant Civil Surgeon had certified that he could find no reason for holding the accused to be insane. This is disclosed further by a certificate of the doctor of 30th November 1928. It was upon receipt of this certificate by the learned Judge that on 12th December he fixed a date for the trial.

So far there is, in our view, no fault to be found with the proceedings. S. 465 requires that the question of whether the accused is of unsound mind and consequently incapable of making his defence should be tried by the Court with the aid of assessors, and should be deemed to be part of his trial before the Court. We are satisfied that the learned Judge was himself of opinion, on seeing the second certificate by an Assistant Civil Surgeon given after observation for a considerable period, that the accused was not then of unsound mind and was capable of making his defence ; but we are unable to find any trace of any proceeding by which the Judge put to the assessors, or in any other way with their aid tried, the question of the accused's capacity to make his defence, and came to any decision with the aid of the assessors on that point. We conclude that the Judge was personally himself satisfied for otherwise we could not understand how he could have proceeded with the trial. But we find in his judgment in the case the following phrase :

"From his appearance in Court also one got the impression that he was an insane person, but whose insanity normally ran in a subdued course making it easy for people to believe that there was nothing seriously wrong with him."

This would suggest that actually in Court there was something in the demeanour of the accused which raised doubts in the Judge's mind.

The absence of any proper trial and finding as to the question of the accused's capacity to make his defence might well have resulted in our having

to set aside the conviction and sentence and direct a retrial of the accused at Sessions. But in this particular case, for the reasons which we shall now give, we are satisfied that this is not necessary.

The evidence, in our view, indubitably establishes that the accused was entitled to the benefit of S. 84, I. P. C. It is unnecessary to recapitulate the facts which are all set out in the judgment of the learned Judge. He himself appears to have wavered in regard to the question of the state of mind of the accused at the time he committed the act. After quoting S. 84 he says :

"I have set out all the facts of his mental history from which it may be inferred whether the accused was not in possession of his sense of responsibility in spite of his insanity at the time when he committed the murder. I find it difficult to answer that question and from the case law it appears that unless one can answer that question in the affirmative there should be a conviction for the offence."

All the assessors were of the opinion that the accused was not guilty. The learned Additional Sessions Judge's doubts may, we think, fairly be expressed as follows :

"I am satisfied that the accused was of unsound mind at the time he committed the act, I am not satisfied that he was by reason of that unsoundness of mind incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law."

In other words, he was satisfied that the accused was "medically" insane and insane in the ordinary vulgar acceptance of the term, but he was not satisfied that the accused was "legally" insane. If we are putting his view correctly, he was right. On the other hand, we are satisfied ourselves, on the history of this man and the circumstances on the material date when he killed his wife, that he was not at the time capable of knowing that what he was doing was wrong and contrary to law. We, therefore, allowing the appeal hold that Ramnath did kill his wife, but is entitled to the benefit of S. 84, I. P. C.

We, therefore, direct that he be detained in his present place of detention, which we are informed is the Central Jail at Naini in the district of Allahabad, until orders have been passed on his case by the Local Government, and we direct that a copy of this order be sent forthwith to the Local Government. We further direct that a copy also be

sent immediately to the Superintendent of the Central Jail at Naini with the request that he will take such steps as may be necessary in view of the possibility of a recurrence of violence on the part of Ramnath.

V.B./R.K. *Order accordingly.*

* 1930 Cr. Cases 672

(Allahabad)

DALAL, J.

Daya Ram—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Ravn. No. 577 of 1929, Decided on 5th December 1929, from an order of Sess. Judge, Agra, D/ 9th August 1929.

(a) Criminal P. C., S. 147—"Application."

Section 147 applies to disputes as regards entry into a temple or mosque and it would so apply whether the right claimed is an easement or otherwise: *A. I. R. 1926 Cal. 497, Dist.* [P 674 C 1]

(b) Criminal P. C., S. 147—Samadhs of Radhaswami sect in U. P.—Entry in compound of samadhs is covered by words "right to use of any land."

The shrines of the followers of the Radhaswami sect known as samadhs are of as great religious sanctity to the followers of that sect as a temple and entry in the compound of the samadh would be covered by the words "right to use of any land" [P 674 C 2]

* (c) Criminal P. C., S. 147—"Three months."

Three months are not the three months prior to order, but three months next before the institution of the inquiry. [P 675 C 1]

K. N. Katju, Kumuda Prasad and *M. L. Chaturvedi*—for Applicant.

U. S. Bajpai—for the Crown.

Tej Bahadur Sapru, Harnandan Prasad, K. Varma, Laddi Prasad Sinha and *Ravi Nandan Prasad*—for Opposite Party.

Judgment.—Dr. Katju who argued this application for revision desired to impress the Court by stating that members of both sections of the Radhaswami sect were mostly LL. Bs. and not likely to cause a breach of the peace. He has been kind enough to furnish this Court with a typed copy of all the relevant papers which has been a great help and saved a considerable amount of time. On the very first page there is a letter of the then District Magistrate Mr. Dreyfus, dated 12th June 1927, in which he speaks of a complaint by members of the faction whom Dr. Katju represents that they

were pummelled and pushed by LL. B's. of the opposite faction. The whole typed record is full of indication as to a fear of a breach of the peace, if no orders were passed to restrict the two parties and it is therefore idle to argue here that there was no possibility of a breach of the peace. The heading of the very order objected to shows *Emperor v. Nehal Chand*, that proceedings were started on the complaint of Dr. Katju's party, and that it was not the other party which first sought the protection of a criminal Court. The order complained of is by the District Magistrate of Agra, dated 22nd June 1929, and the typed book gives in serial order the various proceedings which followed the letter of the District Magistrate of 12th June 1927 referred to by me above. I consider the present order of 22nd June 1929, to be merely in continuation of the proceedings instituted in 1927. It is not necessary to go into details as to the dispute between the two factions but some summary of the dispute is necessary. There was no schism in the Radhaswami sect till the death of the Guru Maharaj Sahab in 1907. He was an accountant deeply versed in finance before it was discovered that he was an emanation of God.

He, therefore, took the very wise step of establishing a trust in 1904, and putting all the properties of the brotherhood in charge of the trust. Of the two present factions the Swamibagh faction and the Dayalbagh faction, this trust has been captured by the Swamibagh faction and that faction is in charge of the properties. The dispute arose after the death of Maharaj Sahab as he had indicated his sister as the next emanation, but on his death some of his followers did not accept that indication, but seceded and discovered the emanation in a gentleman of the name of Mr. Kamata Prasad Sinha, known after his recognition as Sarkar Sahab. The trust being captured by the Swamibagh section, the other section of the Dayalbagh found difficulty in worshipping at the shrines of their religion, two of them being at Agra, known as the samadhs, and a dispute arose as to the right of the Dayalbagh section to enter these samadhs for the purposes of worship.

It appears that in 1927, the Dayalbagh people insisted on entering which led to the complaint to the District Magistrate by members of the Swamibagh section against the rough behaviour of members of the Dayalbagh section. At that time an appeal had been pending in this Court from a decision of the Subordinate Judge of Benares in a suit filed for a declaration by an official of the Swamibagh section, and it was desired by that section that the trust may be declared a private trust and not a public one and that the men of the opposite faction may be debarred from the use of the properties belonging to the trust. That suit failed in the Court of the Subordinate Judge and the appeal was dismissed by this Court on 12th June 1929. As the dispute was brought to the District Magistrate in 1927, proceedings continued and various orders were passed restricting the Dayalbagh section from the free use of the two samadhs at Agra. Finally on 11th June 1929, the two parties came to a settlement and agreed to abide by the judgment of the High Court. The judgment of the High Court was delivered on 12th June and the District Magistrate's order complained of was passed on 22nd June. He removed all the restrictions placed on the Dayalbagh section as to the use of the samadhs. Dr. Katju frankly admitted that no objection can be raised to that portion of the order. If according to him the District Magistrate had no jurisdiction to interfere necessarily, it will follow that the District Magistrate will have no jurisdiction to place any restrictions on the use of the samadhs by the Dayalbagh section and he could not complain of the removal of these restrictions. After removing these restrictions the order goes on:

"provided only that they shall not hold any ceremonies or worship on such day or days as may be reasonably required by the Swamibagh branch for similar ceremonies for their party."

(This proviso is against the Dayalbagh party and the applicant here would naturally not object to it). The objectionable portion so far as the applicant is concerned now follows:

"The Swamibagh branch are hereby directed that they shall freely permit to the Dayalbagh branch opportunities for such worship etc., so far as may be equal in number and

convenience with the opportunities which they reserve for themselves."

The view of the learned Sessions Judge that the District Magistrate had passed this order in his executive capacity, a capacity not known to me or to the law, was not supported by counsel on either side here. What was definitely argued before me was on the side of the applicant that the order did not fall within the provisions of S. 147, Criminal P. C. and on the opposite side that the order was covered by the provisions of that section. I have held that there is a danger of a breach of the peace. The application of the provisions of S. 147 can only be doubted if the question of entry into a place required by any religion were not subject to action under S. 147, Criminal P. C. There was a conflict of opinion between the Madras and Calcutta High Courts: see *Kader Batcha v. Kader Bakha* (1) in opposition to *Guiram Ghosal v. Lal Behari Das* (2). This conflict was, however, set at rest by Act No. 18 of 1923 amending the Criminal Procedure Code wherein the view of the Madras High Court was adopted. Originally the words were :

"a right of use of any land or water including any right of way or other easement over the same."

These words indicated to the Calcutta High Court certain rights which were confined to rights of easement and similar rights. In the amended section, the wider view of the Madras High Court was adopted and it was specifically noted that the provisions of that section would apply whether such right be claimed as an easement or otherwise.

Dr. Katju the editor of a commentary on the Criminal Procedure Code knew of this amendment and so he quoted a Calcutta case subsequent to the year 1923. *Surendra Nath Banerji v. Shashi Bhushan Sarkar* (3). In that case the learned Judge who delivered the judgment of the Bench specifically noted that there was no dispute then as to the right of a user of any land or entry into any building, but the dispute related only to the performance of pooja of an idol. Argument was addressed to the Bench there that the ruling in *Guiram*

Ghosal v. Lal Behari Das (2) was no longer operative after the amendment of the Code in 1923. But that argument was not examined for the reason that the dispute before the Bench was in a very narrow compass as to the right to perform pooja and not as to the right of entry into any temple or mosque. After the amendment of the Code no doubt remained as to the provisions of that section attaching to disputes as regards the entry into a temple or mosque. In the present case a samadh is of as great religious sanctity to the followers of the Radhaswami as a temple and the entry in the compound of the samadh would be covered by the words "right of use of any land."

Dr. Katju next pointed out that there had been no proper enquiry as directed in the section, that no order was recorded, and no written statements from the two parties called for. Again reference should be made to the typed copy of the relevant papers, in which such a declaration by a Magistrate will be found and such request to the parties to enter into written statements (notice issued under S. 147, Criminal P. C. on 15th November 1927). The proceedings were suspended under a compromise by both parties, which was accepted by the District Magistrate that the parties would abide by the decision of the High Court here. This compromise has given rise to the argument of Dr. Katju that a District Magistrate is not entitled to interpret a judgment of this Court in criminal proceedings. The Magistrate has, however, to decide the question of the right of the Dayalbagh party according to Cl. (2), S. 147. That clause runs as follows:

"If it appears to such Magistrate that such right exists, he may make an order prohibiting any interference with the exercise of such right."

It is difficult to understand how a Magistrate can adjudicate upon the existence or non-existence of a right without interpreting the judgments of a civil Court. In the present case Dr. Sapru has referred on behalf of the respondent to the last sentence of the judgment of this Court:

"We find also that the defendants are entitled to have an interest in the alleged trust and in the trust properties."

Clearly therefore, the judgment gave evidence of the existence of the right

(1) [1908] 29 Mad. 237.

(2) [1910] 87 Cal. 578=11 C. L. J. 292=6 I. C. 132=14 C. W. N. 611.

(3) A. L. R. 1926 Cal. 437=52 Cal. 959.

of the Dayalbagh section to use all the properties of the trust and it was admitted that these samadhs in Agra are properties of the trust.

Finally Dr. Katju referred to the proviso and pointed out that the District Magistrate overlooked the necessity of the party, in whose favour the order was made, exercising such right within three months. Three months, however, are not the three months prior to the order, but three months next before the institution of the enquiry. The enquiry was instituted in June 1927, and from the fact of the Dayalbagh party exercising the right which gave rise to the complaint to the District Magistrate. On the part of the Swamibagh section, I am satisfied that the right of entry was exercised by the Dayalbagh party within three months of 12th June 1927. I dismiss this application. The stay order is withdrawn.

V.B./R.K. *Application dismissed.*

1930 Cr. Cases 675

(Lahore)

BROADWAY, AND QADIR, JJ.

Indar Singh—Convict—Appellant.

2v.

Emperor—Opposite Party.

Criminal Appeal No. 219 of 1930, Decided on 8th April 1930, against order of Sess. Judge, Gujranwala, D/- 4th February 1930.

Penal Code S. 302—Accused striking deceased with hatchet with knowledge of what he was doing and dangerous nature of his act is guilty under S. 302—But where attack by him is result of foul language used by deceased, death sentence should not be imposed, transportation for life is sufficient.

Where the accused knew what he was doing when he struck the deceased on the head with a hatchet and also knew that his act was imminently dangerous to life, he can be rightly convicted under S. 302.

But where there is no premeditation nor any enmity between the accused and the deceased or his relation and the attack on the deceased is the result of foul language used by him, the extreme penalty of law is not called for and sentence of transportation for life is sufficient to meet the case. [P 676 C 2]

Din Dayal Khanna—for Appellant.

R. C. Soni—for the Crown.

Broadway, J.—Indar Singh son of Ishar, a Waraich Jat of Mauza Hegar in the Kila Didar Singh thana of the Gujranwala District, has been found guilty of the murder of a young man

named Abdulla or Dulla on the 16th November 1929, and under S. 302, I. P. C. has been sentenced to death. He has appealed and the case is also before us under S. 374, Criminal P. C.

The facts are set out at considerable length in the judgment of the learned Sessions Judge and it is therefore not necessary for me to detail them at any length. Briefly, Indar Singh, the appellant, is one of the lambardars of the village. His uncle Fateh Muhammad is his sarbrah. It appears that this Fateh Muhammad joined the Islamic fold some twelve or fourteen years ago and married a Sansi woman of the name of Mt. Hussainan. This Mt. Hussainan had three sons and a daughter by her Sansi husband Hira. Fateh Muhammad took the entire family to live with him and his three stepsons assisted him materially in the cultivation of his land. Of these three sons the deceased Abdulla was one.

The family of the appellant are co-sharers in a well, known as Jharanwala Nau well, which is situated at a little distance from the village abadi. Each of the co-sharers is entitled to a certain definite period for working that well for the purpose of irrigation. According to Fateh Muhammad and the deceased's brother Nawab, the appellant had not paid his share of the costs of the new gear of this particular well. On 16th November 1929 while the deceased Abdulla was working the well the appellant is said to have gone there, towards evening with his cattle and to have demanded the use of the well. Abdulla refused to allow Indar Singh to use it saying that he would not give up the well till the return of his chacha, i.e. Fateh Muhammad. An altercation ensued and both parties are said to have used vile language making improper and indecent references to their female relations. This altercation was heard and partly witnessed by two witnesses Virsa Singh lambardar and Muhammad Hussain alias Hussain Bakhsh who happened to be returning to their village from Kila Didar Singh. Virsa Singh endeavoured to get the dispute settled but finding that impossible told the young men to do as they wished. Thereupon Abdulla seated himself on the gaddi in order to work the well. On this the appellant struck

him a violent blow on the head with the hatchet which he had in his hand following it up with a second blow also on the head which, however, struck the deceased with the blunt side. After this the appellant ran away.

Nawab, the deceased's brother, who was working in the fields close by arrived on the spot, as did Hazur Singh and an Indian Christian named Raja. The deceased was taken in unconscious condition to the village and from there taken to the hospital at Kilu Didar Singh. While he was still unconscious the Sub-Assistant Surgeon, one Ganga Ram, sent a ruqa to the police station informing them of the arrival of the deceased and that ruqa forms the first information report. Apparently the Sub-Inspector was not in the thana at that late hour of the night and nothing was done till the following morning when he proceeded to the hospital and there prepared the naqsha mazrubi. As the deceased's head was bandaged the Sub-Inspector concluded that he had received only one injury and recorded that fact. He then proceeded to the village where he made an enquiry. On 18th November 1929 the deceased succumbed to his injuries without having recovered consciousness. The fact was notified to the police and a constable went to the hospital and prepared the necessary inquest report.

The appellant has led a certain number of witnesses in support of his assertion that he was absent from the village on the 16th November 1929 and was as a matter of fact at a village five kos away named Dohla Chatha. The learned Sessions Judge has analysed the evidence of the defence witnesses and has, in my judgment, very properly held their testimony to be utterly worthless. It is obvious that these witnesses are doing what they could to assist a friend of theirs in trouble and that they are speaking falsely. The case therefore rests entirely on the statements of Virsa Singh and his companion Muhammad Hussain.

The appellant has failed to bring out or even to allege, any enmity between himself and these two witnesses. The story they tell appears to me to be a straightforward and truthful one. Their presence there is supported by the testimony of P. W. 6 Hazur Singh

who had obviously resiled from the statement he made to the committing Magistrate and has endeavoured to assist the appellant at the trial. Even in his statement at the trial, however, he has admitted that Virsa Singh and Muhammad Hussain were present when he arrived on the spot. In these circumstances I have no hesitation in agreeing with the learned Sessions Judge and the assessors in holding that the story for the prosecution is substantially true and that Dulla met with his death at the hands of the appellant Indar Singh.

There remains the question of the offence committed by him. It has been urged that the conviction under S. 302, I. P. C. is not warranted. In my judgment there can be no doubt that the view taken by the learned Sessions Judge is correct. That the appellant knew what he was doing when he struck the deceased on the head with his hatchet can, I think, be accepted without any hesitation. That he knew that his act was imminently dangerous to life is also clear. He followed up the first blow by a second one which, according to the medical evidence, was also delivered with considerable force. I think, therefore, that Indar Singh has rightly been convicted under S. 302, I. P. C. At the same time I do not think that the extreme penalty is called for. There does not appear to have been any previous enmity between Indar Singh and the deceased, or Indar Singh and his uncle Fateh Muhammad. The story that Indar Singh had not contributed anything towards the expenses incurred some two years ago in connexion with this well I am not prepared to accept. According to Virsa Singh, Abdulla's refusal to give up the use of the well was accompanied by foul vituperations and in these circumstances it is not surprising that when two hot-blooded youths have a quarrel in which both use foul language unfortunate results follow. There being no premeditation and no previous enmity, I consider that the sentence of transportation for life will meet the case. I would, therefore, reduce the sentence accordingly.

Qadir, J.—I concur..

R.M./R.K.

Order accordingly.

1930 Cr. Cases 677

(Lahore.)

TAPP, J.

Jagir Singh and another—Accused—
Petitioners.

v.

Emperor—Opposite Party.

Criminal Misc. Petn. No. 28 of 1930,
Decided on 22nd March 1930, for transfer
of case from Court of Addl. Dist.
Mag., Lahore, to some other Court.

(a) Criminal P. C., S. 117 (3)—Bail.

The provisions of Ch. 39 relating to bail do
not apply to an order made under S. 117 (3).

[P 677 C 2]

(b) Criminal P. C., Ss. 117 (3) and 498—
S. 117 (3) is intended to prevent breach of
peace—High Court cannot therefore under
S. 498 reduce security order to be furnished
although it can consider whether interim
security is not too high.

Section 117 (3) has apparently been introduced
for the purpose of preventing a breach
of peace or disturbance of the public tranquillity
or the commission of any offence or
in the interest of public safety pending an
enquiry under Ss. 108, 109 and 110. It is not
therefore open to the High Court under provisions
of S. 498 to reduce the security which the
Magistrate orders to be furnished.

But there is nothing to prevent the High
Court in exercise of its inherent powers from
considering whether the interim security which
is ordered to be furnished is not too high.
The order of the High Court reducing interim
security does not, however, fetter the discretion
of the Magistrate as to the amount of security
which may ultimately be demanded.

[P 677 C 2; P 678 C 1]

(c) Criminal P. C., S. 526—Nothing to
indicate that inquiry was not fair beyond
mere fact that proceedings were hurried
—Transfer cannot be granted.

Where, beyond the mere fact that the proceedings
against the petitioners were hurried, there
is nothing to indicate that the inquiry
had not been fair and impartial, and the
petitioners remain unrepresented through no
fault of the Magistrate, an application under
S. 526 for transfer of cases cannot be granted.

[P 678 C 1]

Bishan Nath—for Petitioners.

R. C. Soni—for the Crown.

Judgment.—The petitioners Jagir
Singh and Dewan Chand are being proceeded
against under S. 108, Criminal
P. C. in respect of certain speeches and
poems alleged to be seditious and inflammatory
and said to have been delivered and recited by
them at a gathering at village Jaman on 26th January
1930. The Additional District Magistrate,
Lahore, on receipt of a police report ascribing
the above acts to the petitioners proceeded to the
Barqi police

station, within the limits of which Jaman is situate,
on 1st February and on the petitioners being produced
before him in custody he made an order under
S. 112 of the Code calling on them to show cause
why they should not execute bonds in Rs. 10,000 each
with two sureties of Rs. 5,000 each to be of good
behaviour for a period of one year. After this order
had been read out and explained to the petitioners
the learned Additional District Magistrate recorded
the evidence of eight witnesses who were produced
on behalf of the prosecution, examined the two
petitioners and adjourned the further hearing for
the defence evidence to 5th February. In his order
under S. 112, the learned Additional District
Magistrate further directed under sub-S. (3), S. 117,
that the petitioners should furnish interim security
to the same amount as mentioned above.

Two petitions have been preferred on behalf
of the petitioners by Mr. Bishan Nath; one under
S. 498, Criminal P. C. for reduction of the amount
of the interim security and the other under S. 526
for transfer of the proceedings to some other Court.
Now the provisions of Chap. 39, of the Code relating
to bail will not apply to an order made under
sub-S. (3), S. 117 and this is conceded by the
learned counsel for the petitioners. Sub-section (3)
was introduced into the Code by the amending Act
of 1923 and has apparently been introduced for the
purpose of preventing a breach of the peace or
disturbance of the public tranquillity or the commission
of any offence or in the interests of public safety
pending an enquiry under Ss. 108, 109 and 110.
Consequently it follows in my judgment that under
the provisions of S. 498 it is not open to this Court
to reduce the amount of security which the Additional
District Magistrate has called upon the petitioners
to furnish. At the same time there is nothing to
prevent this Court in the exercise of its inherent
powers in considering whether the interim security
which the petitioners have been called on to furnish
is not too high.

In my opinion the amount might well be reduced
and any reduction so made will not in any way
affect the amount of security which the petitioners
may be finally required to furnish and which of

course will be subject to the maximum amount entered in the order under S. 112. I would, therefore, order that the interim security which the petitioners have been called on to furnish be reduced from Rs. 10,000 to Rs. 5,000 each with two sureties of Rs. 2,500 each. I would again emphasize that this order shall in no way be deemed to fetter the discretion of the Magistrate in regard to the amount of security which may be ultimately demanded from the petitioners subject to the maximum referred to.

As regards the application for transfer I am not impressed with the grounds urged on behalf of the petitioners and set forth in the application. Beyond the fact that the proceedings against the petitioners were hurried there is nothing in my opinion to indicate that the enquiry so far has not been fair and impartial. It is true that the petitioners were not represented by counsel but in this respect no blame can attach to the learned Magistrate as from one of the affidavits on the record it appears that Mr. Bishan Nath was engaged on 31st January to represent the petitioners but owing to some misunderstanding as to the Magistrate who would hold the enquiry and as to the place of the enquiry the learned counsel did not, or was unable to, attend. The chief cause of complaint is that the petitioners, who did not cross-examine any of the prosecution witnesses, have under the law no right to recall them for cross-examination. Mr. Bishan Nath states that if the petitioners are afforded an opportunity of recalling for cross-examination all or any of the prosecution witnesses whom they may wish to cross-examine he will be quite satisfied. The learned counsel for the Crown indeed suggested that this course might be adopted and I would, therefore, while dismissing the application for transfer, direct that the prosecution witnesses or such of them as the petitioners require to be called be recalled for cross-examination and the enquiry then proceeded with as early as possible.

R.M./R.K.

Order accordingly.

1930 Cr. Cases 678

(Lahore)

TAPP, J.

Mamun—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1079 of 1929,
Decided on 2nd January 1930.

Evidence Act, S. 27—Statement by accused that he buried body of person murdered at place pointed out by him is admissible only for S. 201, I. P. C.

A statement made by the accused to the police that he had buried the body of the murdered person at the place pointed out by him is clearly admissible in evidence under S. 27 only for the purposes of S. 201, I. P. C. but not for convicting him of murder: *A. I. R. 1929 Lah. 844, Expt.* [P 679 C 2]

Muhammad Tufail—for Appellant.

Muhammad Munir—for the Crown.

Judgment.—The appellant Mamun a Jat of Sher Baga in the Gujranwala district and one Shamun of the same village were sent up for trial under S. 302, I. P. C. for causing the death of Sillu a Baloch in or about the middle of April 1929.

Two of the assessors were of opinion that both the above persons were guilty of murder while the other two considered that the appellant Mamun alone was guilty of the offence.

The learned Sessions Judge disagreeing with two of the assessors found Shamun not guilty, acquitted him and holding in disagreement with all the assessors, that the evidence, which was purely circumstantial, did not establish the guilt of the appellant Mamun in respect of the murder of Sillu, acquitted him of that charge, convicted him of an offence under S. 201, I. P. C. and sentenced him to 7 years' rigorous imprisonment.

The case for the prosecution was that owing to the existence of a liaison between Mt. Roshan, wife of the deceased and the appellant Mamun, Sillu proposed moving to Chah Balochwala a village some 5 or 6 miles from Sher Baga. It was alleged that the appellant coming to learn of the intention of the deceased, he and Shamun enticed the deceased from his house one night on pretence of showing him a camel. They are then said to have strangled him and buried his dead body in a jungle. This was about the middle of April and Sillu was not seen alive after this

His absence was brought to light by Ali P. W. 3, a fellow Baloch who on arriving at Sher Baga from Manawala in the Sheikhpura District learnt of Sillu's disappearance. Accordingly on 10th May 1929 Ali sent a telegram to the Superintendent of Police at Gujranwala accusing the appellant Mamun and his brother one Ghulam of having murdered Sillu. This telegram was forwarded to Sub-Inspector Mohammed Nawaz Khan in charge of the Police Station at Pindi Bhattian on 14th May. The Sub-Inspector being ill sent Head-Constable Ghulam Muhammad to Sher Baga to make an enquiry into the disappearance of Sillu. The Head Constable continued his enquiries till 19th May but failed to obtain any clue with regard to the disappearance of Sillu. Thereupon the Sub-Inspector took up the investigation himself and on the same day, that is 19th May, after recording a statement of Mt. Roshan he questioned the appellant Mamun and Shamun. The appellant is alleged to have told the Sub-Inspector that he had buried the dead body of Sillu in the jungle and leading the investigating party to a jungle pointed out a place as that where he had buried the body. On this spot being dug up to a depth of some 3 or 4 feet a human body was seen. Permission was then obtained for the exhumation of the body and on 21st May this was done in the presence of Dr. Mohammad Abdullah, Assistant Surgeon, Hafizabad, the Sub-Inspector, Nur Mohammad Zaildar P. W. 4, Fateh Mohammad P. W. 5, Sher Mohammad P. W. 6, Pir Mohammad P. W. 7, Mt. Roshan, wife of the deceased, and Ali P. W. 3.

The evidence of the Assistant Surgeon shows that though the body was decomposed it was well preserved and identifiable and it was identified as that of Sillu by Mt. Roshan, Ali, Pir Mohammad and others. The Sub-Inspector and Pir Mohammad supported the medical evidence as to the body being in an identifiable condition but Nur Mohammad, Fateh Mohammad and Sher Mohammad endeavoured to controvert this testimony. Nur Mohammad, however, on being afforded a locus penitentiae admitted that the body was identifiable. The learned Sessions Judge has rightly rejected the evidence

of Fateh Mohamed, Sher Mohamed and the first statement of Nur Mohamed as to the body not being recognizable for there is no doubt that these witnesses are interested in the appellant and tried to help him, by throwing a doubt on the condition of the body and thus tending to discredit the evidence of the witnesses who identified the body as being that of Sillu. In my opinion it has been conclusively established that the disinterred body was capable of identification and was identified as being that of the deceased, as on this point the evidence of the doctor, the Sub-Inspector and the other witnesses supported as it is by the inquest report Ex. P/K prepared at the time by the Sub-Inspector is more than sufficient.

The post-mortem examination disclosed a whitish mark, well preserved, round the neck becoming less marked at its back. The muscles underneath were found contused and the cricoid cartilage fractured. In the centre of the skull there was a fractured hole of the size of a four anna silver piece just touching the membranes covering the brain. In the opinion of the doctor the cause of death was strangulation. Now the evidence in the case has indubitably established that Sillu was murdered and while it has not been found possible to connect the appellant with the commission of this crime, he having reason to believe that murder had been committed has been found guilty of having caused evidence of the commission of that offence to disappear with this intention of screening the offender from legal punishment. His conviction depends entirely on the evidence as to his having stated that he had buried the body of Sillu in a particular place and pointed out the spot to the investigating party. It was urged by the learned counsel for the defence that the statement of the appellant as to his having buried the body of Sillu was inadmissible in evidence and he cited the Full Bench ruling of this Court in *Sukhan v. Emperor* (1). In my opinion the evidence as to the appellant having stated that he had buried the body of Sillu at the place pointed out by him is clearly admissible under the provisions of § 27. Evidence

(1) A. I. R. 1929 Lah. 344=10 Lah. 255 (F.B.).

Act and its admission did not conflict with the principles laid down in the ruling cited. The appellant was suspected or accused of having murdered the deceased and his statement that he had buried the body of Sillu at the place pointed out by him was in no sense incriminating as regards the murder of Sillu. In the case cited above the incriminating statement was :

"I had removed the karas and pushed the boy into the well and had pledged the karas with Allah Din."

It was held by the Full Bench that the statement by the accused that he had pledged with Allah Din the karas subsequently recovered from the latter was admissible under S. 27 but that the rest of the incriminating statement could not be received in evidence. In the present case if the appellant had stated that he had murdered Sillu and buried his dead body in the place pointed out by him there on the authority of the ruling I should have had to exclude that portion of the statement as to his having murdered Sillu but not the rest which is on a par with the statement in the reported case as to the accused having pledged the karas with one Allah Din. There is no reason to disbelieve the evidence as to the appellant having pointed the place wherefrom the dead body of Sillu was recovered and the first part of his statement as to his having buried the body there affords ample and sufficient proof of knowledge on his part as to Sillu having been murdered, and as to his having caused the disappearance of the corpus delicti with the intention of screening the offender, may be himself, or some other person from punishment. For the above reason I hold that the appellant has been rightly convicted and affirming his conviction and sentence which I do not consider severe, I dismiss the appeal.

R.M./R.K.

Appeal dismissed.

1930 Cr. Cases 680

(Lahore)

TAPP, J.

Gian Singh and others—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 671 of 1929, Decided on 23rd December 1929, from an order of 1st Class Magistrate, Gujranwala, D/- 6th June 1929.

Penal Code, S. 304-149—One member of unlawful assembly was Sikh wearing kirpan which he unsheathed and gave fatal blow to victim—Other members are not constructively liable for causing death.

The mere fact that a member of an unlawful assembly which assailed its victim, was Sikh wearing kirpan, unsheathing which he dealt the fatal blow to the victim is not sufficient to hold the other members of the assembly constructively liable for causing of death simply because he was wearing a kirpan. [P 681 C2]

Bhagat Ram Puri—for Appellants.

Muhammad Munir—for the Crown.

Judgment.—Six persons, viz., Kala Singh, his father Gian Singh, Hayat, Jalal, Mahana of Killa Rai Singh and Shamun of Bhaike Jung in the Gujranwala District were sent up for trial under Cl. (2), S. 304/149, I. P. C., for having on 30th October 1928, along with Jaswant Singh (discharged) and Sohan Singh (absconding) formed an unlawful assembly and caused the death of one Ganda Singh.

Jalal was acquitted while the other five were convicted under S. 304, Cl. (2) read with S. 149, I. P. C. and each sentenced to five years' rigorous imprisonment. They were also found guilty of causing simple hurt to one Pira, a companion of Ganda Singh, convicted of an offence under S. 323, I. P. C., and each sentenced to one year's rigorous imprisonment to run concurrently with the sentence of five years.

Mahana and Jalal were also found to have caused simple hurt to two other companions of Ganda Singh, viz., Mutalli and Kartar Singh shortly after, and each being convicted of an offence under S. 323, I. P. C., was sentenced to one year's rigorous imprisonment the sentence in the case of Mahana to be consecutive.

Against these convictions and sentences Kala Singh, Gian Singh, Hayat, Mahana and Shamun have appealed.

through Mr. B. B. Puri and Jalal from jail.

The case for the prosecution briefly is that, on the morning in question, Pira, Mutalli, Ganda Singh and Kartar Singh were following the tracks of certain persons suspected of having stolen the melons of Ranjha, an uncle of Pira. Ganda Singh was on horse-back while the other three were mounted on a camel. On the party arriving near the dera of Hayat appellant outside Kila Rai Singh, the deceased Ganda Singh commenced to sing a ballad alleged to have been indecent and to which Shamun appellant appears to have taken exception. An altercation arose between Ganda Singh and Shamun and the latter then called out to Hayat, Jalal and Mahana who were ploughing close by. These four persons arming themselves with lathis prepared to assail Ganda Singh. Meanwhile Pira getting down from the camel joined Ganda Singh and mounting behind him they both rode away in the direction of Kila Rai Singh followed apparently by Hayat, Jalal, Shamun and Mahana. The cries and shouts of these four appellants brought Gian Singh, Kala Singh, Sohan Singh and a fourth Sikh out of the village and they barred the way of Ganda Singh and Pira. These eight persons then assailed and beat Ganda Singh and Pira, Sohan Singh the alleged absconder was wearing a kirpan some 3 feet long and unsheathing this is alleged to have used it with fatal effect on Ganda Singh. Kartar Singh and Mutalli were not assailed then as they dismounting from the camel retreated to Kotli Mansu where they took refuge in the house of one Sohna. They were, however, followed and beaten there according to the finding of the Magistrate by Jalal and Mahana.

The medical evidence shows that Ganda Singh bore two incised wounds one of which on the head caused a complete fracture of the skull resulting in death a few days later. He also bore 8 other contusions and bruises on his body and one of the former resulted in a fracture of the ulna bone.

Pira sustained 19 contusions and bruises all simple, Kartar Singh 15 bruises and contusions, and Mutalli 8 similar injuries all simple in both cases.

While the evidence is conflicting as

to whether Ganda Singh and Pira were assailed and injured simultaneously by all the appellants and the others or whether they were first beaten by Hayat, Mahana and Shamun who were then joined by Gian Singh, Kala Singh and Sohan Singh, there is no room for doubt that Ganda Singh and Pira were assaulted and beaten by all the appellants except Jalal outside Kila Rai Singh and that Kartar Singh and Mutalli were later beaten by Mahana and Jalal in Kotli Mansu. Indeed the matter was not contested by Mr. B. R. Puri, who frankly admitted that the defence version of the affair as to Ganda Singh and his companions having been caught breaking into the house of Hayat and committing theft was false. The point which was, however, pressed and calls for consideration is whether all the appellants except Jalal can be held constructively liable for causing the death of Ganda Singh which according to the evidence was said to be due to the act of Sohan Singh alone.

Now while the appellants and one other person undoubtedly constituted an unlawful assembly whose common object was to beat Ganda Singh and his companions, I do not think it is possible to hold that the appellants except Jalal knew that one of the members of the assembly would be likely to commit the offence of culpable homicide, simply because he was wearing a kirpan, a weapon which now a-days is carried by most Sikhs as an emblem of their religion and not for purposes of offence or defence. If Sohan Singh had rushed out with an unsheathed kirpan and joined the other members of the assembly, it might perhaps be possible to impute the required knowledge to the appellants but not otherwise in the circumstances according to my judgment.

For the above reasons I would hold that the appellants Gian Singh, Kala Singh, Hayat, Mahana and Shamun cannot be held liable for causing the death of Ganda Singh and accepting the appeal as regards their conviction under S. 304-II, I set this aside and acquit them.

They have, however, been rightly convicted of causing hurt to Pira and the appellants Mahana and Jalal, of further causing hurt to Kartar Singh and Mutalli. I accordingly affirm the con-

victions under S. 323, I. P. C., in respect of both occurrences and in view of the fact that they have now done more than six months of their imprisonment I would reduce the sentences to the period undergone in the case of all the appellants including Mahana and direct that they be set at liberty. The appeals against the convictions under S. 323, I. P. C., are accepted to the above extent.

V.B./R.K.

Sentence reduced.

* 1930 Cr. Cases 682*

(Lahore)

JAI LAL AND CURRIE, JJ.

Jog Raj—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 31 of 1930, Decided on 18th March 1930, against order of Sess. Judge, Attock, D/- 12th November 1929.

(a) Evidence Act, S. 26—S. 26 makes no difference between oral and written confession.

Section 26 as it stands makes no distinction between an oral and written confession but embodies a substantive rule of law. [P 684 C 1]

* (b) Criminal P. C., Ss. 164 and 533—Compliance by Magistrate with S. 164 but failure to append necessary certificate required by S. 164—S. 533 comes into operation and record becomes admissible on proof of compliance with provisions of S. 164—Criminal P. C., S. 533.

When the Magistrate has complied with the provisions of S. 164, but has failed to append to the record the necessary certificate required by S. 164 S. 533 comes into operation and on proof by the Magistrate that he had complied with the provisions of S. 164, the record becomes admissible. S. 533 is by its terms confined to confessions or statements recorded under S. 164 or S. 364. After the Magistrate has been examined and the Court is satisfied that the statement was duly made it is the record of such a statement that has been made admissible by S. 533 and not the evidence of the Magistrate about the terms of the statement. (*Case Law discussed*). [P 686 C 2]

(c) Criminal P. C., S. 533—Operation of saving clause in S. 533 is to cure want of proper certificate by Magistrate—Oral testimony of Magistrate becomes admissible, in case of Criminal P. C., S. 164.

The words "notwithstanding anything contained in the Evidence Act, 1872, S. 91" indicate that a confession must in every case be recorded in the first instance; but S. 533 is by its terms confined to confessions or statements recorded under S. 164 or S. 364 of the Code. Moreover, the words "notwithstanding anything contained in the Evidence Act, 1872, S. 91" so far as they apply to S. 164 really are intended to make the oral testimony of the Magistrate admissible to prove the fact that notwithstanding the absence of a

certificate that he complied with the provisions of that section, he did as a matter of fact comply with such provision. The operation of this saving clause is therefore intended to cure the defect of want of proper certificate by the Magistrate. [P 687 C 1]

* (d) Evidence Act, S. 26—Confession by accused in presence of Magistrate—Accused not produced before Magistrate to record his admission—Confession when not reduced to writing can be proved by oral testimony of Magistrate—Criminal P. C., S. 164

A confession or an incriminating statement made in the presence of a Magistrate by an accused person while in police custody who is not produced before the Magistrate with a view to record his confession can be proved by oral testimony of the Magistrate when it has not been reduced to writing. In absence of any provision of law making it obligatory on the part of a Magistrate to record a confession it is not a matter required by law to be reduced to the form of a document. [P 687 C 1]

* (e) Evidence Act, S. 26—S. 26 does not make admission dependent upon knowledge of accused as to identity of Magistrate.

Section 26 does not make the admissibility of the confession dependent upon the knowledge of the accused as to the identity of the Magistrate, the main consideration being the presence of the Magistrate and the making of the confession in his presence. [P 687 C 2]

(f) Penal Code, S. 302—Intention to assault with stabbing weapon—Accused having grudge against deceased—He is guilty of murder.

It must be assumed that a person who goes armed with a stabbing weapon to assault another person against whom he has a previous grudge and actually strikes that person at a vital part of his body and causes his death, intends to cause such bodily injury as is imminently dangerous to life and such person must be held guilty of murder. [P 687 C 2]

Kishan Dayal—for Appellant.

R. C. Soni—for the Crown.

Jai Lal, J.—On 3rd June 1929, Azim Dhobi of village Kisran in the District of Attock died in consequence of an incised penetrating wound of the abdomen 2-1/4 "by 1" caused with a knife. The appellant Jog Raj, a Mehra of the same village, has been found guilty of having caused this injury and under S. 302, I. P. C. has been sentenced to transportation for life. He has appealed to this Court through Mr. Kishan Dayal, advocate who has addressed us on his behalf at length.

The prosecution case is that Mt. Garo mother of the convict, was enticed by Fazal Karim, brother of Azim, whom she married subsequently. In consequence of this, Jog Raj entertained a grudge against this person. On 3rd June 1929, at about midday he went to

the house of Fazal Karim where the latter's mother Mt. Mehr Behari was grinding salt and the other members of the family including Fazal Karim, his brothers Abdul Karim and Azim deceased were sleeping in another room. The accused was seen by Mt. Mehr Bhari standing outside the door of her house. He threw two stones at her and she made a noise which woke her three sons who came out of the house and saw Jog Raj standing in the street in front of their house with a stone in one hand and a knife in the other. Abdul Karim and Azim had sticks in their hands while Fazal Karim was empty handed. The accused threw a stone at the head of Abdul Karim and rushed at Fazal Karim flourishing his knife. Fazal Karim stepped aside and the blow of the knife fell on Azim, causing him the injury described above. On hearing the noise caused by this incident, Ahmad and Jiwan who reside in neighbouring houses, came and Ahmad caught hold of the accused who was then chastised for his conduct. In the meantime, it was noticed that Azim had received a grievous injury and those present turned their attention to him. The accused, therefore, ran away and went straight to Sant Singh, a retired Inspector of Police, who is a resident of village Kisan, and informed him that he had been beaten by the dhobi brothers. Soon after information was conveyed to Sant Singh that Azim had been seriously injured by Jog Raj. He, therefore, went to the house of the deceased and after seeing his condition had the accused arrested. Information was lodged at the police station and on the arrival of the head constable Jog Raj was handed over to him.

The above story is deposed to by Mt. Mehr Bhari, Fazal Karim and Abdul Karim. Further Ahmad and Jiwan both have stated that on hearing the noise they went to the house of Azim and saw the accused hitting Abdul Karim on the head with a stone. He then rushed at Fazal Karim with his knife but the latter stepped aside and Azim who was waving his stick at the accused was stabbed in the abdomen and fell down with his intestines protruding.

The story told by all these witnesses throughout is consistent with the exception that at an earlier stage some of them had stated that Azim had actually

hit the accused with a stick before he was injured with the knife.

The accused on the other hand stated at the trial that he had gone to fetch fuel and was returning to his house when he was stopped by the deceased, his brothers, and their parents and was assaulted by them, that Fazal Karim stabbed him on his arm with a knife and was going to repeat the assault with the knife when he swerved aside and Azim was injured with the blow of the knife which Fazal Karim had aimed at him, that is, the accused. He produced no evidence in support of this version, but reliance is placed on his behalf on the statement of the Sub-Assistant Surgeon Mul Raj, who examined his injuries on 4th June and found a superficial incised wound 1-1/2 ' x 1/12" on the back and lower third of the right forearm, in addition to other slight injuries when according to the prosecution witnesses were admittedly, caused to him after he had stabbed Azim. It is, however, denied by these witnesses that any incised injury was caused to the accused and it appears that on the previous day when the head constable examined his injuries the incised wound mentioned above did not exist; therefore, having regard to its trivial nature, the suggestion of the prosecution, that this injury was self-inflicted, is probably correct.

The prosecution version is further sought to be supported by the confession made by the accused in the presence of Raja, Gulab Khan, Magistrate of the First Class. It appears that the accused was produced before this Magistrate for a remand soon after his arrest. The Magistrate was at that time at the Recreation Ground attached to a Club of which he was a member and the Public Prosecutor, Qazi Muhammad Shafi, advocate and Lala Kunwar Bhan another Magistrate were also present on that occasion. The accused was in the custody of the police and was brought before the Magistrate in handcuffs. The Public Prosecutor happened to ask the accused what he had been doing and the accused stated that he had killed the paramour of his mother. This incident is deposed to by the Magistrate Raja Gulab Khan and Qazi Muhammad Shafi, advocate and their statements receive corroboration from the statement of Lala Kunwar Bhan made before the committing

Magistrate and transferred to the Sessions Judge's record under S. 33, Evidence Act. There can be no doubt that such a confession was made by the convict.

But the learned counsel contends that this confession is inadmissible in evidence and the case has been argued before us on this question with great ability by counsel on both sides. On behalf of the accused it is contended that the only section under which a confession made by an accused person can be recorded and proved at his trial, if made before the commencement of the trial or enquiry is a confession which is duly recorded under S. 164, Criminal P. C., and that the law prohibits the reception of oral evidence as to any confession made by an accused person while in police custody whether such confession is made before a Magistrate or otherwise.

On behalf of the prosecution on the other hand it is urged that S. 164, Criminal P. C., is an enabling section and it is at the discretion of the Magistrate to record a confession or not, and that if a Magistrate chooses not to record the confession it is open to the prosecution to prove it if it is made before the Magistrate, by his oral testimony.

In order to understand the respective cases advanced on both sides, it is necessary to mention some statutory provisions of the law. The general rule embodied in S. 21, Evidence Act, is that any admission which includes a confession, made by a person is legal evidence against him. Certain exceptions, however, are enacted to this general provision. Among them is S. 26, Evidence Act, which provides that no confession made by any person whilst he was in the custody of a police officer unless it be made in the immediate presence of the Magistrate shall be proved against such person. So far as S. 26, therefore, is concerned it enacts an exception to the general rule and I must confine this exception to the express provisions of the section. The section as it stands makes no distinction between an oral and a written confession, but embodies a rule of substantive law and it is to be seen, therefore, whether there is any rule of procedure, which makes it incumbent on a Magistrate to make a record of a confession in every case

when one is made before him by an accused person. The appellant's counsel contends that S. 164, Criminal P. C., lays down such a rule. That section provides that a Magistrate may record inter alia the statement or confession of an accused person made to him during investigation or thereafter but before the commencement of the trial or enquiry held with a view to commit the accused to take his trial in the Sessions Court. The section further provides that in recording the confession the Magistrate shall comply with certain conditions mentioned therein with a view to satisfy himself as to the voluntary nature of the confession and also shall append to such record a certificate in the prescribed form. It is urged that the expression "may record" in the section really is tantamount to "shall record," in other words, that it is incumbent on the Magistrate always to reduce a confession made before him to writing, and reliance is placed in support of this on the judgment of Shah, J., in *Emperor v. Maruti Santu More* (1).

The view taken by the learned Judge in that case fully supports the contention of the learned counsel. But it is to be observed that his opinion was not shared by the other learned Judge, Hayward, J., who sat with him. The following quotation from the judgment of Shah, J., indicates the view that the learned Judge took of the scope of S. 164, Criminal P. C. :

Taking the provisions of the section as a whole it seems to me that though the Magistrate has the power to refuse to record it if he is not satisfied that it is voluntarily made, he has no such option where he is satisfied that it is voluntarily made. The expression "may record" appears to have been used as the Magistrate has to ascertain whether the confession is voluntarily made. The section is no doubt permissive in that sense. But it is obligatory in the sense that it must be recorded if it is found to be voluntarily made. It is hardly consistent with the purpose and terms of this section to hold that the Magistrate has the option of refusing to record it, even when he is satisfied that it is voluntarily made, if it is to be proved as a confession later on."

In that case also the accused was sent to a Magistrate for a remand and the Magistrate put some questions to him to ascertain if he had been ill-treated

(1) [1920] 21 Bom. L. R. 1065=54 I. Q. 465=21 Cr. L. J. 65.

or tortured by the police and also with regard to some property which was referred to in the report of the Sub-Inspector of Police, and in reply to one of these questions the accused made a statement which was sought to be proved against him at his trial. The statement not having been reduced to writing Shah, J., held that the same could not be proved against the accused. In taking the view mentioned above he dissented from two judgments of the Chief Court of the Punjab, that is, *Shere Singh v. Empress* (2) and *Buta v. Empress* (3) and Hayward, J., on the other hand, held that oral statements made during investigations had nowhere expressly been required to be reduced to writing and that the Magistrates had been given the permission to record such statements in writing by S. 164, Criminal P.C.

Reliance is also placed on *Emperor v. Gulabu* (4) in which it was held that a confession of an accused person made to a Magistrate holding an enquiry must under the law be reduced to writing and consequently under S. 91, Evidence Act, no evidence can be given of such a confession unless it is recorded. In that case it appears that the Magistrate was holding a preliminary enquiry into the case (it was not a judicial enquiry such as precedes a commitment for trial to the Sessions Court, but was supplementary to the investigation by the police) and during such an enquiry the accused made a statement which was not reduced to writing, but was sought to be proved against him by the oral testimony of the Magistrate.

In *Nathu v. Emperor* (A. I. R. 1929 All. 855), the statement in question was made by the accused to a Deputy Magistrate who was then on leave, and not having been reduced to writing it was held that it was not admissible against the accused. *Queen Empress v. Bhairab Chunder Chuckerbutty* (5) and the *Queen v. Domun Kahar* (6), are also cited on behalf of the appellant.

The learned Assistant Legal Remembrancer on the other hand referred to *Tangedupalle Pedda Obigadu v. Em-*

peror (7), in which most of the cases relied upon by the appellant's counsel were discussed and dissented from. The learned Judges in that case held that under S. 164, Criminal P. C., it is not obligatory on a Magistrate holding an investigation or preliminary enquiry under S. 159 of the Code to record in writing a confession made to him by an accused person and that such confession may be proved by the oral testimony of the Magistrate. In *Shere Singh v. Empress* (2), it was held that where a confession is recorded by a Magistrate but the document containing it cannot be proved for any reason, oral evidence of the confession by the Magistrate is admissible against the accused and the document can be used by the Magistrate for the purpose of refreshing his memory. In *Buta v. Empress* (3), it was held that an extra judicial confession to a Magistrate is not a matter required by law to be reduced to writing but is merely a matter which a Magistrate is authorised to reduce to writing and in this respect differs from an examination of the accused persons under S. 364, Criminal P. C., which is a matter required by law to be reduced to writing. Similarly in *Feroz v. Emperor* (8), it was held that an oral confession by an accused person, not being open to any exception under Ss. 24, 25 or 26, Evidence Act, is, as an admission by an accused person, a relevant fact and may be proved at his trial under S. 21 and, therefore, that such a confession made to a Magistrate is relevant and may be proved by the oral evidence of the Magistrate. This view further receives support from *Faiz Ullah v. Emperor* (9), judgment of a Division Bench of the Chief Court of the Punjab.

From what I have stated above, it will be observed that so far as this province is concerned it has consistently been held that a confession made before a Magistrate by an accused person while in police custody but not recorded by him can be proved against the accused by the oral testimony of the Magistrate, though there is some difference of opinion even in this province whether a confession which has actually

(2) [1881] 21 P. R. 1881 Cr.

(3) [1887] 52 P. R. 1837 Cr.

(4) [1311] 83 All. 260=19 I.C. 307=11 A.L.J. 285.

(5) [1907] 2 C.W.N. 702.

(6) 12 W. R. Cr. 22

(7) A. I. R. 1922 Mad. 40=15 Mad. 230.

(8) [1918] 11 P. R. 1918 Cr.=45 I. C. 843=19 Cr. L. J. 651.

(9) [1914] 8 P.W.R. 1914 Cr.=22 I. C. 150=33 P.L.R. 1914.

been recorded under S. 164 can be proved by the oral testimony of the Magistrate if the record thereof is not admissible for want of compliance with the formalities required by law. Reference as to this may be made to *Shere Singh v. Empress* (3) already cited and to *Khemar v. Emperor* (10) and *Partap Singh v. Emperor* (11); at the same time it must be conceded that the question of exclusion of the oral testimony of the Magistrate as to the terms of the confession does not appear to have been directly involved in the two cases last mentioned.

Now, the cases cited above refer to the following circumstances:

(a) Where a confession has been recorded under S. 164, Criminal P. C.; but the Magistrate though he complied with the procedure laid down in that section omitted to append the necessary certificate to the record; (b) Where the Magistrate in the above case not only failed to record the necessary certificate but as a fact failed to observe the procedure laid down in S. 164 and thus failed to satisfy himself that the confession was voluntarily made; (c) where the accused was produced before the Magistrate for the purpose of recording his confession under S. 164 and confession was actually made before the Magistrate after he had satisfied himself that it was voluntarily made but no record of the terms of the confession was made; (d) Where the accused is produced before a Magistrate for some other purpose, e. g., for a remand, as in this case, and voluntarily makes a confession of his guilt.

The present is a case which falls in the category of (d), and, therefore, it is not really necessary to decide what would be the proper course to adopt in (a), (b) and (c) if the confession is sought to be proved by the oral testimony of the Magistrate. But some of the cases cited above have made no distinction between the four instances given by me above. The Bombay and the Allahabad High Courts seem to lay down that whenever an accused person in police custody makes a confession before a Magistrate it must be reduced to writing under S. 164, Criminal P. C., which applies to all such confessions

and that failure of the Magistrate to record the confession disentitles the prosecution to prove it by the oral testimony of the Magistrate. The Madras High Court and the Chief Court of the Punjab have taken just the opposite view. But I do not feel called upon in the present case to express any opinion which of these two views is correct i. e., whether a Magistrate is bound to record a confession under S. 164, or not when an accused person is produced before him for the purpose of recording a confession. The later view taken in this Court appears to be that when a confession has been recorded but without due compliance with the provisions of S. 164, Criminal P. C., the record thereof must be excluded and no oral evidence can be given to prove such a confession, but this question does not arise in this case. The case, however, is different when the Magistrate has complied with the provisions of S. 164 but has failed to append to the record the necessary certificate required by that section. In such a case S. 533, Criminal P. C., comes into operation and on proof by the Magistrate that he had complied with the provisions of S. 164, the record becomes admissible.

The only question that I have to decide is whether a confession or an incriminating statement made in the presence of a Magistrate by an accused person when in police custody who is not produced before the Magistrate with a view to record his confession can be proved by the oral testimony of the Magistrate when such confession has not been reduced to writing. In the present case it is admitted that no such record was made.

In support of his contention that the oral testimony of the Magistrate is inadmissible, in this case, the appellant's counsel cited S. 91, Evidence Act and S. 533, Criminal P. C. S. 91, Evidence Act, provides inter alia that in all cases in which any matter is required by law to be reduced to the form of a document no evidence shall be given in proof of the terms of such matter except the document itself. S. 533, Criminal P. C., provides that:

"If any Court, before which a confession or other statement of an accused person recorded or purporting to be recorded under S. 164, or S. 564 is tendered or has been received in evidence, finds that any of the provisions of

(10) A. I. R. 1925 Lah. 815=6 Lah. 58.

(11) A. I. R. 1925 Lah. 605=6 Lah. 415.

either of such sections have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded, and notwithstanding anything contained in the Evidence Act 1872, S. 91, such statement shall be admitted if the error has not injured the accused as to his defence on the merits."

It is contended that the use of the words, "notwithstanding anything contained in the Evidence Act 1872, S. 91" indicates that a confession must in every case be recorded in the first instance; but S. 533 is by its terms confined to confessions or statements recorded under S. 164 or S. 364 of the Code. Moreover, the words "notwithstanding anything contained in the Evidence Act 1872, S. 91" so far as they apply to S. 164 really are intended to make the oral testimony of the Magistrate admissible to prove the fact that, notwithstanding the absence of a certificate that he complied with the provisions of that section, he did as a matter of fact comply with such provision. The operation of this saving clause is, therefore, intended to cure the defect of want of proper certificate by the Magistrate. It is to be noted that after the Magistrate has been examined and the Court is satisfied that the statement was duly made it is the record of such a statement that has been made admissible by S. 533 and not the evidence of the Magistrate about the terms of statement. These two sections, therefore, do not help the appellants as they do not, read together, affect a confession which has not been recorded.

Section 164 in my opinion does not govern the present case, as the accused was not produced before the Magistrate for the purpose mentioned therein, nor does S. 364 of the Code governs the case as it is confined to cases where evidence has been produced against the accused and the Magistrate examines him with a view to enable him to explain anything which has appeared against him in such evidence. In the absence of any provision of the law making it obligatory on a Magistrate to record a confession, as in the present case, I must hold that it is not a matter which is required by law to be reduced to the form of a document. I would, therefore, hold that the terms of the confession made by the accused in the presence of the Magis-

trate in the present case could be proved by the testimony of the Magistrate.

Nor do I think that as was contended on behalf of the appellant; it makes any difference that the accused did not know that he was making the incriminating statement in the presence of a Magistrate; in other words, that he did not know that the person before whom he was produced was a Magistrate, because S. 26, Evidence Act, does not make the admissibility of the confession dependent upon the knowledge of the accused as to the identity of the Magistrate, the main consideration being the presence of the Magistrate and the making of the confession in his presence. But I am not prepared to hold that the accused was not aware of the presence of the Magistrate.

The oral testimony of the eyewitnesses mentioned above and the confession of the accused leave, in my opinion, no doubt that he caused the death of Azim by stabbing him in the abdomen with a knife which he carried with him for the purpose of assaulting his enemies. It must be assumed that a person who goes armed with a stabbing weapon to assault another person against whom he has a previous grudge and actually strikes that person at a vital part of his body and causes his death, intends to cause such bodily injury as is imminently dangerous to life and must be held guilty of murder.

I would, therefore, uphold the conviction of Jog Raj for the murder of Azim and would dismiss his appeal.

Currie, J.—I agree.

R.M./R.K. *Appeal dismissed.*

*** 1930 Cr. Cases 687**

(Lahore)

JAI LAL AND CURRIE, JJ.

Abdul Shakur—Petitioner.

v.

Mahadev Parshad and another—Respondents.

Criminal Revn. Petn. No. 701 of 1929, Decided on 29th March 1930, against order of Dist. Magistrate, Ambala, D/- 23rd February 1929.

* Criminal P. C., S. 439 — Suit for possession of house dismissed—Plaintiff subsequently presenting application that defendant having disappeared his moveables should be taken into possession by police—Order by Magistrate accordingly—Subsequent application by defendant to set

aside previous order dismissed — Both orders held to be passed in executive capacity under Police Act and High Court held to have no jurisdiction to reverse them — Government of India Act S. 107 held to have no application — Police Act, S. 25 — Government of India Act, S. 107.

A suit for possession of a house was dismissed on a finding that the relation of landlord and tenant did not exist between the parties. Subsequently the plaintiffs in the suit presented an application to a Magistrate First Class, that the defendant S who was again alleged to be a tenant had disappeared and his whereabouts were not known and his moveables were lying in the house. A prayer was made that the police be directed to take over the possession of the property after breaking the lock of the house. The Magistrate on 26th November 1928 passed the following order : "The application be sent to the Sub-Inspector of Police Ambala with the remark that the house should be got opened in the presence of respectable persons of the Mohalla and that on receiving cartage from the applicant goods be made over to the Sheriff of the Court."

The goods were made over to the Sheriff in pursuance of the order. In December 1928 S presented an application praying that the order passed on the previous occasion be set aside. The Magistrate dismissed the petition on 19th January 1929.

Held : that the first order passed by the Magistrate on 26th November 1928 was passed by him as an executive officer purporting to act under the Police Act and not as a Court of law or as a Magistrate acting in judicial capacity. The second order of 19th January 1929 was merely consequential on the first order and stood or fell therewith. The question of the power of the Magistrate to pass such an order was one to be dealt with by his superiors on the executive side and the High Court had no jurisdiction to reverse the said orders under the provisions of the Criminal P. O.

That in view of the finding that the Magistrate was not acting as a Court of law, S. 107, Government of India Act had no application ; 4 P. R. 1908 Cr. ; A. I. R. 1927 All. 193 ; A. I. R. 1926 Bom. 551 ; 24 Mad. 121 ; 36 Mad. 72 ; *Ex parte Bradlaugh*, 3 Q. B. D. 549, Dist. [P 691 C 1]

Shujauddin and Mohammad Amin — for Petitioner.

Sundar Das — for Respondents.

Order of Reference.

Jai Lal, J. — The facts of this case are peculiar. Apparently there was a dispute about some immovable property between the parties and in a suit No. 138 of 1926/27 *Firm Harji Mal Mithan Deo Parshad v. Abdulla and Shakur* it was held that the relation-ship of landlord and tenant did not exist between the parties and on that finding the suit for possession of the house was dismissed.

It appears that subsequent to the

dismissal of the suit the respondents, who were plaintiffs in the suit mentioned above, presented an application to the Magistrate First Class Ambala Cantonment alleging that Abdul Shakur the defendant in that suit, who was again alleged to be the tenant of the applicant had disappeared and his whereabouts were not known, and that his moveable property was lying in the house. A prayer was made that the police be directed to take over possession of the moveable property after breaking the lock of the house. The Magistrate, on 26th November 1928, passed the following order :

"The application be sent to the Sub-Inspector Police of Ambala, with the remark that the house should be got opened in the presence of respectable persons of the Mohalla and that on receiving cartage from the applicant goods be made over to the Sheriff of the Court."

It appears that in pursuance of this order, the Sub-Inspector opened the house and made over the goods of the petitioner Abdul Shakur to the Sheriff of the Court. The petitioner, on 1st December 1928, presented an application to the Magistrate, praying that the order passed on the previous occasion be set aside and that possession of the house be given back to him. The Magistrate dismissed the petition on 19th January 1929. Thereupon a petition for revision of this last order was presented to the District Magistrate but was rejected by him on 23rd February 1929. It is to be noted that no application for revision of the original order, directing the Sub-Inspector of Police to open the house and to hand over the property of the petitioner to the Sheriff of the Court, was presented to the District Magistrate.

The petitioner has now presented this petition for revision in this Court and it is directed against both the orders of the Magistrate. An important question that arises in this case is whether this Court has jurisdiction to entertain the petition or in other words whether the order of the Magistrate, which is sought to be revised, was passed by him in his judicial capacity or in his executive capacity. If it was passed in his judicial capacity then I have no doubt that this Court has jurisdiction and, under the circumstances of the case, the order should be set aside. The respondents' counsel con-

tends that the application for revision should not be entertained by this Court because the petitioner has subsequently instituted a suit against the respondents for recovery of possession of the house, but in the peculiar circumstances of this case, I do not think this objection should prevent this Court from entertaining the petition.

It is quite clear that the respondents dishonestly moved the Magistrate to practically eject the petitioner from the house after he had failed in this attempt in the civil Court and it will under the circumstances, be unfair to drive the petitioner to the civil Court to obtain relief by a suit if it can be granted to him in these proceedings.

Mr. Sundar Das, counsel for the respondents, contends that the order of the Magistrate was passed under S. 25, Police Act, 1861. That section provides that :

"it shall be the duty of every police officer to take charge of all unclaimed property, and to furnish an inventory thereof to the Magistrate of the district and that he shall be guided as to the disposal of the property by such orders as he shall receive from the Magistrate of the district."

The order in the present case was not passed by the District Magistrate but by a Magistrate of the First Class, arrogated to himself the powers of a District Magistrate, powers which are of an executive nature, it is no concern of this Court. There is no other provision of the law under which the Magistrate could proceed in the present case and it is contended that he exercised his powers as a Magistrate and, unless it can be shown that he acted expressly under the provisions of some law which confers power on him so to act and such powers are expressly defined to be executive powers, this Court would have jurisdiction over the actions of the Magistrate. In other words when a Magistrate takes any action in his capacity as a Magistrate, it is contended on behalf of the petitioner that, he is amenable and subject to the supervision of this Court, and this Court has the power to revise his orders. The question, in my opinion, is of interest and presents some difficulty and is, therefore, fit to go before a Division Bench for decision. I accordingly refer the following question to a Division Bench.

"Whether this Court has jurisdiction to revise the orders of the Magistrate, First Class, Ambala Cantonment, passed on 26th November 1928, and 19th January 1929, whether under the Criminal Procedure Code, or under S. 107 Government of India Act ?"

Currie, J.—The circumstances leading to this application have been fully stated in the order referring the question to Division Bench. The question :

"Whether this Court has jurisdiction to revise the orders of the Magistrate First Class, Ambala Cantonment passed on 26th November 1928, and 19th January 1929, whether under the Criminal Procedure Code, or under S. 107, Government of India Act."

If the orders passed by the Magistrate, First Class, Ambala Cantonment, were passed by him in the capacity of a judicial officer sitting as a Court, this Court would admittedly have jurisdiction to revise those orders. The point for determination therefore is whether the said orders were passed by Mr. Keelan as a Magistrate in his judicial capacity or as contended by the respondents in his executive capacity under S. 25, Police Act. In the first application presented on 25th November 1928 by the firm Harji Mal Mahan Deo Parshad no specific reference to the provisions of any law is made; the petition is headed *bakhiamat shaeif sahib bahadur Magistrate darja aval camp Ambala* and the prayer is that orders *hasab qaida marwaja kufal makan mazkur khalwaya jakar jo asbab baramad howe woh mal khana sarkari men rakhwa diya jawe* might be passed. This petition recited that the house was the property of the applicants and that the goods in the house belonged to Abdul Shakur. The order of the Magistrate passed on 26th November 1928, was to the effect :

"that the application be sent to the Sub-Inspector, Ambala, with the remark that the house should be got opened in the presence of respectable persons of the mohalla and that on receiving cartage from the applicant goods be made over to the Sheriff of the Court."

This was accordingly done.

On the 1st December Abdul Shakur presented a petition to the Magistrate asking for return of possession. This petition was dismissed by Mr. Keelan on 19th January 1929. It was noted that no law had been cited under which he could restore possession and that the copy of the judgment in the civil suit did not show the petitioner as

owner. Mr. Keelan then signed himself Magistrate, First Class. The mere fact that he signed as "Magistrate First Class" does not necessarily imply that he was acting as a Court of law.

The next step was an application for revision presented before the District Magistrate which was, however, dismissed on 23rd February 1929. This application had sought merely to have Mr. Keelan's second order revised and had not attacked his first order.

In the course of the proceedings before the District Magistrate Mr. Keelan was asked under what provisions of law he had acted, and he replied that he has acted in accordance with the usual practice, and that his action was under S. 25, Police Act. Now, S. 25, Police Act runs ;

"It shall be the duty of every police officer to take charge of all unclaimed property and to furnish an inventory thereof to the Magistrate of the district."

"The police-officers shall be guided as to the disposal of such property by such orders as they shall receive from the Magistrate of the district."

From this it will be seen that what is contemplated is that a police officer shall take charge of all unclaimed property and shall furnish an inventory to the Magistrate of the district, and take his orders for disposal thereof. That is to say the initiative is to be ordinarily with the police. "Property" is defined in S. (1) as including any moveable property, money or valuable security and clearly the provisions of S. 25, Police Act, would not apply to to immovable property. In this connexion it should be noted that the Magistrate's order of the 26th November contains no reference to the possession of the house being handed over, though it directs the house to be opened and gives directions concerning the goods to be found therein.

Now, Mr. Keelan is clearly not the Magistrate of the District. It appears that he is the Magistrate in charge of Ambala Cantonment. There is nothing on the record to show whether the Magistrate of the district has formally delegated any powers under S. 25, Police Act, to Mr. Keelan, though it appears that as a matter of practice he does exercise such powers.

Various cases have been cited at the

Bar dealing with the question of the jurisdiction of a High Court to revise orders. 4 P. R. 1908 Cr. was cited to show that the orders of an officer who claimed to be acting as Collector and head of the excise administration of the district could be revised. That case, however, is distinguishable from the present case. It was there held that the officer in question could only pass the order directing the police to make further enquiries in his capacity as District Magistrate and could not have ordered the police to make investigation in his capacity as Collector."

Reference was made to *Panchavan Banerji v. Upendra Nath* (1) and *Crawford Bayley Co. In the Petition of* (2) regarding the powers of a High Court under S. 561-A, Criminal P. C. The Allahabad case related to the power of a High Court to order certain remarks made in the judgment of the Sessions Judge to be expunged from the record, and there can be no doubt that in the case the Sessions Judge was sitting as a Court subordinate to the High Court. In *Crawford Bayley Co. In the Petition of* (2) the High Court held that they had power to interfere with the order of the Commissioner of Police, Bombay, refusing to allow his legal advisers to interview an accused person remanded to police custody, when the accused had already been brought before a Magistrate for remand. There could be no doubt that the matter came within the criminal jurisdiction of the Bombay High Court. Neither of these rulings is, therefore, applicable to the present case. Reference was also made to an English case *Ex parte Bradlaugh* (3) but the circumstances there were not analogous to the present case.

The rulings, *Queen Empress v. Munda Shetti* (4) and *Nataraja Aiyar, In re* (5) have been cited with reference to the remarks contained therein on the tests to be applied for the determination of whether an order is a judicial order or an executive one. In *Nataraja Aiyar, In re* (5), at p. 85, the learned Judge remarked :

(1) A. I. R. 1927 All. 198=49 All. 254.

(2) A. I. R. 1926 Bom. 551=50 Bom 741.

(3) [1876] 3 Q. B. D. 549.

(4) [1901] 24 Mad. 121.

(5) [1912] 86 Mad. 72=27 M. L. J. 893=16 I. C. 755=(1912) M. W. N. 1012.

"In *Bex v. Woodhouse* (6) the test adopted appears to be whether there was a lis before the officer."

and this test was applied.

Now, in the present case, it cannot be said, in my opinion, that there was any lis before Mr. Keelan. There was no question of deciding the rights of any party on the petition decided by the order 26th November 1928. That order merely directed the police to open the house, take charge of certain goods which were said to be unclaimed and deposit them with the Sheriff. Eventually the goods were made over to Abdul Shakur by an order dated 13th December 1928. There can thus in my opinion be no doubt that the first order passed by Mr. Keelan on 26th November 1928 was passed by him as an executive officer purporting to act under the Police Act and not as a Court of law or as a Magistrate acting in a judicial capacity. The second order of the 19th January 1929 is merely consequential on the first order and stands or falls therewith. In my opinion the question of the power of Mr. Keelan to pass such an order is one to be dealt with by his superiors on the executive side. I therefore hold that this Court has no jurisdiction to reverse the said orders under the provisions of the Criminal Procedure Code. In view of the finding that Mr. Keelan was not acting as a Court of law S. 107, Government of India Act would in my opinion have no application.

I would therefore dismiss the application.

Jai Lal, J.—I agree.

R.M./R.K. *Application dismissed.*

(6) [1903] 2 K. B. 501=75 L. J. K. B. 745=
22 T. L. R. 603=70 J. P. 485=95 L. T.
399.

1930 Cr. Cases 691

(Lahore)

ADDISON, J.

Mt. Mubarak Jan — Accused — Petitioner.

v.

Mt. Rahat Jan — Complainant — Opposite Party.

Criminal Revn. Petn. No. 63 of 1930,
Decided on 5th April 1930.

Criminal trial—Evidence—Mere fact that another view of case may be taken does not justify retrial.

Where the trial Magistrate after coming to the conclusion that the prosecution story is

doubtful, discharges the accused, the mere circumstance that another view may be taken of the case than that which the trial Magistrate takes would not justify a retrial. [P 692 C 1]

Din Muhammad and Nazir Ahmad—
for Petitioner.

M. Sleem—for Opposite Party.

Judgment.—The complainant instituted a criminal complaint under S. 406, I. P. C., against her half sister on the ground that she had misappropriated certain jewels entrusted to her. The complaint was sent to a Second Class Magistrate who after hearing all the evidence for the prosecution discharged the accused. A revision petition was preferred in the Court of the District Magistrate and it was heard by the Additional District Magistrate. He considered that there should be a retrial although the record of the evidence was complete. He accordingly accepted the petition and set aside the order of the Second Class Magistrate discharging the accused and sent the complaint to a First Class Magistrate for disposal. To set aside this order the accused has moved this Court.

It is apparent that the Magistrate is inexperienced and that he permitted too lengthy a cross-examination of the prosecution witnesses on matters some of which were of doubtful relevancy. It is also the case that some of his criticism of the evidence is petty but on the whole he came to the conclusion that the story was a doubtful one which he could not accept. He accordingly on that finding rightly discharged the accused.

The reasons given by the learned Additional District Magistrate for sending the complaint back for trial are not sound. He has stated that if there was evidence that ornaments were made over and that there was a promise to return them then obviously there was a prima facie case and the respondent had to clear herself. The Magistrate, it seemed to him, in holding that there was no prima facie case did so without there being any evidence of rebuttal. This statement of law is undoubtedly wrong. It was for the Magistrate to reject the prosecution evidence if he did not believe it without any rebuttal. The mere fact that a certain number of prosecution witnesses are examined does not mean that they must be believed or that any rebuttal is necessary. Again, the learned Additional District Magistrate said that even if the

entrusting of the jewels was doubtful and enquiry would be necessary and as the lower Court admitted that there was some doubt he considered that it was his bounden duty to go ahead with the enquiry. This again is a wrong principle of law. All the evidence had been heard, and the Magistrate considered that in spite of that evidence, the case remained doubtful. He therefore acted quite properly on his finding in discharging the accused and giving her the benefit of the doubt.

I was asked, however, to maintain the order of the Additional District Magistrate though the reasons given by him were not sound. I have given the case careful consideration and I am not prepared to do so. In my judgment this is a case for the civil Courts and it cannot be said that the judgment of the trial Magistrate was perverse or foolish. It may be that another view may be taken of the case than that which the Magistrate took; but that circumstance alone would not justify a retrial. I therefore accept this petition and setting aside the order of the Additional District Magistrate dated 11th December 1929, restore the order of the trial Magistrate dated 19th August 1929, discharging the accused.

R.M./R.K.

*Petition allowed.***1930 Cr. Cases 692**

(Lahore)

CURRIE, J.

Mangloo—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 183 of 1930, Decided on 11th April 1930, against order of First Class Magistrate, Rohtak, D/- 22nd January 1930.

Penal Code, Ss. 75, 369 and 392—Charges framed against accused under S. 392 and not specifically under S. 75 though he admits previous convictions—Subsequent conviction under S. 369 without amendment of original charge—S. 238, Criminal P. C., is inapplicable offence under S. 369 being not minor in relation to S. 392—Conviction under S. 379-75 is also impossible there being no specific charge under S. 75—Criminal P. C., S. 238 (2).

Where the Magistrate frames a charge against an accused under S. 392 and does not charge him specifically under S. 75, though he admits previous convictions, but eventually holding the offence to fall more properly under S. 369 convicts the accused under S. 369 without amending the original charge, S. 238 (2),

Criminal P. C., cannot be applied as an offence under S. 369 can scarcely be held to be a minor offence in relation to S. 392, the circumstances attending the two kinds of offences having considerable elements of difference between them. The accused cannot also be convicted under S. 379-75 in such a case, there being no formal charge under S. 75. [P 692 C 2]

Khurshid-Zaman—for the Crown.

Judgment.—The present appeal is from jail and it is not necessary to go into the facts of the case at length. It is obvious that the conviction in its present form cannot stand.

The prosecution story was that the appellant enticed two small boys into the jungle and removed from their persons certain ornaments and was subsequently captured with these ornaments in his possession. The case was sent up for trial under S. 392, I. P. C., and the Magistrate framed a charge under that section. Though the appellant was a previous convict and though the previous convictions were put to him and admitted by him, he was not, as far as I can see specifically charged under S. 75, I. P. C. Eventually the Magistrate held that the offence, as made out by the evidence, more properly fell under S. 369, I. P. C., and accordingly convicted the appellant under that section without any amendment of the original charge. Mr. Khurshid Zaman appearing for the Crown admits that this procedure was irregular. In my opinion, S. 238 (2), Criminal P. C., cannot be applied as an offence under S. 369, I. P. C., can scarcely be held to be a minor offence in relation to S. 392, I. P. C., the circumstances attending the two kinds of offences having considerable elements of difference between them. Mr. Khurshid Zaman suggested that another method of dealing with the offence would be to convict under S. 379/75, I. P. C., but this is impossible, as the Magistrate has not framed any formal charge under S. 75, I. P. C. The only course, therefore, open to me is to set aside the conviction and remand the case for retrial. The appellant to remain in judicial lock-up pending retrial.

R.M./R.K.

Case remanded.

* 1930 Cr. Cases 693

(Bombay)

MIRZA AND BROOMFIELD, JJ.

Vishram Narayan Devli—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 499 of 1929, Decided on 11th March 1930, against order of Presidency Magistrate, Fourth Court, Bombay.

(a) Criminal P.C., Ss. 256 and 537—Omission to record reasons under S. 256 for questioning accused forthwith after framing charge is irregularity covered by S. 537 unless failure of justice is caused.

Omission to record reasons under S. 256, for questioning the accused forthwith after the framing of the charge, as to whether he wishes to recall any of the prosecution witnesses for further examination amounts to no more than an irregularity in procedure covered by S. 537, and would not be a ground for setting aside the conviction unless it has occasioned a failure of justice : *A. I. R. 1927 All. 217* ; *A. I. R. 1926 Lah. 155, Rel. on.* : *A. I. R. 1929 Bom. 309, Dist.* [P 694 C 1]

*(b) Criminal P. C., S. 342—Provided accused is given opportunity to explain evidence against him, it is immaterial whether he is examined before or after framing of charge.

Provided the accused is examined after the evidence for prosecution is completely closed to enable him to explain the circumstance appearing in evidence against him, it makes no difference whether the examination takes place before or after the framing of the charge : *A. I. R. 1929 Bom. 447, Expl.* [P 694 C 2]

T. N. Walavalkar—for Petitioner.

A. A. Adarkar—for Opposite Party.

P. B. Shingne—for the Crown.

Broomfield, J.—There is a society in Bombay called the Nutan Marathi Hitavardhak Sangha. At a meeting of the society on 14th October 1928, there was a dispute between the President, S. D. Tandulkar, and the present petitioner V. N. Devli, who claims to be a member of the society but whose membership is disputed. Each of the parties filed a criminal complaint against the other. The President's complaint against the petitioner for offences under Ss. 447, 504 and 506 I. P. C., was filed on 19th October 1928, and was heard and decided on 13th November 1929. The witnesses for the prosecution were examined and cross-examined ; the accused (that is, the petitioner) was examined by the Court at some length under S. 342, Criminal P.C., then the charge was framed; the accused was asked if he wished to cross-examine the prosecution witnesses

further and he said he did not ; and lastly some defence witnesses, who were present in Court, were examined. The accused was represented by a pleader. It does not appear that further time for the defence was asked for, or that any objection was then raised to the case being disposed of in one sitting.

But S. 256, Criminal P.C., as recently amended, appears to be intended to provide that there shall ordinarily be at least two hearings (of a warrant case). The accused is to be asked at the next hearing whether he wishes to recall any of the prosecution witnesses for further cross-examination. If the Magistrate thinks proper to put this question forthwith he is required to record his reasons for so doing. In the present case the Magistrate omitted to record his reasons. This is the first ground on which this Court is asked to revise the order of conviction of the petitioner. Reliance is placed on the decision of the High Court in *Emperor v. Lakshman* (1).

In the second place it is contended that the examination of the accused under S. 342 ought to have been taken after the charge was framed, and that the omission to examine the accused again under that section is an irregularity which vitiates the trial. For that proposition reliance is placed on *Emperor v. Genu Gopal* (2).

I do not think there is any substance in either of these contentions. It goes without saying, of course, that the provisions of the Code are meant to be strictly obeyed, and if they are disobeyed, and the disobedience results in any kind of injustice that will be a good ground for interference in revision. But S. 537 expressly provides that there shall be no interference in appeal or revision on account of any error, omission or irregularity which has not occasioned a failure of justice. In *Emperor v. Lakshman* (1) the failure of justice was patent. The accused in that case has been called upon to state forthwith if they wished to cross-examine the prosecution witnesses. They applied for time as their pleader was absent. The Magistrate refused to grant them any time, and he also refused their request to be allowed to cross-examine the witnesses at the next hearing. That

(1) *A. I. R. 1929 Bom. 309=58 Bom. 578.*

(2) *A. I. R. 1929 Bom. 447.*

was very different from a mere omission to record reasons. The accused were denied a privilege to which under the law they were clearly entitled. This case cannot, I think, be regarded as an authority for the proposition that any breach of the provisions of S. 256 necessarily involves the quashing of the proceedings. No doubt Mirza, J., says at p. 598 : "The provisions of S. 256 appear to us to be peremptory". But the learned Judges who constituted the Bench were apparently in agreement, and Patkar, J., says at p. 600 :

"It would depend on the facts of each case whether the contravention of S. 256, Criminal P. C., amounts to a mere irregularity of procedure or to an illegality vitiating the trial."

That is in accordance with the view of the other High Courts : *Emperor v. Ohhajju* (3) and *Mt. Ghasiti v. Emperor* (4). In *Emperor v. Khushal* (5) our own High Court held that there is no universal rule that disobedience even of a mandatory provision of the Code has the consequence of nullification of all proceedings, irrespective of the question of prejudice. There is a ruling of the Rangoon High Court to the same effect in *Nga Hla U v. Emperor* (6). The Privy Council ruling in *Subrahmanya Ayyar v. Emperor* (7) applies only to the breach of a mandatory provision as to the mode of trial. There had been an illegal joinder of charges in that case. S. 256 does not deal with the mode of trial, but with the order of proceedings : see *Emperor v. Ohhajju* (3), already cited, and *Emperor v. Bechu Chaube* (8).

I do not see any reason to suppose that the accused in the case before us was prejudiced in any way by the Magistrate asking him forthwith if he wished to cross-examine further, or by the Magistrate's omission to record his reasons for this procedure. Apparently, if he had recorded his reasons, it would only have been necessary for him to say that the case was a simple and rather trivial one, that all the necessary evidence was available, and that nobody objected to the case being disposed of at once. It has been suggested to us that if there had been an adjournment the

accused might perhaps have summoned some additional witnesses. But if he really wanted any more witnesses there was nothing to prevent him asking the Magistrate to summon them.

As to the objection in connexion with S. 342, it is true that in *Emperor v. Genu Gopal* (2) Patkar, J., appears to have expressed the opinion that the proper stage for the compulsory examination of the accused under S. 342, is after the framing of the charge. But that expression of opinion was not necessary for the decision of the case. The examination of the accused had been merely perfunctory ; they had not been given a proper opportunity of explaining the evidence against them. That circumstance in itself was sufficient to vitiate the trial. But Wild, J., held that, if the questions put to the accused had been such as to enable them to explain the circumstances appearing in the evidence against them, there would have been no contravention either of the spirit or letter of S. 342. The facts there were similar to those of the present case, that is to say, the accused had been examined before the framing of the charge and there had been no further examination or cross-examination of prosecution witnesses. With great respect I prefer the view taken by Wild, J. Provided that the accused are examined after the evidence for the prosecution is completely closed, and before they are called on for their defence, I do not think it makes any difference whether the examination takes place before or after the framing of the charge. The provisions of the Code are sufficiently rigid already. It would be a mistake, in my opinion, to make them more rigid than they are by judicial interpretation. So far as my experience goes the general practice has always been that the detailed examination of the accused is taken before the charge. That some examination of the accused is intended to be made at that stage appears to be indicated by the language of S. 254, "when such evidence and examination have been taken and made." If, after the framing of the charge, further evidence for the prosecution is put in, whether by the examination of additional witnesses or by further cross-examination of those already examined, then S. 342 requires that there shall be

(3) A. I. R. 1927 All. 217=49 All. 816.

(4) A. I. R. 1926 Lah. 155=6 Lah. 554.

(5) A. I. R. 1926 Bom. 584=50 Bom. 680.

(6) A. I. R. 1925 Rang. 258=3 Rang. 139.

(7) [1901] 25 Mad. 61=28 I. A. 257 = 8 Sar. 180 (P.C.).

(8) A. I. R. 1923 All. 81=45 All. 124.

a further examination of the accused, to give an opportunity for explaining that additional evidence. But if there has been a proper examination of the accused before the charge, and the prosecution case remains as it was without any addition, S. 342, I should say, does not require anything further. It is always open to the accused to make a further statement when called upon to plead under S. 255.

Even on the other view, that the accused in this case ought to have been examined again after the charge, the error or irregularity would certainly be curable under S. 537 : *Emperor v. Bechu* (8), *Nga Hla U v. Emperor* (6), *Mohiuddin v. Emperor* (9). But I do not think there was any error or irregularity.

I would discharge the Rule.

Mirza, J. — The facts of the case which have given rise to this revision application are set out in detail in the judgment of my learned brother. The only two grounds urged on behalf of the applicant are : (1) that the Magistrate committed an illegality in proceeding forthwith with the trial after the charge had been framed without giving any reason in writing, a procedure which is in contravention of S. 256, Criminal P. C., and (2) the Magistrate committed an illegality in not questioning the accused generally on the case after the charge had been framed, failure to do which, it is contended, amounts to a contravention of the provisions of S. 342, Criminal P. C.

In support of the first contention, reliance is placed upon a ruling of this Court in *Emperor v. Lakshman* (1), where the conviction was set aside because the provisions of S. 256, Criminal P. C., had not been followed in the trial. I was a party to that decision. The facts of that case, however, can be distinguished from the present case. In that case it clearly appears that the failure by the Magistrate to comply with the provisions of S. 256, had resulted in a prejudice to the accused. The accused's pleader was absent relying on the usual practice of the Court in such matters to adjourn the case after the charge is framed. The accused had applied for an adjournment and the Magistrate had refused the application. The accused were unable to further cross-exa-

mine the prosecution witnesses in the absence of their pleader. In the present case it has not been shown that any prejudice has resulted to the applicant owing to the Magistrate proceeding with the case forthwith after framing the charge. The applicant was represented by a pleader who raised no objection to the procedure followed by the Magistrate. The applicant did not apply to the Magistrate for an adjournment on the ground that he wanted to summon more witnesses to give evidence on his behalf or any other ground. It is not every failure to comply with provisions of the Criminal Procedure Code, which, although peremptory in form, would vitiate a trial apart from its being shown that such failure has prejudiced the case of the accused. S. 537, Criminal P. C., seems to me to be comprehensive enough to cover a case like the present where although an error or irregularity is shown to have taken place in the procedure followed by the Magistrate yet it does not appear that such error or irregularity has occasioned a failure of justice.

In *Emperor v. Chhajju* (3) Kendall, J., was of opinion that the provisions in S. 256, Criminal P. C., were not provisions relating to the mode of trial and that failure to follow those provisions would strictly amount to no more than an irregularity in procedure, and would not be a ground for setting aside the conviction, unless the irregularity had occasioned a failure of justice. The facts of the case in *Emperor v. Chhajju* (3) were similar to those with which we have here to deal. The Magistrate had not recorded reasons for proceeding with the trial forthwith after the charge had been framed. The learned Judge remarks (p. 318):

"It appears to be clear enough that the accused did not wish to re-summon any witness, for, when they were represented by counsel on 19th May the witnesses were not re-summoned as I have no doubt they would have been, had any application been made on behalf of the accused. There has been no failure of justice on account of the irregularity."

In *Mt. Ghasiti v. Emperor* (4). Shadi Lal, C. J., has held that provided there has been no consequent failure of justice, the Magistrate's omission to record his reasons for requiring the accused, at the same hearing as that at which the charge was framed, to state whether they wished to cross-examine the pro-

(9) A. I. R. 1926 Pat. 414=4 Pat. 488.

secution witnesses, would not render the trial illegal. He has further held that the provision contained in S. 256, Criminal P. C. is not mandatory, but merely directory. In that case it was found that the omission by the Magistrate to record the reasons had not caused any prejudice to the accused and the irregularity in the procedure was considered to be cured under S. 537 Criminal P. C.

It is clear in my judgment that no prejudice having resulted to the applicant by the failure of the Magistrate to comply with the provisions of S. 256, the objection taken under the first head fails.

On the second point, namely, the illegality or irregularity alleged to have taken place in not complying with the provisions of S. 342, the applicant has relied upon certain observations of Patkar J. in *Emperor v. Genu Gopal* (2). In dealing with the latter part of S. 342, the learned Judge has remarked that the stage for calling upon the accused to explain the circumstances appearing in the evidence against him would be reached when after the charge is framed the accused either declines to cross-examine the prosecution witnesses, or when he expresses a wish to cross-examine the witnesses the cross-examination and re-examination are finished, and the evidence of the remaining witnesses for the prosecution taken. But that expression of opinion was not necessary for the decision of the case and was not shared by Wild, J. who delivered a separate but concurring judgment. Wild J., remarks (p. 1143):

"... if the learned Magistrate had questioned the applicants generally on the case on 1st November for the purpose of enabling them to explain the circumstances appearing in the evidence against them, his failure to question them again after their refusal to cross-examine the prosecution witnesses would not have been contrary to the provisions of S. 342."

The Magistrate in that case had questioned the accused before framing the charge. With great respect I follow the view expressed by Wild, J. on this point in preference to that expressed by Patkar J. The latter part of S. 342, Cl. (1), lays down that the Court shall question the accused generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence. It would be permissible

under this section, in my opinion, for such examination of the accused to be after the witnesses for the prosecution are examined but before the charge is framed and the accused called on for his defence. The Magistrate, in my opinion, has not committed any irregularity in recording the accused's statement before framing the charge. I may state here that the applicant's petition did not set out ground 2 in clear or explicit terms. Ground 2 taken in the petition which relates to this point only states: "The statement of the accused has not been properly recorded". We have, however, heard arguments on the point and are satisfied that there has been no illegality or irregularity in the procedure under this head which can be said to vitiate the trial.

I agree that the Rule should be discharged.

R.M/R.K.

Rule discharged.

1930 Cr. Cases 696

(Bombay)

MIRZA AND BROOMFIELD, JJ.

Emperor

v.

Shivputrayya Baslingaya — Accused.

Criminal Ref. No. 11 of 1930, Decided on 25th February 1930, made by Addl. Sess. Judge, Belgaum.

* (a) Evidence Act, S. 114, Illus. (a)—Accused showing place where stolen property is concealed does not by itself raise presumption of his having committed theft or dacoity or receiving stolen property but if such property was produced from his house unless he can account for his possession there is such presumption.

The mere fact that an accused person points out the place in which stolen property is concealed does not give rise to any presumption under S. 114, or justify his conviction of the offence of receiving stolen property, still less of the offence of theft or dacoity. But if such property is produced from the house of the accused person a presumption would arise under S. 114, Illus. (a), that the accused was either the thief or had received the goods knowing them to be stolen unless he can account for his possession of the stolen articles: 17 *ALL. 570, Ref.* [P 700 C 1]

(b) Evidence Act, S. 27—Court's duty in applying S. 27.

Per *Broomfield, J.*—In order to apply S. 27 it is necessary to know exactly what the statements relied upon are; because they are admissible only so far as they lead to the discovery of some fact and no further: 11 *B. H. C. R. 242, Rel. on.* [P 700 C 1]

(c) Evidence Act, S. 27—Fact discovered in consequence of information by one ac-

cused, other giving same information—Fact cannot be said to be discovered from information given by both.

When a fact is discovered in consequence of information given by one accused, and other accused persons also give the same information, it is not legitimate to say that the fact is discovered within the meaning of S. 27 from the information given by all of them: 2 *Bom. L. R.* 1039; 24 *W. R. (Cr.)* 36; 11 *B. H. C. R.* 242, *Ref.* [P 700 C 2]

P. B. Shingne—for the Crown.

S. D. Sapre and *H. B. Gumaste*—for the Accused.

Mirza, J.—This is a reference made by the Additional Sessions Judge, Belgaum, under S. 307, Criminal P. C., in a case he tried with a jury in which the accused were charged with having committed offences under Ss. 457 and 395, I. P. C. The jury returned an unanimous verdict of not guilty. The Sessions Judge differing from that verdict has made this reference and is of opinion that the accused could be convicted of offences under those sections.

The case for the prosecution rests upon the identification of accused 1, 3, 4 and 5 and upon the production of part of the stolen property by accused 1 to 4 jointly and by accused 2 from his own house.

There can be no doubt that an offence of house-breaking and theft was committed in the house of the complainant Adivappa on the night of 11th September 1929. At that time the only occupant of the house was Adivappa's daughter-in-law Basavanewa. The evidence of Basavanewa is that on that night her husband was absent from the house and as she was the only inmate, she had closed all doors and had gone to sleep, that she had got up owing to a noise proceeding from the kitchen and had lighted her lamp. The persons who had made an entry into the house came up, blew out the lamp, and thereafter effected an entry into the God room of the house from which they removed a tin-box containing certain articles of value. According to her, she saw and identified accused 1, 3 and 4 who were previously known to her and she also saw a dark tall man whom she subsequently identified as accused 5. Accused 2 was not mentioned by her as having been among the persons who had entered the house this night. The

robbers chained up the door of the house from outside when they left it. The infirmity in this evidence is that the next morning when the house was opened from outside by a passer by, a woman, also of the name Basavanewa, in consequence of the witness Basavanewa calling out to her for help, Basavanewa gave out that thieves had entered her house and had chained the door from outside after having stolen property from the house, but she did not mention the names of accused 1, 3 and 4 as having been among the dacoits. At 7 a. m. in the morning her father-in-law Adivappa returned from his field and coming to the house was informed by Basavanewa of what had occurred. On this occasion the evidence of both Adivappa and Basavanewa is that Basavanewa told Adivappa the names of accused 1, 3 and 4 and stated also that there was a dark tall man whom she could identify if she again saw him.

At about nine o'clock the same morning Adivappa gave the first information to the police patil but the information was in general terms and he did not disclose the names of accused 1, 3 and 4 to the patil. At this time a police jamadar Jangumiya was staying in the village in the house of the police patil in connexion with the Ganapati festival.

Jangumiya assisted the police patil in the investigations which were started immediately after Adivappa had given the information to the police patil. Certain panchas were summoned and a panchnama of the house was made in the presence of Jangumiya and the police patil. Adivappa was present at the time the panchnama was made. Even then the names of the dacoits were not disclosed. The Police Sub-Inspector arrived in the village at 4 or 4-30 p. m. of the same day, 12th September. It was after the arrival of the Police Sub-Inspector that the names of accused 1, 3 and 4 were disclosed to him by Basavanewa and the complainant as persons who had taken part in the dacoity. The Sub-Inspector of Police gave instructions to the police patil to keep a watch on these three accused. The police patil did so and as the result of his following the three accused to a public meeting, which was held that night at 11 p. m. in the village, gathered certain information which he communicated to the Sub-Inspector

of Police on the following day, 13th September. The Police Sub-Inspector sent for accused 1 to 4 and in consequence of certain information he got from them they were taken to certain fields which did not belong to them where they individually and by turns pointed out places from which some of the stolen articles were recovered. The evidence does not show what statements each of the four accused made in consequence of which the discovery of the stolen articles was made. Later in the afternoon of the same day in consequence of information given by accused 1 to 4 accused 5 was arrested, and an identification parade was held at which Basavanewa identified him as the fourth person who had entered her house and taken part in the dacoity on the night of 11th September.

In order to convict the accused of offences of house-breaking and theft it would be necessary in the first place to believe the evidence of Basavanewa as to her identification of accused 1, 3, 4 and 5. It is clear the offence was committed during the night. Basavanewa was asleep at the time when the dacoits entered the house. Having been awakened by the noise she lighted the lamp, but the lamp was blown out soon after it was lighted. She has stated that some of the accused came up to her. But she has also stated that after the lamp was blown out she was unable to see or identify the persons who were standing near her. She has also stated that some of the persons present threatened her not to raise an alarm. Had this evidence of Basavanewa received support from the first information given the next morning to the police patil we might have regarded it with some confidence. The explanation given by Adivappa that he suppressed this information from the complaint he lodged with the police patil because he was afraid the police patil might shield the culprits and help them to do away with the stolen property is not one which we could easily accept. If the jury disbelieved this part of the evidence of Basavanewa and Adivappa we would not be able to say that they were not justified in doing so or that they acted in a perverse manner.

The learned Government Pleader has urged that the evidence of Basavanewa

and Adivappa regarding the identification of accused 1, 3 and 4 has received sufficient corroboration with reference to the stolen articles that were produced by them. The evidence with regard to the production of the stolen articles by accused 1, 3 and 4 does not show that the articles were produced from their possession. All that it amounts to is that those accused along with accused 2 pointed out places where the stolen articles were concealed. The only value that could be attached to the discovery of these articles would depend upon any relevant statements the accused may have made which led to the discovery. It is not shown from the evidence what statement each of the accused made which led to the discovery of the articles. Under these circumstances we cannot say that the jury was wrong in not attaching importance to the discovery of the articles made in consequence of the accused 1 to 4 having pointed out the places where the articles lay hidden. Where the articles are not shown to have been in the possession of the accused no presumption would arise that they had come by it by means of an offence. The prosecution have not succeeded, in our opinion, in proving that the accused admitted or were otherwise proved to have been in possession of the stolen articles at any time.

With regard to the case of accused 5 it depends solely upon his identification by the witness Basavanewa. It has not been shown that he was in possession of any stolen article or pointed out any. We cannot say that the jury were wrong or perverse in not relying upon the evidence of Basavanewa against accused 5. We are not prepared to take a different view from the one taken by the jury in his case.

With regard to the case of accused 1, 3, 4 and 5 we are of opinion that the verdict of the jury is proper.

With regard to the case of accused 2, Basavanewa has not identified him as one who entered the house. The theory of the prosecution is that accused 2 must have been outside the house guarding the entrance and facilitating the commission of the offence by the other accused. The evidence against accused 2 is that he produced from his house articles Exs. E and F, which are

proved to have been part of the stolen property. As these articles were produced from the house of accused 2, by accused 2 himself, it is satisfactorily proved in our opinion that he must be deemed to have been in possession of them. A presumption would arise under S. 114, Illus. (a), Evidence Act, that accused 2 was either the thief or had received the goods knowing them to be stolen, unless he can account for his possession of the stolen articles. The dacoity was committed on the night of 11th September and the discovery of the stolen articles in the possession of accused 2 was made on 13th September. Accused 2 in his statement simply denied that the articles found in his house were in his possession and gave no explanation as to how they came to be in his house which would be consistent with his innocence. The learned Judge does not seem to have placed this aspect of the case against accused 2 before the jury. It is possible that if the jury had been properly directed on this point they might have convicted accused 2 of an offence in the alternative of either having committed dacoity or of having committed the offence of dishonestly receiving stolen property. The evidence against accused 2 would justify us in holding that he is guilty of this alternative offence. We convict accused 2 of an offence in the alternative under Ss. 395 and 411 and sentence him to eighteen months' rigorous imprisonment.

The Registrar, appellate side, should provide each accused who has been acquitted and discharged with single third class railway fare by a passenger train from Bombay to Kambar Ganvi railway station, M. & S. M. Railway, near Dharwar, and to pay to each such accused six annas for three days' expenses in advance.

Broomfield, J.—I agree with my learned brother that it is impossible to place much reliance on the evidence of the girl Basavanewa as to her identification of accused 1, 3 and 4 in view of the fact that the names of these accused were not communicated until the arrival of the Sub-Inspector. The mention of the names of alleged offenders in the first information is always and quite properly relied upon by the prosecution

as affording strong corroboration of evidence of identification. But conversely when the names are not mentioned at the earliest opportunity it must necessarily follow that the evidence of identification is rendered more or less suspicious, unless some satisfactory explanation is forthcoming of the failure to mention the names. In this case the explanation given by Adivappa, the complainant, is that he was afraid that the police patil might be desirous of shielding the accused. This story, however, is not in the least probable. Although there appears to be some relationship between the patil and accused 2 he is not in any way connected with the other accused, and accused 2 happens to be just the one whom Basavanewa does not claim to have identified. Further it appears that the police patil so far from shielding the accused took a very active part in working up the case. As far as I can see there is no reason whatever why the complainant should not have mentioned the names of the accused if he had really known them, particularly in view of the fact that the police patil was accompanied by a police head constable, Jangumiya, who, for some reason which is not very apparent, has not been examined as a witness for the prosecution.

In the case of accused 5 there is no evidence at all except the fact that Basavanewa picked him out in an identification parade held on 13th September. When she made her statement to the Police Sub-Inspector at 4 o'clock on the 12th she is said to have stated that one of the dacoits whose name she did not know was a tall dark man. We have seen accused 5 as well as the rest of the accused in Court, and it does not appear to us that he is markedly distinguished from the others either in respect of his complexion or his height. I think it would be unsafe to convict accused 5 merely on the strength of this identification by the girl.

There remains, therefore, only the evidence relating to the property. Now it appears to be a fact that accused 1, 2, 3 and 4 pointed out certain places in fields not belonging to them in which some of the property stolen in the dacoity was concealed. It is important to note that the fields where the property was found do not belong to these

accused. The property was not, therefore, in their possession, and the position in that respect has not been properly explained to the jury by the learned Judge in his charge. What he says about this production of property is:

"If an accused is in possession of stolen property, he must explain how he came to be in possession of the property or he is presumed to be a thief or receiver of the stolen property (S. 114, illus. (a))."

If the jury, instead of acquitting accused 1, 3 and 4, had convicted them, relying upon this presumption in the Evidence Act, and the matter had come before us, it would have been necessary to consider whether there had not been a misdirection. The mere fact that an accused person points out the place in which stolen property is concealed does not give rise to any presumption under S. 114, or justify his conviction of the offence of receiving stolen property, still less of the offence of theft or dacoity. In that connexion I may refer to *Queen-Empress v. Gobinda* (1). To justify the finding that the accused 1, 3 and 4 had been in possession of the property which they pointed out, it would be necessary further to rely on certain statements alleged to have been made by these accused to the police. A number of statements have been placed upon the record in the body of the various panchnamas made which are obviously irrelevant and should never have been admitted at all. There are certain other statements of the accused deposed to by witnesses which might conceivably be admissible under the terms of S. 27, Evidence Act. But in order to apply that section it is necessary to know exactly what the statements were; because they are admissible only so far as they lead to the discovery of some fact and no further. That is a proposition which has been frequently laid down by the Courts. I need only refer to the case of *Reg. v. Jora Hāsji* (2). Here the evidence which has been given as to the statements made by the accused is in this form. Ex. 21, the police patil, says that the Sub-Inspector came and questioned the accused. They gave some information and offered to point out the place where the property had been hidden. The Sub-Inspector, Ex. 25, says similarly:

"Accused 1 to 4 came. I questioned them. They gave me information and offered to point out the places where the stolen property had been concealed."

He then goes on to say that each accused independently pointed out the same place. The panch witness Gangappa Ex. 15 says:

"The first four accused led us to the places where they said they had secreted the ornaments. They took us to a place near the patil's tank. There was near by a prickly pear hedge. They could not be seen from outside. All the accused pointed out the same place as the one where they had secreted the stolen jewellery."

Then again later on:

"Accused 1 and 2 offered to show us another place near Nichanki where they said they had concealed the tin box (Art. 1). They took us to a hedge of prickly pear in a field belonging to the patil."

Again in cross-examination this witness says:

"Accused 1 was questioned by us as to the place where the stolen articles were hid."

The statements of the accused being deposed to as having been jointly made in this manner, it is not clear whose statement led to the discovery of the property. When a fact is discovered in consequence of information given by one accused, and other accused persons also give the same information, it is not legitimate to say that the fact is discovered within the meaning of S. 27 from the information given by all of them: see *Queen-Empress v. Bashya* (3) and *Queen-Empress v. Ram Churn Cheng* (4). Further, owing to the form in which these statements of the accused have been deposed to, it is not even possible to say that the statement which actually led to the discovery of the property was an incriminating statement at all. In that connexion I may refer again to the judgment of West, J., in *Reg. v. Jora Hāsji* (2), where the learned Judge says (p. 244):

"For instance, a man says: 'You will find a stick at such and such a place. I killed Rama with it.' A policeman, in such a case, may be allowed to say he went to the place indicated, and found the stick; but any statement as to the confession of murder would be inadmissible."

For anything we know to the contrary, the statements made by the accused in this case may have been "you will find the property at such and such a place" and they may then have gone on to make further statements incriminating themselves, which however, would not

(1) [1895] 17 All. 578—(1895) A.W.N. 226.

(2) [1874] 11 B.H.C.R. 242.

(3) [1900] 2 Bom.L.R. 1089.

(4) [1875] 24 W.R.Cr. 83.

in that case be legally admissible in evidence. I agree with my learned brother in holding that in the case of accused 1, 3 and 4 the fact that they pointed out the places where the stolen property was concealed would not justify their conviction of the offence charged or any offence, once it has been held that the evidence of identification is not reliable. The case of accused 2, however, stands on a different footing altogether. It is proved by evidence which there seems to be no reason to distrust that certain gold ornaments, which are identified as forming part of the stolen property, and one of which was mentioned and described in the list of property given by the complainant immediately after the offence was discovered, were produced by this accused from his house. From that circumstance the presumption under S. 114, Illus. (a), Evidence Act, properly arises, and I agree with my learned brother that this accused ought to be convicted in the alternative of dacoity or of receiving stolen property, and I further agree that under the circumstances the sentence which ought to be imposed is one of eighteen months' rigorous imprisonment.

Per Curiam.—The remaining accused, accused 1, 3, 4 and 5 are acquitted and discharged and ordered to be set at liberty.

V.B./R.K.

Order accordingly.

1930 Cr. Cases 701

(Allahabad)

BOYS AND YOUNG. JJ.

Emperor

v.

Kanhaiya—Respondent.

Criminal Appeal No. 979 of 1929, Decided on 6th February 1930, against order of Addl. Sess Judge, Moradabad, D/- 22nd June 1929.

(a) Criminal Trial—Acquittal on charge under trial—Court finding accused guilty of another offence but being unable to convict putting him on another trial—Opinion of Court in prior trial cannot be allowed any weight in subsequent trial.

Where a person is acquitted of the offence of which he is charged but the Court finds him guilty of another offence and puts him on trial for that other offence, as it could not convict him of that offence in that trial, the opinion of that Court in prior trial cannot be allowed any weight in the subsequent trial. [P 701 C 2]

(b) Criminal P. C., S. 236—S. 236 applies only in case of doubt.

Section 236 is only applicable where there is

doubt as to which of several offences had been committed. [P 702 C 2]

(c) Evidence Act, S. 114—Person carrying in his cart dacoity, one of, whom being injured and having blood-stains on clothes soon after dacoity—Unless he explains circumstances presumption is that he knew of part taken by those person in dacoity and that one injured was injured in dacoity.

Where a man is found taking along in a cart persons one of whom has blood-stained clothes and a broken head, and these persons are subsequently found to have taken part in a dacoity recently before being taken away in the cart, the burden lies upon the person so found in the circumstances to disclose what he knows about the circumstances in which he was found. Failure to discharge the burden will lead the Court to the irresistible conclusion that he must have known that those persons had taken part in the dacoity and that one of them was injured in that dacoity. [P 702 C 1]

U. S. Bajpai—for the Crown.

Binod Behari Lal—for Respondent.

Boys, J.—This is an appeal on behalf of the Local Government. A dacoity was committed on 25th October 1928, as a result of which 7 men were put on trial on charges of dacoity and convicted and they have been sentenced to long terms of imprisonment. The present accused Kanhaiya, against whose acquittal the Local Government have appealed in this case, was put on trial in the prior case on a charge of abetment and acquitted. The learned Judge was of opinion that the charge of abetment must fail, that charge being founded on evidence of acts prior to the dacoity. He was of opinion, however, that Kanhaiya was undoubtedly guilty of the charge of harbouring, but held, and we think, in view of the facts, rightly, that he could not in that trial convict Kanhaiya under S. 216-A, I. P. C. Subsequently Kanhaiya has been put on trial under S. 216-A, has been acquitted, and the Local Government have appealed. There can, of course, be no question but that the opinion of the learned Judge who tried the original case cannot be allowed any weight on the merits of the present case. We have only had to refer to it because counsel for Kanhaiya in the present case was anxious that the judgment in the first case should be considered in support of his argument that the second trial was illegal. On the merits we have no hesitation in saying that the learned Government Advocate on behalf of the Local Government has made out

his case. The facts are that Kanhaiya was caught on the road very shortly after the dacoity driving a bullock-cart in which were two men, one of whom was sitting, the other lying down, the latter with blood-stained clothes and a broken head. While the Sub-Inspector and his syce, who had stopped the cart, were engaged in arresting the two men in the cart, Kanhaiya succeeded in releasing the bullocks and himself bolting. The bullocks also disappeared. Another man, who was walking alongside the cart, similarly bolted and we hear nothing further of him. Subsequently the ownership of the cart was traced to Kanhaiya and his uncles, and the bullocks which had been in the cart were found at Kanhaiya's house, and Kanhaiya has been identified. The mukhia of his village further gives evidence that Kanhaiya was making false statements as to an alleged theft of his cart and bullock clearly in order to account for how his cart could have been found on the highroad. It is not necessary to detail this evidence more precisely, for in fact it is so clear that counsel for Kanhaiya has been unable to challenge it in this Court and has felt constrained to accept the facts alleged by the prosecution. On the merits the only argument that was possible before us as to whether Kanhaiya had knowledge or not that the two men he was taking along in the cart had committed a dacoity. We should have mentioned that these two men were among the dacoits subsequently convicted. When we find a man driving a cart along the road containing two persons, one of whom has blood-stained clothes and a broken head, and that those two persons are persons who have in fact recently taken part in a dacoity, it is manifest that the burden lies heavily upon that person to disclose what he knows about the circumstances in which he was found. Kanhaiya, instead of saying anything whatever to excuse himself, if anything could be said, bolted and even up to the last has not attempted to explain how he was there with the cart, but has simply contented himself with denying everything. The conclusion is irresistible that Kanhaiya must have known that the two men had been taking part in the dacoity and that one of them had

been injured in that dacoity. The only other point urged is that the second trial was barred by the terms of S. 403, and an endeavour is made to bring this case within the terms of S. 236, Criminal P. C. Whatever the true interpretation of S. 236 may be, whether it applies only to cases where all the facts are known and only the application of the law is doubtful, or whether it applies only to cases where, while some of the necessary facts can be proved, pointing to one or another of several offences alternatively, one or more facts cannot be proved, which, if proved, would make it clear which of the offences had been committed, or whether it applies to both types of case, it is not necessary for us in this case to determine. It is clear on the words of the section itself that it is only applicable where there is a doubt as to which offence has been committed. Here counsel for the appellant is constrained to admit that in the previous trial there was no question of any doubt at all as to which of several offences had been committed. The Judge was clear that the offence of abetment had not been established. He was equally clear that the offence of harbouring had been established, and if there had been any provision of the law permitting him to alter the charge or to add a charge at the last moment, he would have done so. There was no question whatever of doubt whether on the law or on the facts, as to which offence had been committed. No other section but S. 236 could possibly, in the circumstances of the present case, bring it within S. 403, Criminal P. C. That failing there was nothing illegal in the present trial. We allow the appeal and convict Kanhaiya under S. 216-A, I. P. C. and sentence him to three years' rigorous imprisonment.

V.B./R.K.

Appeal allowed.

1930 Cr. Cases 702

(Allahabad)

SULAIMAN, J.

S. A. Dange and others—Applicants.

v.

S. T. Sheppard and another—Opposite Party.

Criminal Miso. Case No. 96 of 1930,
Decided on 20th March 1930.

(a) Allahabad High Court Rules, Chap. 1, R. 1 (14)—Single Judge has jurisdiction to dispose of an application for notice to printer and publisher of newspaper to show cause why they should not be convicted for contempt of Court and if such application come through jail authorities Judge can dispose it of in chambers.

Under Chap. 1, R. 1 (14), sub-Cl. (b), a single Judge has jurisdiction to dispose of an application praying for a notice to be issued to printer or publisher of a newspaper to show cause why they should not be convicted for contempt of Court, when there is no rule expressly requiring it to be made by a Bench of two or more Judges. Further when such an application is sent through the Superintendent of Jail the Judge can dispose of the matter in chambers without fixing any date for its hearing.

[P 703 C 2]

(b) Penal Code, S. 228—Test to see whether publication comes within scope, is, whether publication is likely to interfere with due course of justice.

If the scope of the inquiry or defence is very wide, it cannot be expected that, while the trial is going on, public criticism on all the subjects mentioned above should be entirely withheld. General comment on these various matters or historical events, so long as they do not directly refer to the part played by the accused, cannot be seriously objected to. Such criticism would not be a comment on pending proceedings at all nor would the publications of such comments ordinarily tend to interfere with the course of justice. The test to be applied is whether the publication is likely to prejudice mankind in favour of or against a party before the case is finally heard or whether it is likely to interfere with the due course of justice.

[P 704 C 1]

(c) Penal Code, S. 228—Matter relating to antecedent character of accused particularly if suggesting similar offence is contempt.

Matter published in a newspaper relating to the past life of an accused or to his antecedent character, particularly if it suggests an offence similar to that which he is charged, is contempt of Court as it must tend to interfere with the fair trial of that charge.

[P 704 C 2]

(d) Penal Code, S. 228—Contempt is matter of substance and not technicality and Court may not interfere if comments are not likely to prejudice fair trial.

The contempt of Court is not a matter of mere form or technicality but of substance, and the jurisdiction to punish for contempt has to be very carefully and cautiously exercised. It is well settled that when the offence is technical or of a slight or trivial nature the Court may condone it. Even if the observation on the subject matter of a proceeding may be likely to interfere with the course of justice and may technically amount to contempt, the Court may not interfere, if it is not satisfied that such comments were calculated to prejudice the fair trial; *In re, New Gold Coast Exploration*, (1901) 1 Oh. 860. *Ref.*

[P 704 C 2, P 705 C 1]

Judgment.—This is an application by six of the accused in the Meerut Cons-

piracy Case drawing the attention of the High Court to the issue of the Times of India dated 25th February 1930, pp. 11 and 17 and praying that a notice be issued to the Editor and the Printer and Publisher, of the said newspaper to show cause why they should not be convicted for contempt of Court.

If I had thought it a fit case for issuing notice to show cause, I would have directed this matter to be laid before the Hon'ble Chief Justice for the constitution of a Bench of three Judges, as has been done in the past in regard to contempt of Court cases. But as I do not propose to take such a step, I think I have jurisdiction as a single Judge under Chap. 1, R. 1 (14) sub-Cl. (b), High Courts Rules, to dispose of this application when there is no rule expressly requiring it to be made by a Bench of two or more Judges. Also as the application has been sent through the Superintendent of Jail I can acceding to the practice of this Court dispose of the matter in chambers without fixing any date for its hearing. The inherent jurisdiction formerly exercised is now expressly conferred by the Contempt of Courts Act 12 of 1926.

The issue referred to above reproduced a note issued by the Government of Bombay on the labour position in Bombay City. Objection is taken by the applicants not to any comments made by the Editor on that note but on three specific passages in the note itself which has been printed in extenso in the paper. The accused persons are being tried for an offence under S. 121-A, I. P. C., and their grievance is that the publication of this note is likely to prejudice their trial. In para. 6 of their application it is admitted that the subject matter in the trial embraces many subjects and the movements in which the accused took part have become part of history, and:

"It is impossible for anybody to write about or comment on any labour or allied subjects without in some manner or other, directly or indirectly referring to the issues in this case;"

and that:

"the case of the petitioners covers the origin and growth of modern capital going back for centuries, revolutions in all parts of the world, social science, the whole field of sociology and state, the constitutions of several modern forms of state and several countries, including all the historical development of India and its offshoots for the last ten years."

If the scope of the inquiry or defence is so wide, it cannot be expected that, while the trial is going on, public criticism on all the subjects mentioned above should be entirely withheld. General comment on these various matters or historical events, so long as they do not directly refer to the part played by the accused, cannot be seriously objected to. Such criticism would not be a comment on pending proceedings at all nor would the publications of such comments ordinarily tend to interfere with the course of justice. The test to be applied is whether the publication is likely to prejudice mankind in favour of or against a party before the case is finally heard or whether it is likely to interfere with the due course of justice. Passage marked A-3 deals with the infusion of communism into the labour movement. No doubt the note refers to the starting of a paper called the "Kranti" (revolution), of which one of the accused is stated in the application to have been the Editor, refers to the formation of a new Girni Kamgar Union, of which some of the accused are stated in the application to have been office bearer and also refers to efforts to bring about strikes with the object of destroying capital and establishing a labour raj; but it does not otherwise refer directly to the accused or any specific activities of theirs which would have a bearing on their alleged offence under S. 121-A. The passage refers to the position in general and is by no means a comment on the pending proceedings or any writing likely to influence the result of that trial. I, therefore, do not think that this amounted to a contempt of the Subordinate Sessions Court.

Paragraph marked A-2 is as follows:

"It is unfortunate that certain individuals are fastening upon the workers, deluding them with promises incapable of fulfilment and endeavouring to use cloak of trade unionism as a mark for revolution. Such exploitation is disastrous to the working classes themselves and the Government desire to do everything possible to check it."

If the context of the note had shown definitely that any of the accused in the conspiracy trial are meant by the words "certain individuals" who are aiming at revolution, it would undoubtedly be a writing prejudicing the public against the accused concerned during the pendency of the proceedings and its publication would have amount-

ed to a contempt. But even when the whole note is read, it remains doubtful whether the individuals referred to therein are necessarily the accused in the Meerut trial. They are certainly not mentioned by name at or about the place where this passage occurs. It would not be fair to connect this passage with the passage at another place in this long note to be mentioned hereafter. On the whole, I think that this is an ambiguous expression of opinion which cannot be considered to relate necessarily to any of the accused in the Meerut trial. It is, therefore, unnecessary to take cognizance of it.

The passage marked A-1 is slightly more definite and is in the following words:

"The abstention of the Bombay Textile Labour Union threw into the relief the activities of the Girni Kamgar Union, more particularly as several of the leaders of that union had been arrested in connexion with the Meerut case. While the public itself felt that the communal riots in the early part of the year had been fomented by the activities of those same leaders in stirring up animosity against the Pathans who helped to break the oil workers' strike."

The reference in the note to the leaders of the union who were arrested in connexion with the Meerut case as having fomented the riots was not proper, as the Meerut case is still proceeding. It unquestionably implies the suggestion that these persons have fomented the communal riots. Matter published in a newspaper relating to the past life of an accused or to his antecedent character, particularly if it suggests an offence similar to that which he is charged, is contempt of Court as it must tend to interfere with the fair trial of that charge. Publishing such matters in reference to the parties of a pending prosecution is likely to exercise a prejudice against them in the minds of the public, and it is incumbent on Courts of justice to preserve the minds of the public from being prejudiced against the accused before the trial is concluded. The reproduction of this passage therefore, amounts to a contempt of Court.

But the contempt of Court is not a matter of mere form or technicality but substance, and the jurisdiction to punish for contempt has to be very carefully and cautiously exercised. It is well settled that when the offence is technical or of a slight or trivial nature the

Court may condone it. Even if the observations on the subject matter of a proceeding may be likely to interfere with the course of justice and may technically amount to contempt, the Court may not interfere, if it is not satisfied that such comments were calculated to prejudice the fair trial. In *In re, Clemens*, Jessel, M. R. remarked :

"In my opinion although as I say there is here that which is technically a contempt, and may be such a contempt as to be of a serious nature, I cannot think there is any such interference or any such fear of any such interference with the due conduct of this action, or any such prejudice to the defendant who is applying here as to justify the Court in interfering by this summary and arbitrary process: *In re, New Gold Exploration Co.* (1)."

There is no affidavit in support of the application, but as I do not propose to issue any notice to show cause, I do not think it necessary to call for affidavits. The proprietors might or might not have been actually aware of the publication of the note, but the Editor and the Printer and Publisher must be presumed to have knowledge of it. The note, however, is not any editorial comment, but is apparently a faithful and bona fide reproduction of a communication issued by the Government of Bombay. There is no reason to imagine that in reproducing it the Editor and the Printer and Publisher of the Times of India had themselves any intention of prejudicing the trial. Such communications are usually printed and published in the ordinary course of business. There cannot be any reasonable apprehension that the Sessions Judge in trying the case or the assessors would be in any way prejudiced by what the Government of Bombay has thought or what the Times of India has published. Nor is there any reasonable apprehension that witnesses who have to depose as to facts would be influenced by the opinions held by others. It is not suggested in the petition that the Editor and the Printer and Publisher of the Times of India themselves were actuated by any malicious motives against the accused in reproducing it.

Having regard to all these circumstances, I do not think that this is a fit case in which notice to show cause should be issued; but at the same time it is necessary that the Editor and the

Printer and Publisher should be warned so as not to comment in future on the proceedings of the criminal trial or the antecedent history or character of the accused in any way likely to prejudice the minds of the public in favour of or against the prosecution or any of the accused.

In case either the editor or the printer and publisher named in the application desire to dispute their connexion with the said paper or challenge my conclusion, it would be open to them to apply for a re-hearing, as I am disposing of this matter only *ex parte*.

I accordingly order that only the warning referred to above should be sent to them by the Registrar.

V.B./R.K.

Order accordingly.

1930 Cr. Cases 705

(Rangoon)

CARR AND BROWN, JJ.

Jas Bahadur Thapa—Accused — Appellant.

v.

Emperor—Opposite Party.

Criminal Appeals No. 1374 and 1375 of 1929, Decided on 27th November 1929.

Evidence Act, S. 25—Police Officer acting also as Magistrate — Confession to him is illegal.

An Assistant Superintendent having all the powers of a District Superintendent of Police cannot cease to be a police officer simply because he is also a Magistrate and is acting in that capacity and therefore confession made to him is inadmissible in evidence: 7 *Bur. L. R.* 100 and 1 *Cal. 207, Rel. on.* [P 707 C-1]

Bomanji—for Appellant.

Tun Byu—for the Crown.

Judgment.—The two appellants, *Jas Bahadur Thapa* and *Jasimaya*, have been sentenced to death for the murder of one *Surjiman Lama*. The evidence against the appellants consisted in part of direct evidence and in part of a retracted confession of the appellant *Jas Bahadur Thapa*. This confession was admitted apparently without question in the Sessions Court but it is now urged that it was inadmissible. The confession was made to *U Tun Pe*, who is described in the record as the Superintendent to the *Pakokku Hill Tracts*. It appears from the Civil List *U Tun Pe's* correct designation is Assistant Superintendent, that he exercises the powers of Additional District Magistrate and that he is also an Assistant Commandant of Military

(1) [1901] 1 Ch. 880=70 L. J. Ch. 355=8 Manson 296=17 T. L. R. 312.

Police. The contention is that at the time of the recording of the confession U Tun Pe was a police officer and that the confession was therefore inadmissible under the provisions of S. 25, Evidence Act. In the committal proceedings U Tun Pe himself stated that he was District Superintendent of the Pakokku Hill Tracts Police. No evidence on this point was taken in the Sessions Court, but in a Police Department Notification No. 196, dated 22nd October 1912, appearing at Part 1 of the Burma Gazette at p. 756 for the year 1912 the Assistant Commandant of the Military Police in the Pakokku Hill Tracts was empowered with all the powers of a District Superintendent of Police under the Police Act, 1861. We have not been able to find any precise definition of the words "police officer." In the case of *The Queen v. Hurribole Chunder Ghose* (1), a confession was made to a Deputy Commissioner of Police who was also a Magistrate and Justice of the Peace and who took the confession in his magisterial capacity. It was argued in that case that the term "police officer" did not include a Deputy Commissioner of Police, but this objection was overruled. On p. 215 of the judgment Garth, C. J., remarks :

"in construing S. 25, Evidence Act of 1872, I consider that the term 'police officer' should be read not in any strict technical sense, but according to its more comprehensive and popular meaning. In common parlance and amongst the generality of people, the Commissioner and Deputy Commissioner of Police are understood to be officers of police, or in other words 'police officers,' quite as much as the more ordinary members of the force; and, although in the case of a gentleman in Mr. Lambert's position, there would not be, of course, the same danger of a confession being extorted from a prisoner by any undue means, there is no doubt that Mr. Lambert's official character, and the very place where he sits as Deputy Commissioner, is not without its terrors in the eyes of an accused person; and I think it better in construing a section such as S. 25, which was intended as a wholesome protection to the accused, to construe it in its widest and most popular signification."

It was held that, although the officer recording the confession in that case was also a Magistrate, nevertheless a confession made to him was inadmissible. No other official report of any case directly bearing on this point has been cited to us. According to the unofficial report, in the case of *Nwe Ka & 2*

v. Emperor (2), the question whether a confession made to a Magistrate who was also a police officer was admissible in evidence was considered, but no definite decision on that point was arrived at. It would not seem to have been disputed in that case that the District Superintendent of Police was a police officer within the meaning of S. 25. That the term "police officer" is not ordinarily confined only to subordinate officers in the police force is clear from the provisions of S. 14 (4), Criminal P. C., which says :

"No power shall be conferred under this section to any police officer below the grade of Assistant District Superintendent."

We do not think it could be disputed that a District Superintendent of Police is ordinarily regarded as a police officer and that a confession made to him in the ordinary way would be barred under the provisions of the Evidence Act. From the Police Department Notification we have referred to it is clear that U Tun Pe had all the powers of a District Superintendent of Police and he must, therefore, be held to have been a police officer at the time he recorded the confession. That being so we are of opinion that the objection raised in this case by the appellants must be upheld. S. 25 is very explicit in its terms and lays down definitely that no confession made to a police officer shall be proved as against a person accused of any offence. In the case of prohibition against admission of a confession made while in custody of a police officer under S. 26 there is a special exception if that confession is made in the immediate presence of a Magistrate; but there is no such exception in the provisions of S. 25. In the case of *The Queen v. Hurribole Chunder Ghose* (1), which we have already referred to, Pontifex, J., remarks at p. 218 of the judgment :

"There are cases in which a person holding high judicial office has control over and is the nominal head of the police in his district" and he indicates that in such a case he would hold that a confession made to such an officer could be admitted. But a District Superintendent of Police is clearly more than a nominal head of the Police in the district. He is the actual head of the Police and he cannot cease to be a police officer simply because he is also a Magistrate and is acting in that

(1) [1876] 1 Cal. 207.

(2) 7 Bur. L.R. 100.

capacity. We are confirmed in this view by the provisions of S. 164, Criminal P. C., which lays down that :

"Any Presidency Magistrate may if he is not a police officer record any statement or confession made to him."

The section, therefore, clearly contemplates the possibility of an officer holding the dual position of police officer and Magistrate, and the powers of recording confessions are in no case given to such officer. We are of opinion, therefore, that the confession in this case was made to a police officer within the meaning of S. 25, Evidence Act, and that it was therefore inadmissible in evidence. (Here their Lordships discussed the evidence of two boys and concluded as follows). The result is that we allow these appeals, set aside the convictions of the two appellants and direct that they be acquitted and released so far as this case is concerned.

P.N./R.K. * *Conviction set aside.*

* 1930 Cr. Cases 707

(Calcutta)

C. C. GHOSE AND GUHA, JJ.

Kaseruddin Mahaldar and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 858 of 1929, Decided on 2nd April 1930.

* Criminal P. C. S. 300—Jury retiring to consider verdict—All jurors must be in retiring room together during whole time

When the jurymen are not able to come to a decision or agree upon a verdict before the trial then the law requires that they should retire to consider their verdict and they should all be in their retiring room together during the whole of the time between the moment of their retirement and the moment when their verdict is taken by the presiding Judge: *R. v. O'Connell* 1, Cox. C. O. 410, *Rel. on.*

The jury who were nine in number retired to consider their verdict. At 4 p. m. five of the jurors came out and sat in Court. The remaining four stayed in the retiring room till 4-30 p. m. and then came out and sat in Court, when the presiding Judge proceeded to take the verdict of the jury.

Held: that the accused had not the benefit of the joint consideration and consultation of all the jurymen before the verdict was returned and hence the verdict should be set aside.

(P 708 C 1)

*Mrityunjoy Chatterjee—*for Appellants.

*Prafulla Chakravorthy—*for the Crown.

C. C. Ghose, J.—In this case, the only point that has been argued on behalf of the appellants is that the jury

did not after the delivery of the Judge's charge to the jury, sit together in their retiring room during the whole of the time taken for their deliberations and that, therefore, the accused have been deprived of the benefit of the joint deliberation of the jury before their verdict was taken. Now, the undisputed facts are as follows: The learned Judge concluded his charge to the jury at about 3-30 p. m. on 16th September 1929. The jury who were nine in number then retired to consider their verdict. At about 4 p. m., five of the jurors came out and sat in Court. The rest of the jury i. e., the remaining four jurors stayed in the retiring room till 4-30 p. m. and then came out and sat in Court. The learned Judge then proceeded to take the verdict of the jury. The case was under Ss. 302, 302/149 and 120-B, I. P. C. What happened after the jury had re-assembled together appears from the following :

"Verdict of the jury"

"Q.—Are you unanimous?"

"A.—No."

"Q.—What is the majority verdict? Eight of us find all the accused guilty under S. 302, I. P. C., second part read with S. 149, I. P. C."

"We are all unanimous that the accused are not guilty under S. 120-B, I. P. C., and that they are not guilty under Ss. 302 and 302/149, I. P. C."

(Sd.) K. K. Dutta,
Sessions Judge,
16-9-29"

The learned Judge convicted all the accused, who were 15 in number under Ss. 304, I. P. C., part. 2, read with S. 149, I. P. C., and sentenced the accused other than three to undergo rigorous imprisonment for three years and as regards three of the accused to undergo rigorous imprisonment for one year. Mr. Chatterjee argues that the appellants were entitled to have the benefit of the joint consideration and consultation of all the jurymen before the verdict was returned and that in the events that happened his clients have not had that benefit. He argues further that if what happened in Court is allowed the *raison d'être* of a trial by jury will have disappeared.

The learned advocate, who appears for the Crown, does not challenge any of the facts set out above. Indeed, they cannot be challenged because it appears that the accused put in a petition before the learned Sessions Judge then

and there drawing attention to what had happened. In these circumstances, we have had to consider whether the verdict of the jury can be allowed to stand. It is elementary that after the conclusion of a trial the jury are not allowed to separate until they have considered and returned their verdict. The trial was by a jury composed of nine persons and unless and until it is shown that all the jurors have taken part throughout in deliberating upon what their verdict should be the assent of all the jurors to a verdict pronounced by the foreman cannot be conclusively presumed. In this case, it may be said that the verdict was delivered by the foreman in the presence and hearing of all the jurors but that is not enough. If the jurymen were not able to come to a decision or agree upon a verdict before retiring then the law requires that they should retire to consider their verdict and it follows that they should all be in their retiring room together during the whole of the time between the moment of their retirement and the moment when their verdict is taken by the learned presiding Judge. In England it has been held from very ancient times that the jury, when once enclosed for deliberation cannot separate without the special permission of the Court: see in this connexion Archbold's Criminal Pleadings Edn. 26, v. 210 and the case of *R. v. O'Connell* (1). It is, quite true that in England it used to be the rule that the jury were not even allowed to go to their homes until the verdict was delivered if the deliberation should have extended over two days. The law has been amended in this particular in England. But it has never been held that during the process of their deliberation they can go about in any manner they like. It is obvious that the rule against separation of the jury has a great deal of common sense in it and, in our opinion it should be strictly adhered to. In this view of the matter, much as we regret the result the verdict of the jury and with it the conviction and sentence must be set aside and the matter must go back for retrial according to law.

Guha, J.—I agree.

R.K.

* Conviction set aside.

(1) 1 Cox. C. C. 410.

1930 Cr. Cases 708

(Lahore)

BHIDE, J.

Mauj Ali and another—Sureties—Petitioners,

v.

Emperor—Opposite Party.

* Criminal Revn. Petn. No. 147 of 1930, Decided on 28th March 1930, against order of Sess. Judge, Shahpur, D/- 11th January 1930.

Criminal P. C., S. 514—Bail bond for appearance of accused person forfeited—Sureties alleging that they were not allowed to control movement of accused person should be given opportunity of proving their allegation it being mitigating circumstance.

Where the bail bond given for the appearance of a person accused who was to remain in hospital is forfeited and the sureties allege that they were not allowed to exercise any control over the movements of the accused person, there being a police guard at the hospital, the sureties should be given opportunity to prove their allegations for if they were really interfered in their control over the movements of the accused person, the circumstance might at any rate, be taken into account in mitigation of the penalty.

[P 708 O 2]

Ghulam Mohiuddin—for Petitioners.

S. L. Puri—for the Crown.

Judgment.—This is a petition for revision of an order forfeiting a bail bond of Rs. 5,000 which had been given for the appearance of a person who was accused of murder. The bail had been granted subject to the condition that the accused person, who was ill, should remain in the hospital. It was alleged by the sureties that the police guard had been placed at the hospital and the sureties were not allowed to exercise any control over the movements of the accused. The learned Sessions Judge held that the sureties should have brought this to the notice of the Court and as they did not do so the bail bond was forfeited. In my opinion the sureties should have been given an opportunity to prove their allegations for if they were really interfered with in their control over the movements of the accused person, the circumstance might, at any rate, be taken into account in mitigation of the penalty.

I, therefore, accept this petition and setting aside the order of the learned Sessions Judge remand the case for re-decision in the light of the above remarks.

* R.M./B.K.

Petition allowed.

1930 Cr. Cases 709

(Patna)

MACPHERSON, J.

Ramyad Singh and others—Petitioners.
v.*Emperor*—Opposite Party.

Criminal Misc. Cases Nos. 6 to 9 of 1930, Decided on 7th February 1930, for transfer of appeal pending in the Court of Sess. Judge, Gaya, to some other Court.

Criminal P. C., S. 526—Mere fact that in another case Judge came to particular conclusion on certain evidence is not sufficient ground for transfer.

While it is sound doctrine that a reasonable apprehension in the mind of an accused that he will not have a fair trial is a sufficient ground for transfer, yet in applying the doctrine regard must be had to the circumstances in each case, and the mere fact that in another case, on other evidence the Judge has come to a particular conclusion is not in itself a sufficient ground for transfer : 81 Cal. 715 ; 36 Cal. 903, *Foll.* [P 710 C 1]

W. H. Akbari and K. P. Sukul—for Petitioners.

Shiveshwar Dayal—for the Crown.

Macpherson, J.—These four applications in revision are analogous and have been heard together.

The petitioners have been convicted under S. 193, I. P. C., in the following circumstances. There was a case of rioting in 1927 in which Audh Singh said to be the gomasta of Bandhuganj was an absconder. On his arrest he was tried at a supplementary trial in April 1929. The witnesses to the occurrence stated that Audh Singh, gomasta of Bandhuganj, had given orders to assault, but that he was not the Audh Singh in dock, who, therefore, had to be discharged as no one identified him. The witnesses were placed on trial for perjury and were tried before three different Magistrates. One Magistrate acquitted the accused on the cases before him, another convicted the several accused whom he tried and on appeal the convictions were upheld by the Sessions Judge of Gaya, while the present petitioners came before a third Magistrate, and they having been convicted, have preferred appeals which are at present pending before the same Sessions Judge. The petitioners now apply under S. 526 (1), Criminal P. C., for transfer of their appeals from the file of the Sessions Judge of Gaya to some other Sessions Court for trial.

1930 Cr. C. 89b/4, 90 & 91a/4

It is explicitly not contended that a fair and impartial trial cannot be had before the Sessions Judge. What is expressly relied on is not Cl. (a), S. 526 (1) but Cl. (e) on the plea that an order of transfer "is expedient for the ends of justice." It is, however, pointed out that the witnesses against petitioners are much if not quite the same as in the cases in which he has already upheld convictions in appeal, and it is urged that in view of the conclusions already arrived at by him in appeal on the evidence of the witnesses, the present petitioners are under a reasonable apprehension that they may not have a fair trial. This plea really falls under Cl. (a) and this is manifestly inconsistent with the suggestion that the application is made under Cl. (e) only. Now the judgments in appeal were delivered on 12th December 1929 and the petitioners were convicted on 13th January 1930. It therefore became important to consider whether the Magistrate, who convicted the petitioners, had in his mind the appellate judgment delivered nearly a month before.

A perusal of both judgments, however, fails to elicit any indications that the Magistrate in any measure went outside his own record or had in contemplation either the appellate judgment in the second batch or the judgment of acquittal in the first batch. Then it is difficult to see how Cl. (e) can apply. It may be taken for granted that the learned Sessions Judge does not feel himself in any difficulty; otherwise he would have moved this Court to transfer the appeals from his file. That is one ground for considering that Cl. (e) does not apply. The precedents are also against the contentions of Mr. Akbari. It was held in *Joharuddin Sarkar v. Emperor* (1) that the fact that the presiding officer had tried and convicted one set of accused did not disqualify him from conducting the supplementary trial when another batch of accused was put on trial on identically the same set of circumstances. It is urged by Mr. Akbari that in a supplementary trial other matters have to be considered besides those which arose for decision in the original trial. But the chief new point would be whether the individual accused were participants in

(1) [1904] 81 Cal. 715=8 C. W. N. 910.

the riot assuming that the riot was proved in the supplementary trial. In the appeals of each of the petitioners the new question will similarly be assuming that it is proved that the Audh Singh in the dock was the Audh Singh who had given orders to assault whether the petitioner had the knowledge and intention requisite to bring him within S. 193. There does not appear to be any difference in principle between the two cases.

It was held in *Rajani Kanta Dutta v. Emperor* (2) that while it is sound doctrine that a reasonable apprehension in the mind of an accused that he will not have a fair trial is a sufficient ground for transfer, yet in applying the doctrine regard must be had to the circumstances in each case, and the mere fact that in another case, on other evidence, the Judge has come to a particular conclusion is not in itself a sufficient ground for transfer. There the Sessions Judge had actually dealt in his judgment in the original trial specifically with the offence in respect of which the petitioner before the Court was charged at the supplementary trial and had expressed an opinion unfavourable to the petitioner. On the other hand, so far as the petitioners are concerned, no opinion whatever has been expressed by the Sessions Judge in regard to any of them. In the earlier appeals he confined himself strictly to the record in respect of the particular appellant before him. The case of the petitioners does not come within the provisions of S. 526 (1). I cannot better set out the position than in the words of the learned Judges in the case last cited :

"We feel confident that the learned Sessions Judge, in dealing with the case now under consideration, will not allow his mind to be in any way influenced by any evidence that was adduced before him in the previous case or any opinion which he then formed on that evidence, and that he will deal with the case without any kind of bias by reason of his decision in the former case."

There being no reason for the transfer of the appeals of the petitioners, these Rules are discharged.

V.B./R.K. Rule discharged.

* 1930 Cr. Cases 710 (Patna)

SCROOPE AND DHAVLE, JJ.
Nanhu Mahton—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 43 of 1930 and Death Ref. No. 7 of 1930, Decided on 10th April 1930, from decision of Sess. Judge, Manbhum (Sambhalpore), D/- 6th February 1930.

(a) Criminal P. C., S. 288—Deposition before committing Magistrate contradicting evidence before Sessions—Former statement cannot be put in under S. 288 without putting to witness—Evidence Act, S. 145.

No doubt when depositions before the committing Magistrate are admitted in the Sessions Court under S. 288 they are on the same footing with any other evidence in the case. But S. 145, Evidence Act governs the position in so far as these statements are used for contradicting the witness either mainly or incidentally. Depositions, therefore, taken in the committing Magistrate's Court which contradict the evidence given in the Sessions Court cannot, however, be put in without putting them to the witness: *A. I., R. 1922 Pat. 40; 7 All. 862 Appr.; 28 All. 683, Expl. and not Appl.; 4 C. W. N. 49, Diss. from. Other case law Referred.* [P 711 C 1, P 716 C 2]

(b) Criminal Trial—Witnesses implicating accused only when faced with necessity of exculpating themselves—Evidence is open to suspicion.

Where the witnesses in a murder case implicate the accused only when they are faced with the necessity of exculpating themselves their evidence is open to grave suspicion and no sufficient weight should be attached to such evidence. [P 712 C 2]

J. Chatterji—for Appellant.

Sultan Ahmad—for the Crown.

Scroope, J.—This is a reference under S. 374, Criminal P. C., in respect of one Nanhu Mahton who has been convicted under S. 302, I. P. C., by the Sessions Judge of Manbhum-Sambalpur in disagreement with the assessors for the murder of one Khudu Mahaton of village Merenda in Jhalda, P. S.

The prosecution case is that on the night of 26th October last Khudu Mahato with his relatives Balaram Mahato, Sonaram Mahato, Jugal Mahato and Baneshwar Mahato spent the night in the Kishumghutu jungle in order to watch their lac trees and that while sleeping side by side that night under a palas tree Khudu's companions were awakened by his groans and actually saw the accused Nanhu withdrawing his arm from Khudu's head Khudu expired almost instantaneously and Nanhu ran off. This is the story told by

these four witnesses and it has been accepted by the learned Sessions Judge. It is necessary to state, however, that Jugul (P. W. 2) in the Sessions Court whilst corroborating his companions on other points states that he was not able to recognise the assailant whereas before the committing Magistrate he said definitely that Nanhu was the assailant. Somewhat similar is the evidence of another witness Kinu Mahato (P. W. 13) in the Sessions Court. He stated that he saw a man like the accused proceeding eastward with a weapon in his hand (that would be before the murder) whereas before the committing Magistrate he definitely identified this man as Nanhu. The learned Sessions Judge relied on the depositions of these two witnesses as given in the first Court in preference to the evidence in the Sessions Court, although the former were not put to the witnesses in the Sessions Court and the learned advocate for the appellant urges that these first statements should not have been admitted in evidence under S. 288, Criminal P. C., as they were not put to the witnesses in the Sessions Court. He relies on the following dictum in *Lachmi Lal v. Emperor* (1).

"To put in such evidence is permissible but it has been repeatedly laid down and it is now settled law that such statements should not be put in without the attention of the witness being drawn to the portion of the statement which it is desired to use."

Of much the same effect are the decisions in *Queen Empress v. Dan Sahai* (2) *Bajrangi Lal v. The Empress* (3) and *Emperor v. Zawar Rahman* (4). The learned Government Advocate, however disputes the correctness of the view taken in *Lachman Lal v. Emperor* (1) and argues that *Queen Empress v. Dan Sahai* (2) on which it is presumably based has been subsequently overruled by *Emperor v. Dwarka Kurmi* (5) and a series of cases in which it has been held that statements admitted under S. 288, Criminal P. C., are on the same footing as evidence taken in the actual Sessions trial: for instance, *Queen Empress v. Doraswami Ayyar* (6), *Em-*

peror v. Maruti Joti Shindi B G. P (7) *Somadu v. Emperor* (8) and *Abdul ani. v. Emperor* (9). It must, however, be borne in mind that the question here is whether depositions taken in the committing Magistrate's Court which contradict the evidence given in the Sessions Court can be put in under S. 288, Criminal P. C., without putting them to the witnesses, and none of the cases cited by the learned Government Advocate deal with that point specifically except perhaps the case of *Emperor v. Dwarka Kurmi* (5). In that case the Lordships of the Allahabad High Court dissented from the following general dictum of Straight, J. :

"Section 288, Criminal P. C. was never intended to be used so as to enable a Court trying a cause to take a witness's deposition bodily from the committing Magistrate's record and to treat it as evidence before the Court itself."

Straight, J., however, qualified this dictum as follows at any rate :

"At any rate a Judge is bound to put to the witnesses whom he proposes to contradict by their statements made before the committing Magistrate the whole or such portions of their depositions as he intends to rely upon in his decisions so as to afford them an opportunity of explaining their meaning or denying that they had made any such statements and so forth."

and Banerji, J., who was one of the Judges in that case while dissenting from the general proposition refers with approval to the qualifying words of Straight, J. Aikman, J., who was the other Judge in that case does not deal with the question as to how far admissibility is affected by failure to put the depositions to the witnesses. He discussed only the general proposition and held that once these statements are admitted they are on the same footing with all other evidence in the case. The whole point here is whether such a statement can be admitted without being put to the witness. There is no doubt, having regard to the state of the authorities that once they are admitted they are on the same footing with any other evidence in the case for the language of S. 288, Criminal P. C. is quite clear now. (Since the amendment of 1923) but S. 145, Evidence Act must govern the position in so far as these statements

(1) A. I. R. 1922 Pat. 40.

(2) [1885] 7 All. 862.

(3) [1900] 4 C. W. N. 49.

(4) [1904] 31 Cal. 142 (F.B.).

(5) [1906] 23 All. 688=3 A. L. J. 852=(1906) A. W. N. 187.

(6) [1901] 24 Mad. 444.

(7) A. I. R. 1922 Bom. 108=46 Bom. 97.

(8) A. I. R. 1924 Mad. 379=47 Mad. 232.

(9) A. I. R. 1926 Cal. 255=53 Cal. 181.

are used for contradicting the witnesses. The learned Government Advocate, however argues that he does not wish to contradict the depositions of these witnesses given in the Sessions Court by means of the depositions in the first Court; he wants the latter to be taken simply as substantive evidence in the case along with the other evidence but this in my opinion is begging the question. I do not see how the prosecution can place on the record two contradictory statements from the same witness and rely on one as substantive evidence without contradicting the other and I do not see that the purpose for which the original statement in the committing Court is brought on the record makes any difference if that is the incidental result. In other words my opinion is that S. 145, Evidence Act, operates even if contradiction is not the main purpose of bringing the first deposition on the record but is only incidental thereto. On the whole, therefore, I am not prepared to say that the decision relied by the learned advocate for the appellant *Lachman Lall v. Emperor* (1) is bad law or *Queen Empress v. Dan Sahai* (2) either in so far as it lays down that depositions given in the lower Court which contradict the statements in the Sessions Court should be put to the witnesses before they are admitted under S. 288: see also Woodroffe in his *Criminal Procedure Code*, p. 334:

"The Judge is bound to put to the witnesses whom he proposes to contradict by their former statements before the committing Magistrate the whole or such portions of their depositions as he intends to rely upon in his decisions, so as to afford them an opportunity of explaining their meaning or denying that they had made any such statements and so forth."

I have dealt with this point at some length, because Sir Sultan Ahmad pressed his point of view against the decision in *Lachman Lall v. Emperor* (1) with considerable force and has asked us for a considered ruling on this question. The question is really, however, academic, here, because assuming that these earlier statements are admissible they do not strengthen the rest of the evidence on the record which to my mind is thoroughly unreliable throughout. Though these four witnesses would have us believe that they saw the accused Nanhu withdrawing his

axe from the head of Khudu yet none of them mentioned the name of the assailant to the villagers on the morning of the occurrence. The murdered man's mother Mundria Mahatani states that she heard about her son's death on the following morning from Baneshwar. Baneshwar did not then name the accused, his explanation was that he apprehended that he might be implicated. When the writer head-constable visited the village on the afternoon of the 27th, he being, in charge of the thana as the Sub-Inspector was away, he saw these witnesses but none of them gave the name of the assailant. The witnesses say that they were afraid to do so. This could only have been either fear of the accused or fear of being implicated. There was no reason to fear the accused, the police had taken the matter up and these four witnesses could not have been so terror-stricken. As to fear of being implicated I do not see how a disclosure of the name of Nanhu could have made the case any blacker against the witnesses; in fact rather the contrary suspicion was very black against them already, because apparently they did not deny to the writer head-constable that they had been sleeping with the deceased man on the night of the murder in the Kisumghutu jungle. They were so much under suspicion that on the arrival of the Sub-Inspector in the village on the 28th he searched their houses and discovered on the person of Baburam a gilaf or a quilt and in the house of Lakshman Manato, father of the accused, a kantha on both of which there were red stains. It was then that the witnesses spoke out. The learned Sessions Judge puts it as follows:

"The recovery of the said two articles evidently led the above four witnesses to believe that the Sub-Inspector of Police succeeded in finding out the real truth and it seems to me that though in their anxiety to screen the accused they had so long minced matters, they at last under the circumstances stated above thought it prudential for their own safety to give out the real truth and that accordingly they admitted the same to the investigating police officer."

It does not affect the value of their evidence that the stains subsequently found were not those of human blood. The point is that the witnesses only implicated the accused when they were faced with the necessity of exculpating

themselves, and therefore their evidence is open to grave suspicion. The learned Sessions Judge has not attached at all sufficient weight to this fact. The excuse of fear is the stock one put forward for failure to speak out the truth at once in this type of case, but here it is more suspicious than ever owing to the fact that the witnesses were under the gravest necessity of fixing the guilt on to somebody in order to save their own necks.

Their evidence also is inherently improbable. The medical evidence shows that the deceased had one wound, a gaping incised wound $8\frac{1}{2}$ " x $1\frac{3}{16}$ " on the left side of the head cutting completely through the skull and the brain substance. If the witnesses are to be believed Nanhu must have crept up stealthily in the night when the watchers were sleeping and must have then inflicted this fatal wound. The doctor was not examined on the point but it seems to me most unlikely that the accused could have groaned after such a wound and it could have been delivered and the weapon withdrawn after delivery in a fraction of time. The witnesses were all sleeping yet. Nanhu was long enough there to allow them to recognize him. It was in the middle of the night, according to the calendar the moon would not have risen on the night in question until about 1 a. m. The witnesses got over the difficulty of darkness by saying that the moon was then in the east; they were all sleeping under a large palas tree. I do not believe that even assuming the truth of the basis of their story that Khudu was murdered while sleeping with the witnesses there was any recognition at all of the assailant. It is perfectly obvious that the circumstances were all against recognition as the light of the moon would have been of very little assistance to bring about the complete recognition by a man just awakening from sleep. There is another stock story introduced into the case, namely, the discovery of the tabla. According to the Sub-Inspector Golam Mustafa he examined the accused Nanhu Mahaton after 4 p. m. whereupon he led him and about 25 or 30 villagers to a bari land just to the north of the house of one Bidhu Mahatani and dug up from the depth of 9 or 10 inches a tabla or

small axe. Assuming that the accused did produce the tabla in the manner described by the Sub-Inspector I do not think much weight attaches to it. It is quite probable that as Baburam was implicating Nanhu, Nanhu should have tried to implicate Baburam by burying a tabla and then producing it for the police and its discovery is just as consistent with incriminating evidence against Baburam as it is with incriminating evidence against Nanhu. Bidhu Mahatani, to the immediate north of whose house lies the bari land from which the tabla was produced, states that on the day after the murder she saw the accused Nanhu near her bari land carrying an axe which was partially concealed by some thorny plants. The suggestion is that this must have been when he was on his way to bury the axe; this is an incredible story. It is contrary to common sense that the man who commits a murder would try to dispose of the weapon in this fashion in broad day light.

This witness is the woman in the case, the allegation being that Nanhu is carrying on an intrigue with her which had annoyed some of the Mahatos, that there was a panchayat at the instance of Khudu, the deceased, that both Nanhu and Bidhu were fined for misbehaviour, and that as a result of the grudge he bore on this account, Nanhu murdered Khudu. The woman is obviously afraid of being implicated in the murder and hence she could easily be got to fill in any necessary details that will serve to clinch the case finally against Nanhu. That aspect of her evidence has been overlooked by the learned Sessions Judge when he regards her as proving beyond any reasonable doubt that the accused had hidden the tabla after the murder. It is noticeable that the accused was not under arrest when he produced the tabla and was only arrested later in the day. This makes me think that the accused may have been tricked into disclosing a tabla under the impression that it would be used against the other Mahato notably Baburam, instead of against himself. Baburam states that it was only after the production of the tabla that he told the Sub-Inspector that he had seen the accused pulling out the tabla from the head of Khudu and

running away then towards the nala. Sonaram contradicts him on that point. The latter also states in cross-examination that the Sub-Inspector had threatened to send up Baburam, and Jugal states that the daroga also threatened to challan him. Be that as it may, it is quite clear that the eye-witnesses spoke under extreme pressure and to save themselves. Kinu Mahato another witness relied on by the learned Sessions Judge, so far as his statement in the lower Court is concerned, is also trying to prove the case to the hilt when he states that at about midnight on Saturday he had seen the accused passing through the jungle with a tabla in his hand. He was one of the villagers who was under suspicion in respect of this murder. The learned Sessions Judge was also much impressed by the fact that human hair was detected on the tabla by the Chemical Examiner. The Sub-Inspector of Police and two Poddar witnesses examined the weapon with the help of a magnifying glass after its discovery and they say that they noticed some hair adhering thereto.

It passes my comprehension how any hair could have adhered to the axe after it had been buried and then dug up, or, at any rate be visible by the aid of any microscope likely to be available to a Sub-Inspector of Police. Obviously any human hair that may possibly have adhered to the weapon would have been completely obliterated by the earth that became attached to the tabla consequent upon its being buried. Frankly I do not believe the evidence on this point; if in reality, human hair was found on the tabla it was put there by somebody in order to create evidence. A tabla is a most ordinary weapon for the Manbhum peasant and I do not believe Raghu Mahato either when he states that he saw the accused purchase it about eight months prior to this occurrence. The point that the wound 8½ inches long tallied with the circumference of the blade of the tabla also 8½ inches long weighed with the learned Sessions Judge, as if a wound inflicted by a smart blow of a hatchet would exactly coincide in length with the size of the hatchet. Quite the contrary is usually the case; a splitting wound of this nature would ordinarily exceed it

in length. This ends practically all the evidence and it does not convince me in the slightest degree; most of it is childishly unconvincing; the Mahato witnesses are deposing with a reckless disregard of truth in order to save themselves; there should have been no conviction in this case. I would therefore set aside the conviction and sentence of death passed by the learned Sessions Judge and acquit the appellant. He should be released at once.

Dhavlé, J.—I agree. The Government Advocate has frankly conceded that the case must fail if the four eye-witnesses are disbelieved. Considering the conditions of time, I doubt very much whether they could really have seen the offender at all; and their repeated failure to name him, which has not been satisfactorily explained, does not make it at all easy to believe them, to say nothing of the fact that they seem to have named the appellant with the full consciousness that they had to save themselves. The production of the tabla is also extremely unconvincing as an incriminating circumstance against the appellant. It is, therefore, impossible on the evidence to uphold the conviction, quite apart from the way in which the depositions of Jugal and Kinu before the committing Magistrate were used by the learned Sessions Judge under S. 288, Criminal P. C. In this connexion there has been much discussion before us regarding the soundness of the dictum in *Lachmi Lall v. Emperor* (1), that though it is permissible under S. 288 to put in such depositions:

"it has been repeatedly laid down and it is now settled law that such statements should not be put in without the attention of the witness being drawn to the portion of the statement which it is desired to use."

The Government Advocate has strenuously contended that the law does not require this to be done. The learned advocate for the appellant has referred the dictum to the authority of *Empress v. Dan Sahai* (2) and *Bajrangi Lall v. Empress* (3). It does not seem to me that the decision in *Bajrangi Lall v. Empress* (3) has really any bearing on the precise point in question. In *Dan Sahai's* case (2), however, Straight, J., expressed himself about S. 288, Criminal P. C., in these words:

"That section was never intended to be used so as to enable a Court trying a case to take a witness's deposition bodily from the Magistrate's record, as the Judge has done here, and to treat it as evidence before itself; and I entirely concur in the remarks made on this head by Phear, J., in *Queen v. Amanulla* (10). At any rate the Judge was bound to put to the witnesses he proposed to contradict by their former statements the whole or such portions as their depositions as he intended to rely upon in his decision, so as to afford them an opportunity of explaining their meaning, or denying that they had made any such statements, and so forth. The course adopted by the Judge was contrary to practice, and inconsistent with all the rules regulating the admissibility of evidence. . . ."

The first part of these observations, which relates to the admission of whole depositions as distinguished from particular statements contained in them, is based on *Amanulla's* case (10) which was decided under the Criminal Procedure Code of 1872. S. 249 of this Code, which corresponds to S. 288 of the present Code, ran in these words:

"When a witness is produced before the Court of Session or High Court, the evidence given by him before the committing Magistrate may be referred to by the Court if it was duly taken in the presence of the accused person, and a Court may, if it thinks fit, ground its judgment thereon, although the witnesses may at the trial make statements inconsistent therewith."

Shortly after the decision in *Amanulla's* case (10) the section was amended by Act 11 of 1874 to run as follows:

"When a witness is produced before the Court of Session . . . the evidence given by him before the committing Magistrate may, in the discretion of the presiding Judge, be treated as evidence in the case, if it was duly taken in the presence of the accused person."

This, unlike the original section, clearly made the previous deposition "evidence in the case," and S. 288 of the Code of 1882, which was in the same terms as the present section without the amendments introduced by the Act of 1923, made no change in the position. *Dan Sahai's* case (2) was decided under the Code of 1882, but Straight, J., in following the observations in *Amanulla's* case (10), does not seem to have noticed the change in the law. *Dan Sahai's* case (2) was considered by the Allahabad High Court in *Emperor v. Dwarka Kurmi* (5), when Banerji and Aikman, JJ., held that under S. 288, Criminal P. C., depositions before the committing Magistrate may be evidence in the Sessions trial; and since then it has no longer been held in any High

Court that the section was meant to authorise the Court to take only particular statements and not whole depositions, as evidence in the Sessions trial.

The second part of Straight, J.'s, observations refers to the necessity or otherwise of affording the witnesses an opportunity of explaining their meaning, etc. This must be considered not in the light of the Criminal Procedure Code but of the principles of the law of evidence. In *Reg. v. Arjun Megha* (11), which was decided shortly after the amendments made in the Criminal Procedure Code by Act 11 of 1874. S. 249 was explained to mean that the Sessions Judge had discretion to consider the depositions given before the committing Magistrate in the preliminary inquiry as

"evidence for the purposes of the trial in the Court of Sessions," and that the exercise of the discretion is open to review in appeal:

"If he (the Sessions Judge) finds that the statement of the witnesses in his own Court differ materially from those previously made by the same witnesses,"

said West, J.:

"It is his duty to examine them as to the discrepancies, and this is more especially his duty when the prisoners are undefended, and contradictory testimony is given by the prosecution. But if he thus examines the witnesses, he ought: (see Taylor on Evidence, ss. 1,300-1301, and Evidence Act, S. 155,) in ordinary cases to make the depositions upon which he has examined them evidence in the case: he is at liberty to do so, and the power should be exercised so as to bring all relevant matter, so far as possible, under consideration in forming a judgment on the case. If the Sessions Judge has omitted to examine witnesses on obvious and important discrepancies in their statements, this Court will in general direct that such an examination be made, and the Sessions Judge having the witnesses before him for such a purpose, will, in most cases, feel it his duty to make the former depositions evidence quantum valent for the purposes of the final adjudication in appeal."

This early interpretation of the section gives one reason why witnesses should be questioned regarding their previous depositions and the depositions then brought on the record of the Sessions trial.

Edge, C. J., ordered a retrial in *Empress v. Jawahar* (12), because the Sessions Judge had:

"taken into consideration as evidence against the accused, statements made by wit-

(11) 11 Bom. H. C. 281.

(12) [1886] A. W. N. 256.

nesses before the committing Magistrate, without giving the accused any previous notice or warning, either by examining the witnesses as to the previous statements or otherwise of his intention to do so."

The learned Chief Justice held that the conductors of the prosecution and the defence ought to have full notice of the admission of evidence under S. 288, and after expressing agreement with every word that Straight, J., had said in *Queen Empress v. Dan Sahai* (2), he observed :

"I go further and say that before the Judge presiding at a criminal trial can use 'as evidence on which' in whole or in part, to form his judgment, the deposition of a witness taken before the committing Magistrate, he is bound to let his intention, or the possibility that he may do so, be known to the accused and the prosecution, in order to afford the accused and the prosecutor an opportunity for testing such statement by cross-examination, or otherwise dealing with such statement as part of the case which may be taken into consideration by the Judge. Otherwise it seems to me impossible for the prosecution of the defence to deal with the matters which may influence the Judge's mind in coming to a decision."

This shows that before a previous deposition can properly be treated as evidence on which the Sessions Judge may base his judgment, the parties concerned must have an opportunity of testing it by cross-examination, etc.

Depositions in commitment proceedings can now be :

"treated as evidence in the case for all purposes subject to the provisions of the Evidence Act, 1872."

This makes them available for use as substantive evidence (and not merely for contradicting or corroborating the makers under S. 145 or S. 157, Evidence Act), as was indeed held in several cases even before the addition of the words "for all purposes . . . 1872" by the amendment of the section in 1923: vide *Gansa Oraon v. Emperor* (13) and the case referred to in *Emperor v. Jehal Teli* (14). But it is as a rule only when and so far as such depositions are not repeated in the Sessions trial that it becomes particularly necessary to make use of them. Section 145 of the Evidence Act, it is true, requires the attention of the witness to be drawn to his previous deposition only in those cases in which it is intended to use the previous record for the limited purpose of contradicting him; the object of the

cross-examiner is to shake the evidence given by the witness at the trial. Although the putting in of depositions under S. 288 is not confined to this object, it is plainly necessary that the oral evidence given by a witness during the Sessions trial, so far as it conflicts with his previous deposition, should be properly displaced before the Court gives preference to his deposition before the committing Magistrate. Where a witness's evidence at the trial differs from his previous deposition :

"and the contradiction is intended to be used as evidence in the case, it has been held that he must be allowed an opportunity of explaining or reconciling his statement if he can do so, and that if this opportunity is not given to him, the contradictory writing cannot be placed on the record as evidence. It has also been held that the opportunity of tendering an explanation is still more essential when a witness's character and reputation are at stake, and that the Court is precluded both by S. 145, Evidence Act and by general principles from treating his oral testimony as rebutted by statements by him contained in documents in evidence unless such statements were put to him in cross-examination."

See Woodroffe's Law of Evidence Edn. 8, p. 960, and the cases cited in the first two footnotes.

The principle, it seems to me, applies with even greater force where previous depositions, more or less inconsistent with the oral evidence given by the same witness during the trial, are sought to be used as substantive evidence; if the witness were not called to reconcile the contradictions (so far as he could), the record would contain two sets of unrelated statements, and it would be unfair to the witness himself no less than to the parties to accept the previous deposition and so reject the testimony given at the trial. The observations in *Lachmi Lall's* case do not, therefore, seem to me to require reconsideration.

R.K./D.D.

Accused acquitted.

1930 Cr. Cases 716

(Patna)

JAMES, J.

Bechu Mian—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 79 of 1930, Decided on 6th March 1930, from order of Sess. Judge, Muzaffarpur, D/- 5th December 1929.

(a) *Behar and Orissa Excise Act* (2 of 1915), Ss. 47, 70 and 75—Sub-Inspector of

(13) A. I. R. 1928 Pat. 550=2 Pat. 517.

(14) A. I. R. 1925 Pat. 51=3 Pat. 781.

Excise can arrest without warrant person found committing offence under S. 47—S. 78 has no application to such case.

Under S. 70 of the Act the Sub-Inspector of Excise is entitled to arrest without a warrant a person found committing an offence punishable under S. 47 of the Act and S. 78 has no application to such a case. [P 717 C 2]

(b) Penal Code, S. 225—Obstructing Sub-Inspector of Excise from arresting—Offence comes within S. 225.

Threatening a Sub-Inspector of Excise in order to prevent him from making an arrest amounts to offering a resistance and illegal obstruction to lawful apprehension of an offender, but where the obstruction has not been such as to constitute a serious offence the case does not call for heavy punishment. * [P 717 C 2]

Safdar Imam—for Petitioner.

Government Advocate—for the Crown.

Judgment.—A Sub-Inspector of Excise, who detected one Hira Dusadh in the act of committing an offence under S. 47, Bihar and Orissa Excise Act, attempted to arrest him, but he took refuge in the house of Bechu Mian. The Sub-Inspector called upon Bechu Mian to give up the man. Bechu Mian declined to do so; and he prevented the Excise Sub-Inspector from entering the house. Bechu Mian was accordingly prosecuted at the instance of the Sub-Inspector, and he was fined two-hundred rupees under S. 216, I. P. C., on the charge of having harboured Hira Dusadh with the intention of preventing his lawful arrest. On appeal the Sessions Judge of Muzaffarpur affirmed the findings of fact of the Magistrate; but he altered their application, changing the finding that the man was guilty of an offence under S. 225, I. P. C., while he affirmed the sentence imposed by the Magistrate.

Mr. Safdar Imam on behalf of the petitioner argues in the first place that he has been prejudiced by this action of the lower appellate Court, since he was placed on his defence to answer a charge under S. 216 and not to answer a charge under S. 225, I. P. C. of obstructing the arrest of Hira Dusadh. But the charge framed under S. 216 to the effect that Bechu Mian harboured and concealed Hira Dusadh with the intention of preventing his lawful arrest was practically the same as the charge of obstructing the arrest by preventing the Sub-Inspector from entering the house; and I do not consider that it can be held that the accused person has been in any way pre-

judiced by the fact no formal charge under S. 225, I. P. C., was framed in the Court of the trying Magistrate.

Mr. Safdar Imam argues in the second place that the Sub-Inspector had no power to arrest Hira Dusadh. Under S. 70, Excise Act, any officer of the Excise Department may, subject to any restrictions prescribed by the Local Government by rule made under S. 89 arrest without warrant any person found committing an offence punishable under S. 47 of the Act. The only rules placing restrictions on the exercise of powers conferred by S. 70 of the Act are Rr. 65 and 66 of the Government rules, providing that officer below the rank of a Sub-Inspector of the Excise Department may exercise the power of arrest without warrant in open places only. But Mr. Safdar Imam suggests that sub-S. (c), S. 89, in some way relates back to S. 70. The subsection provides that the Local Government may make rules prescribing restrictions in the application to Excise Officers of the provisions of the Criminal Procedure Code relating to power of Police Officers which are referred to in S. 78 (1), Excise Act. Under S. 78 (1) of the Act, an Excise Officer specially empowered may, after recording and writing his reason for suspecting the commission of an offence which he is empowered to investigate, exercise the powers conferred upon a Police Officer in respect of cognizable offences by Ss. 54 and 56, Criminal P. C. But S. 78 has no application in this case, since the Sub-Inspector was not investigating an offence which he had reason to suspect had been committed. He actually detected the offence, which was committed before his eyes; and S. 70, Excise Act, applied, so that he was entitled to arrest Hira Dusadh without warrant. Mr. Safdar Imam argued further that whatever view may be taken of the legality of the action of the Sub-Inspector, the petitioner should not be held to have obstructed the arrest of Hira Dusadh, since he offered no physical resistance to the Sub-Inspector. According to the evidence of the Sub-Inspector the petitioner threatened him in order to prevent him from making the arrest in the house; and this must certainly be treated as offering resistance and illegal obstruction to the lawful apprehension of Hira Dusadh. But the argument that

the sentence is excessive in view of the fact that the Sub-Inspector so meekly respected the threats held out by the petitioners does, in my opinion, deserve some consideration. I consider that in the circumstances the Sub-Inspector ought to have compelled the petitioner to let him into the house; but instead of doing this he went straight to the Magistrate and complained of obstruction and it should be recognized that the obstruction offered was not such as to constitute a serious offence. I consider that in the circumstances a fine of thirty rupees will be sufficient punishment for the petitioner. The finding of the lower appellate Court is affirmed but the sentence is reduced to a fine of thirty rupees. The balance of the fine originally imposed, if paid, will be refunded.

V.B./R.K.

Sentence reduced.

1930 Cr. Cases 718

(Patna)

MACPHERSON, J.

Emperor—Prosecutor.

V.

Lalchand Teli and another—Accused.

Criminal Ref. No. 7 of 1930, Decided on 30th January 1930; made by Sess. Judge, Bhagalpur, D/- 13th January 1930

Criminal P. C., S. 195 (b)—Cognizance of offence under Penal Code, S. 211 committed in or in relation to offence committed in Court without that Court's or superior Court's complaint in writing is illegal.

Section 195 (1) (b) is a bar to cognizance of offence under S. 211 alleged to have been committed in or in relation to a proceeding in a Court except on complaint in writing by that Court or some other Court to which that Court is subordinate and so where there is clearly no such complaint in writing it is not open to a Magistrate to take cognizance under S. 190 (1) (c). [P 718 C2]

L. K. Jha—for the Crown.

Judgment.—This is a reference by the Sessions Judge of Bhagalpur under the provisions of S. 438, Criminal P. C., recommending that the proceedings of the Sub-Divisional Magistrate of Madhipura in respect of Uchit Dusadh Chaukidar and Harikinkar Jha under S. 211 read with S. 114, I. P. C., be set aside on the grounds: first, that he has exceeded his jurisdiction and secondly, that there is very little likelihood of the prosecution undertaken by him terminating in a conviction.

Mahmood Mian was the complainant in a case tried by the Sub-Deputy

Magistrate of Mudhipura. The latter acquitted the accused and forwarded a complaint under S. 476, Criminal P. C., against Mahmood Mian to the Sub-Divisional Magistrate:

"for favour of taking cognizance of the case under S. 182 read with S. 211, I. P. C. and prosecuting the said Mahmood under those sections."

Thereon the Sub-Divisional Magistrate noted that he took cognizance of the case and issued warrants of arrest against Mahmood Mian under S. 211 and against the petitioners under that section read with S. 114.

In his explanation the Magistrate states that he took cognizance of the case against Uchit and Harikinkar in the exercise of the powers vested in him under S. 190 (1) (c), Criminal P. C. He was of opinion that he was entitled to do so because the Sub-Deputy Magistrate had in his judgment come to a finding that Mahmood Mian had brought a false and malicious charge against the present accused:

"in pursuit of vengeance and gratification of spite in order to harass him at the instance of the chaukidar Uchit Dusadh and Harikinkar Jha."

Manifestly S. 195 (1) (b), Criminal P. C. was a bar to cognizance of an offence under S. 211 alleged to have been committed in or in relation to a proceeding in the Court of the Sub-Deputy Magistrate except on complaint in writing by that Court or some other Court to which that Court is subordinate. There was clearly no such complaint in writing and it was not open to the learned Sub-Divisional Magistrate to take cognizance under S. 190 (1) (c) against the petitioners in respect of whom neither the Sub-Deputy Magistrate nor a superior Court had complained in writing.

I accordingly accept the reference on the first ground and direct that the order of the Sub-Divisional Magistrate dated 3rd December 1929 taking cognizance of an offence under S. 211 read with S. 114, I. P. C., against Uchit Dusadh and Harikinkar Jha be set aside.

V.B./R.K.

Reference accepted.

1930 Cr. Cases 719 (1)

(Patna)

MACPHERSON, J.

Ganu Shukul and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Ref. No., 8 of 1930, Decided on 30th January 1930, made by Sess. Judge, Muzaffarpur, D/- 11th January 1930.

Criminal P. C., S. 88—Attachment in another district without endorsement is illegal.

An attachment of property is not authorised in a district other than that of the issuing Magistrate except when the order of attachment has been endorsed by the district Magistrate within whose District the property to be attached is situate, and an attachment made in contravention of this provision is illegal.

[P 719 C 1]

Judgment.—This is a report by the Sessions Judge of Muzaffarpur for the orders of the High Court that attachments under S. 88, Criminal P. C., have been made in the district of Muzaffarpur on a warrant issued by the Sub-Divisional Magistrate of Bettiah which has not been endorsed by the District Magistrate of Muzaffarpur.

The report apparently contemplates two warrants, but there seems to have been only one warrant. Three persons appear to have presented petitions of claim under sub-S. 6 (a) to the District Magistrate of Muzaffarpur, who having no jurisdiction under Sub-S. 6 (b) because he did not endorse the warrant of attachment, directed them to the Sub-Divisional Magistrate of Bettiah. They then moved the Sessions Judge.

The report contains no recommendation.

It is clear that the attachment was illegal since an attachment of property is not authorized in a district other than that of the issuing Magistrate except when the order of attachment has been endorsed by the District Magistrate within whose district the property to be attached is situate. It need not be determined whether the Sub-Divisional Magistrate had jurisdiction to allow under Sub-S. 6 (a) the claims made to him by the applicants. It clearly appears that all attachments in the Muzaffarpur District on the strength of the order of attachment of the Sub-Divisional Magistrate of Bettiah are fundamentally illegal.

I accordingly set aside all the attach-

ments made in that district on the strength of the order of the Sub-Divisional Magistrate dated 5th July 1929. It is, of course, open to him to proceed according to law.

V.B./R.K.

Reference answered.

1930 Cr. Cases 719 (2)

(Patna)

COURTNEY-TERRELL, C. J., AND

MACPHERSON, J.

Daroga Lohar—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 175 and 204 of 1929, Decided on 20th December 1929, against decision of the Sess. Judge, Monghyr, D/- 31st August 1929.

Penal Code, S. 304—Person being abducted exceeds his power of self defence and on sudden irrational impulse kills person against whom he is defending — Offence falls under S. 304 and not under Penal Code S. 302.

Seizure of the person and dragging a debtor to his creditor by the peons of the creditor against his will, constitutes an offence of abduction within the meaning of S. 362 thereby giving the person so dragged the right of private defence of his body even to the causing of death subject to restrictions mentioned in S. 99. If while defending himself such person strikes the person against whom he was defending on a sudden irrational impulse thereby exceeding the power given to him under the statute and causes death of the other person, the offence comes not under S. 302 but under S. 304.

[P 721 C 1]

S. K. Bhattacharjya and G. C. Mukerji —for Appellant.

Assistant Government Advocate — for the Crown.

Macpherson, J. — These appeals are preferred, one from jail and the other through pleader, by Daroga Lohar who has been convicted under S. 302, I. P. C., by the Sessions Judge of Monghyr and sentenced to transportation for life. They are to be treated as a single appeal.

The charge against him was that on 3rd June 1929 at Lakhisari he committed murder of Durga Singh, a Punjabi, by stabbing him in the abdomen with a knife or dagger. The assessors considered that the case fell under S. 304, I. P. C. but the learned Sessions Judge was unable to accede to the contention that Excep. 2 to S. 300 was applicable to the case.

The case for the 'prosecution' was briefly as follows:

The appellant was a debtor of a Punjab money-lender named Thakur Singh whose two peons Durga Singh and Maha Singh went out in the afternoon of the 3rd June to collect his dues. They met the appellant about 7-30 p. m. and insisted that he should accompany them to their master to settle the question of payment. The appellant declined to go and the deceased Durga Singh caught hold of him by the arm and dragged him along. After they had proceeded a little distance the appellant pulled out a knife or dagger and stabbed Durga Singh with it in the lower part of the abdomen on the right side. The appellant then made off and seems to have gone to the thana. The injured man was taken by Maha Singh to the National School some 250 or 300 yards distant and placed there in charge of the masters while Maha Singh himself set out to tell his master Thakur Singh what had happened, and brought him with a number of other persons to the National School when they found that a literate constable from Lakhisari thana was already there. Thakur Singh examined the wound of the injured man and found it very serious and with the literate constable insisted upon taking him to the thana in spite of the remonstrances of the headmaster who advised that he be taken forthwith to the hospital. From the thana where he made a statement that the wound was caused by appellant with a knife Durga Singh was taken to the hospital where he died on the following morning. The Civil Surgeon in post-mortem examination found an incised wound 2-1/2 inches long on the right-side of the lower part of the abdomen perforating the abdominal wall and in his opinion death was due to the injury and hæmorrhage in the abdomen which ensued in consequence of it. He also held that the wound could have been inflicted with a knife to be presently mentioned.

It is further set out that on the morning of 4th the literate constable was directed to proceed to the scene of occurrence and search for the knife with which the appellant was alleged to have stabbed the deceased. A chaukidar named Idan Mian, who accompanied him, discovered in a paddy field some 15 yards from the roadside a knife described as in a more or less finished state.

This knife is sought to be connected with the appellant by the evidence of Lachmi Marwari, who is the landlord of the house of Thakur Singh and who states that he saw the appellant preparing it at his forge on the evening of the day of occurrence. That is the knife which the Civil Surgeon stated could have inflicted the wound which caused the death of the deceased.

The defence is difficult to describe. But it appears from the written statement to be that when the appellant refused to go to Thakur Singh, Durga Singh the deceased aimed a knife at him and in the struggle for it between the two men both fell down and the knife injured Durga Singh in the abdomen by accident.

The Judge and the assessors who heard the evidence obviously accepted it so far as the question whether the appellant dealt the fatal blow is concerned and they only differed as to whether the offence committed by the appellant fell under the head of murder or of culpable homicide not amounting to murder. There is indeed a further statement of some of the assessors that they were not satisfied that the knife produced was the weapon which had caused the injury to the deceased. The learned Sessions Judge, however, was of opinion that the evidence of Lachmi Marwari was clearly true and that there could be no doubt that the wound which caused the death of Durga Singh was inflicted by the appellant with the weapon already described. To my mind his view is unquestionably correct.

In appeal it has first been urged by Mr. S. K. Bhattacharjya that the injury was accidental. There does not appear, however, to be any sound foundation for this submission. The evidence has, in my opinion, been rightly believed in the trial Court and it clearly brings home to the appellant the responsibility for the death of the deceased by a deliberate blow and not by any accident.

The main submission, however, is that the offence does not amount to murder, but is by reason of the right of private defence of the person clearly a case of culpable homicide not amounting to murder.

Reliance is placed on the provision of S. 100, fifthly, whereby the right of private defence of the body extends under

the restrictions mentioned in S. 100, to the voluntary causing of death if the offence which occasions the exercise of the right be an assault with the intention of kidnapping or abducting.

The material findings of the learned Sessions Judge are stated in a single sentence:

"Apart from the fact that it was undoubtedly Daroga Lohar who stabbed Durga Singh, the two points which emerge quite clearly from the evidence are that the blow was struck on a sudden irrational impulse and it was struck because Daroga Lohar was being forced against his will, to go with the peons to Lakhisarai."

In my judgment the seizure of the appellant by the two Panjabi peons, who were dragging him against his will to their master falls within the provisions of S. 362 and constituted abduction since they were by force compelling him to go from the place where they seized him, and accordingly he possessed the right of private defence of his body even to the causing of death, subject to the restrictions mentioned in S. 99. The most important of these restrictions so far as the present case is concerned, is that the right of private defence in no case extends to the inflicting of more harm than it was necessary to inflict for the purpose of defence. Now the peons were armed with lathis and it would appear that they also had kirpans since the evidence of Lachmi Marwari is that in such circumstances they usually carry them the fact which may well have been known to the appellant. But it was also well known to him that no real personal harm was likely to ensue since he was only being taken by them to their master whom he had met a few hours before and with whom he had discussed the question of the repayment of the sum which was owing by him. In these circumstances though he clearly possessed the right of private defence of his person, it was an excess of it to inflict the harm which he did by striking the deceased with the knife or dagger in a vital part of the body. But, as remarked by the learned Sessions Judge, it was sudden irrational act, and he had not the intention of doing more harm than was necessary for the purposes of his defence. Accordingly he is within Excep. 2 to S. 300 as an offender who in the exercising in good faith of the right of private defence of person exceeded the power

given to him under the statute and caused the death of the person against whom he was defending himself. In these circumstances I would hold that the offence falls not under S. 302 but under 304, I. P. C.

As to the question of sentence, a heavy punishment does not appear to be called for. The appellant is a youth of 20 and he found himself in the hands of two armed peons who were not likely to handle him at all gently and from whose clutches he probably felt that it was necessary that he should be free as soon as possible.

I would therefore allow the appeal in part and alter the conviction under S. 302 to one under S. 304, I. P. C. (part. 2) and sentence the appellant Daroga Lohar to rigorous imprisonment for a period of two years.

Courtney-Terrell, C. J.—I agree.
V.B./R.K. *Conviction altered.*

1930 Cr. Cases 721

(Patna)

COURTNEY-TERRELL, C. J., AND
SCROOPE, J.

Bhagawan Swain—Appellant.

v.

Mathuri Swain—Respondent.

Criminal Ref. No. 3 of 1930, Decided on 14th February 1930, made by Sess. Judge, Cuttack, D/- 7th January 1930.

(a) Criminal P. C., S. 147 (1)—Meaning of "and shall thereafter inquire into the matter in the manner provided in S. 145."

The words "and shall thereafter inquire into the matter in the manner provided in S. 145" merely mean that after the order in writing has been drawn up as required by the earlier part of the subsection, the procedure in the inquiry is then to follow the course laid down in S. 145 and it is immaterial whether the enquiry itself was instituted before or after the drawing up by the Magistrate of the order requiring the parties to attend the Court.

[P 722 C 2]

(b) Criminal P. C., S. 147 (2) Proviso—"Institution of inquiry" does not mean date of drawing up of formal proceedings under S. 147 but date on which complainant first approaches Magistrate.

The words "institution of inquiry" in the proviso to Cl. 2, S. 147, does not mean the date of the drawing up of the formal proceedings under S. 147, but it means the date on which the complainant first brings his grievance to the notice of the Magistrate either directly or indirectly through the police, and the Magistrate takes action with a view to enquiring into the allegation, although that action is merely a preliminary to the eventual institution of a formal proceeding. Hence the period of three months is to be calculated from

the date, the complainant first approaches the Magistrate and not from the date of institution of formal proceedings. 44 C. L. J. 214, *Foll.* [P 728 C 1]

P. Misra—Against the reference.

Courtney-Terrell, C. J.—This is a reference by the Sess. Judge of Cuttack under S. 498, Criminal P. C. relating to an order by a First Class Magistrate drawing up proceedings under S. 147, of the Code under the following circumstances: On 10th May 1929 one Mathuri Swain petitioned the Sub-Divisional Magistrate of Cuttack complaining of the blocking of a public pathway by Parsu Swain and others which blocking was alleged to have been committed on 4th May preceding. The Magistrate sent the case for police enquiry and report and on 26th June, the police reported that the allegations of the petitioner were true and recommended proceedings under S. 107 against Parsu Swain and his associates. On 20th September both parties petitioned that the proceedings under S. 107 should be dropped and that a proceeding under S. 147 should be drawn up and the Magistrate complied with their request but did not pass his formal order until 4th November 1929.

Now the proviso to S. 147, Criminal P. C. is as follows:

"Provided that no such order shall be made where the right is exercisable at all times of the year, unless such right has been exercised within three months next before the institution of the inquiry, or where the right is exercisable only at particular seasons or on particular occasions, unless the right has been exercised during the last of such seasons or on the last of such occasions before such institution."

The right of user of the public path by Mathuri Swain could not have been exercised within three months of the formal order of the Magistrate passed on 4th November 1929 and if that date is to be considered the date from which the period of three months running backward in time is to be taken it is clear that the proceedings under S. 147 will be abortive. On behalf of Mathuri Swain it is contended that the period backwards from which the three months mentioned in the proviso must run is the first order of the Magistrate made on 10th May 1929 when Mathuri Swain petitioned the Magistrate alleging the blocking of the pathway and it is contended that the

beginning of the enquiry mentioned in the proviso to S. 147 means the date upon which the Magistrate made his order sending the case for police enquiry. The learned Sessions Judge in his letter of reference takes a different view. In his opinion the matter of the date of the enquiry referred to in the proviso to the section is to be tested in the following way: If S. 147, sub-S.

(1) be properly read according to his view there must first of all be an order under S. 147 referring to the section and that order must state the grounds upon which the Magistrate is satisfied that a dispute likely to cause a breach of the peace exists and that thereafter there must be an order for an enquiry and that the enquiry does not begin until these two conditions have been satisfied and he construes the words in the proviso "the institution of the enquiry" as referring to the enquiry which according to his view of S. 147, sub-S. (1) does not begin until there has been an order in writing stating the grounds of his being satisfied that a breach of the peace is imminent. In my opinion that construction of the section is not correct. The words in S. 147, sub-S. (1):

"and shall thereafter inquire into the matter in the manner provided in S. 145"

merely mean that after the order in writing has been drawn up as required by the earlier part of the subsection the procedure in the inquiry is then to follow the course laid down in S. 145 and it is immaterial whether the enquiry itself was instituted before or after the drawing up by the Magistrate of the order requiring the parties to attend the Court. It will be noticed that in S. 145 the word "inquiry" is not used at all and under S. 145 the proceedings begin from the moment that the Magistrate having been satisfied that a breach of the peace exists makes his order requiring the parties to attend the Court in person.

It is very clear that if another construction of the words "institution of the enquiry" in the proviso to S. 147, were adopted great difficulties would arise in applying S. 147 in many cases, for a proceeding under S. 107 might be started, the matter might be taken up to the High Court, the High Court might direct that proceedings under S. 107

should be dropped and that proceedings under S. 147 should be undertaken in which case a loss of many months might have occurred, and if the words "institution of the inquiry" mean the date of the ultimate order which actually mentions the section it would be impossible for the party who had alleged that he had exercised the right to be able to prove that he had exercised the right within three months from the date of the order. In my view therefore the opinion expressed by the learned Sessions Judge is erroneous. I find that I am supported in my opinion by the case of *Rama Nath Basu Choudhury v. Sarada Prosad Basu Choudhury* (1) where the learned Judges said:

"We are not prepared to accede to the argument that the institution of the inquiry meant the date when the formal proceedings were drawn up under the section. Such an interpretation of the section would make its working difficult and we think the words of the section are wide enough to justify such a conclusion as that to which we have come."

I would therefore reject the reference and the proceedings should now continue.

Scroope, J.—I agree. In my opinion the learned Judge has taken too narrow a view of the law in regarding the words "institution of the enquiry" in the proviso Cl. (2) to S. 147, as meaning the date of the drawing up of the formal proceedings. This as the learned Chief Justice has pointed out would lead to considerable difficulties in the working of the section. The proviso is one relating to limitation, and it would be very unusual to make, as it were, limitation run backwards instead of forward, that is to say, from the date on which the Court draws up formal proceedings instead of from the date on which the complainant brings his grievance to the notice of the Court either directly or indirectly through the police, this would be the result of accepting the view of the learned Sessions Judge. The latter date would ordinarily be that on which the Magistrate takes action with a view to enquiring into the allegation. Such action may be as here merely a preliminary to the eventual institution of a formal proceeding but in my opinion it covered by the words referred to. In

this case the petitioner approached the Magistrate first on 10th May and in my opinion the period of three months should be calculated from that date and not from the date of institution of formal proceedings which was some seven months later.

S.N./R.K. *Reference rejected.*

1930 Cr. Cases 723

(Patna)

MACPHERSON, J.

Bhagwat Prasad and another—Petitioners.

v.

Ramkisan Ram Sonar — Opposite Party.

Criminal Revn. No. 717 of 1929, Decided on 6th January 1930, against order of Sub-Divl. Magistrate, Siwan, D/- 6th November 1929.

Criminal P. C., S. 344—Order staying criminal proceedings pending decision in civil suit is only justifiable on special grounds.

An order staying criminal proceedings pending decision in civil suit, is in essence only justifiable on special grounds, the general rule being that High Court should avoid staying proceedings in lower Courts, particularly when the civil suit is instituted after the commencement of the criminal case with the object of postponing the criminal trials: *A. I. R. 1927 Mad. 778 and 2 Weir 415, Ref.* [P 724 O 2]

J. Chatterji and R. S. Chatterji—for Petitioners.

G. P. Das—for Opposite Party.

Judgment.—In this application for revision the petitioners pray that criminal proceedings pending against them in the Court of the Sub-Divisional Magistrate of Siwan be quashed or in the alternative be stayed pending the disposal of a civil suit. The first petitioner is a mahajan and the second petitioner is his munib.

On 23rd September last Ramkishun Sonar preferred a complaint against them alleging that on the preceding day petitioner 2 went to him and asked him to fetch his hathchitha (a sort of bank pass book) to petitioner, 1 petitioner 1 asked for the hathchitha and made entries on the debit and the credit side in spite of the protest of the complainant who is illiterate; the hathchitha originally showed Rs. 224 as due by the complainant but by the entries an additional Rs. 594 was fraudulently shown as due.

by him. The complainant's case was that on the 17th day, seventeen days previously, he had refused to clean the ornaments of petitioner 1 who tried to get even with him in the manner described.

The Sub-Divisional Magistrate directed the Sub-Deputy Magistrate to enquire and on reading the report of the enquiry at which the petitioners were represented, he on 6th November summoned the petitioners under S. 467, I. P. C. for 28th November. On 26th November petitioner 1 filed a civil suit for the sums mentioned plus interest and without asking the Court below for a postponement under S. 344, Criminal P. C., moved this Court on 13th December and obtained the present Rule.

In support of the Rule Mr. Jyotirmay Chatterji first urges that no offence is disclosed. The original complaint appears to have been of cheating though summons was issued for a more serious offence. The complainant alleges that only Rs. 244 was due and that the entries were made in the hathchitha fraudulently. The Magistrate was of opinion that the action of petitioner 1 amounted to the making of a false document and that petitioner 2 who had made the previous entries abetted petitioner 1. It is manifestly not possible to say at this stage that the proceedings should be quashed because they disclose no offence.

The learned advocate has, however, most strenuously contended that the criminal case should be postponed until the civil suit has been decided. In this connexion the decisions of single Judges of this Court and the remark obiter of Sulaiman, J. in *Kanhaiya Lal v. Bhagwan Das* (1) have been cited. On behalf of the opposite party reliance has been placed on the decisions in *Ram Saran Singh v. Nikhad Narain Singh* (2) *Raghubir Singh v. Emperor* (3) *Gnanaisigamani Nadar v. Vedamuthu* (4) and *C. Ramiah v. N. K. Ramiah* (5) decided by Jackson, J., the last mentioned of which has been cited with approval by Wort, J. in *Hirdan Narian*

Singh v. Emperor (6) as well as the recent decision in *Gopal Chandra Chakraverty v. Suresh Chandra Sanyal* (7).

It is not without significance that the petitioners failed to make any application to the Magistrate under S. 344. Again it is obvious that the civil suit was filed on 26th November with the object of stifling the pending prosecution. It is not a case of the civil suit being first instituted and thereafter a complaint being filed with the object of prejudicing the trial of the civil suit, in which circumstances the trial of the criminal case might well be postponed. *A. R. S. P. Subramanian Chetti v. Emperor* (8). In my opinion the true Rule is laid down by Jackson, J. There is no reason to prefer consecutive to simultaneous trials. A stay order is in essence only justifiable on special grounds.

"The general rule is that the High Court should avoid staying proceedings in the lower Courts."

The only question which can arise is whether the circumstances of the present case afford reason for treating it as an exception to these rules. In my opinion the answer must be in the negative. The civil proceedings will in all probability be protracted for several years before they are concluded. They have obviously been instituted as a counter blast and particularly with an eye to the present prayer, the grant of which would postpone the criminal proceedings until they are stale. One would also expect the petitioners themselves to resent a serious criminal charge being kept hanging over their heads for years. If, as they allege, it is without substance, the Magistrate may be expected to release them from the shadow of it at a very early date.

Upon this view the application is without merit and the Rule must be discharged.

V.B./R.K.

Rule discharged.

(1) A. I. R. 1926 All. 30=48 All. 60.

(2) A. I. R. 1925 Pat. 619.

(3) [1920] 1 P. L. T. 459=55 I. C. 678=21 Cr. L. J. 842.

(4) A. I. R. 1927 Mad. 308.

A. I. R. 1927 Mad. 778=50 Mad. 839.

(6) A. I. R. 1929 Pat. 500.

(7) A. I. R. 1929 Cal. 568.

(8) [1902] 2 Weir. 415.

1930 Cr. Cases 725

(Oudh)

RAZA, J.

Rangi Lall—Applicant.

v.

Emperor—Opposite Party.Criminal Revn. Appln. No. 34 of 1930,
Decided on 8th April 1930.(a) Criminal Trial—Duty of prosecution—
Burden lies on prosecution to establish
charge substantially and beyond reasonable
doubt—Suspicion is not sufficient.

The onus of proving everything essential to the establishment of the charge against the accused lies upon the prosecution who must prove the charge substantially as laid. The guilt of the accused must be proved beyond a reasonable doubt. The gravest suspicion against the accused will not suffice to convict him of a crime, unless evidence establishes it beyond doubt. [P 727, C 1]

(b) Penal Code, S. 408—Dishonesty is of
essence—Duty of Court in cases under S.
408 stated.

Mere retention of money or mere failure to return it does not necessarily raise a presumption of dishonest misappropriation. The mere fact that the payment was delayed is no ground for imputing a criminal intention. Though the ingredients of the offence of criminal breach of trust are somewhat broadly stated, there is no doubt as to their meaning. The sections dealing with the offence of criminal breach of trust were intended to punish an offence of which dishonesty is the essence. Any breach of trust is not an offence. It may be intentional without being dishonest or it may appear dishonest without being really so. In such cases the Magistrate should be slow to move. This caution is all the more necessary since there is a natural desire to secure speedy justice by having recourse to criminal law: 42 All. 522, Ref. [P 727 C 2]

R. F. Bahadurji and Jagat Narain
Mathur—for Applicant.

Judgment—This is an application for revision of an order dated 8th March 1930 passed by the learned Sessions Judge of Lucknow dismissing the applicant's appeal against the order dated 12th February 1930 passed by the special Magistrate, Lucknow convicting the applicant under S. 408, I. P. C. and sentencing him to three months R. I. and a fine of Rs. 100/- (or in default, one month's further simple imprisonment).

The applicant Rangi Lal is the son of one Brij Bihari Lal. Brij Bihari Lal and Rangi Lal both were charged with an offence punishable under S. 418, I. P. C. but Brij Bihari Lal was acquitted and his son Rangi Lal was convicted and punished under S. 408, I. P. C.

The case originally started on a complaint lodged by one Ram Dass on 25th November 1929. His case was that he

had purchased a lorry on the 'hire purchase system' from the Pioneer Motor Engineering Works, Lucknow, for Rs. 1,200/- on 6th September 1929, at the instance of Brij Bihari Lal and Rangi Lal, having paid the initial sum of Rs. 400/- out of Rs. 1,200/- on 2nd September 1929. The remaining Rs. 800/- were to be paid by monthly instalments of Rs. 80/-. Having got the lorry he employed Rangi Lal at the instance of Brij Bihari Lal to drive the lorry for him. Rangi Lal was to get Rs. 30/- p. m. and daily food. Rangi Lal was thus employed on 6th September 1929. He (Rangi Lal) drove the lorry daily till nearly the end of September when he was dismissed. Another man Ram Swarup was then appointed to drive the lorry, but he drove it for one day only, and after that was prevented from doing so by Brij Bihari Lal and Rangi Lal both. The lorry had been kept at the house of Brij Bihari Lal and Rangi Lal while it was being driven by Rangi Lal and they refused to part with it. As the other instalments had not been paid, according to the agreement executed in favour of the Pioneer Motor Engineering Works they took back the lorry ultimately in November 1929. The substance of the complaint was that Rangi Lal had retained all the money realised by him as hire of the lorry to the amount of Rs. 440/-.

Both the accused pleaded 'not guilty'. It was stated in defence that the complainant Ram Dass and Brij Bihari Lal were partners in the lorry business and had purchased the lorry as such. It was not denied that Brij Bihari Lal and Rangi Lal had realised the hire of the lorry. It was stated that Rangi Lal was always ready to pay Ram Dass his share of the profits after payment of the expenses and wages etc., the account of which had not been settled. Rangi Lal had stated also on 17th December 1929 that he had paid the money received less daily expenses, to Ram Dass. It should be noted that six of the prosecution witnesses were examined on 17th December 1929 and the accused were also examined the same day. Two more witnesses were examined for the prosecution on 6th January 1930, but the accused were not examined after that, though they should have been examined as required by law.

A written statement was filed on 2nd February 1930. It purports to be a written statement on behalf of Brij Bihari Lal and Rangi Lal both, but it bears the signature of Brij Bihari Lal alone.

It was contended before the learned Sessions Judge that there was a genuine dispute as to accounts and no criminal intention; but the contention was not accepted by the learned Judge. The learned Judge was of opinion that Rangi Lal was bound to account for the money realised by him, and he withheld it with criminal intention.

Ordinarily, I do not enter into the merits of cases in revision, that is to say, I refuse to consider questions of fact but, I have to consider questions of fact in this case. The lower Courts have approached the case from a wrong point of view and the evidence which has been produced in this case has not received due consideration.

The learned Sessions Judge has not given any definite finding on the question of partnership. He was of opinion that it was perhaps outside the province of a criminal Court to inquire and determine whether any sort of partnership existed. I am unable to agree with him on this point. In my opinion the determination of that question has an important bearing on this case.

In my opinion there is sufficient reliable evidence on the record to show that Ram Dass and Brij Bihari Lal were partners in the lorry business and had purchased the lorry as such. Ex. A is the receipt for Rs. 400, which was given by the Pioneer Motor Works to Ram Dass and Brij Bihari Lal both on 2nd September 1929. This receipt shows clearly that Ram Dass and Brij Bihari Lal both had purchased the lorry from the Pioneer Motor Works. Ex. 2 is the deed of agreement which was executed by Ram Dass and Brij Bihari Lal both in favour of the Pioneer Motor Works. This document also shows that Ram Dass and Brij Bihari Lal had purchased the lorry as partners. Ram Dass' statement that he had got the name of Brij Bihari Lal entered in the agreement (Ex. 2) simply for his convenience, is not reliable at all and must be rejected. It is true that J. Franklen who is in the service of the Pioneer Motor Works Company gives evidence in favour

of Ram Dass in his examination-in-chief, but let us see what he states in his cross-examination. He admits in his cross-examination that Brij Bihari Lal and Rangi Lal both were present at the time the bargain was settled and that Ram Dass and Brij Bihari Lal both were present at the time Ram Dass had paid Rs. 400/- on 2nd September 1929. When the receipt, Ex. A, was shown to him he admitted that it was in the name of Ram Dass and Brij Bihari Lal both, that it was correct and that Brij Bihari Lal and Ram Dass both had paid the money for which the receipt was given to them. When the agreement Ex. 2 was shown to him he admitted that Ram Dass and Brij Bihari Lal both had signed it as purchasers in his presence and that both of them were bound to pay the money under that deed. The learned Magistrate was of opinion that Brij Bihari Lal had signed the agreement simply as a surety for Ram Dass, as he wanted to get a job for his son Rangi Lal. It is noticeable that this finding is not supported by any reliable evidence on the record. It was never alleged by Ram Dass himself that Brij Bihari Lal had signed the agreement in question simply as his surety. He states simply that he had obtained Brij Bihari Lal's signature on the deed for his convenience. This statement is surely untrue. If Brij Bihari Lal had signed the agreement simply for the convenience of Ram Dass, it is difficult to understand why the names of Brij Bihari Lal and Ram Dass were entered in the receipt Ex. A. Surely the name of Brij Bihari Lal was not entered in the receipt for the sake of Ram Dass' convenience. It should be borne in mind that the receipt had been given to Ram Dass and Brij Bihari Lal both some four days before the execution of the agreement. The fact is that both of them had paid the money to the Motor Works Company and so the names of both of them were entered in the receipt. J. Franklen, P. W. 2, had to admit in his cross-examination that Brij Bihari Lal and Ram Dass both had paid the money for which the receipt was given to them on 2nd September 1929. I am entirely unable to agree with the finding of the learned Magistrate which is purely conjectural and is inconsistent with the statement of

the complainant himself. I hold therefore that Ram Dass and Brij Bihari Lal were partners in the lorry business and had purchased the lorry from the Motor Works Company as such.

The next matter I have to consider is the question of the criminal liability of Rangi Lall applicant. His statement on some points may be untrue, but the onus of proving everything essential to the establishment of the charge against the accused lies upon the prosecution who must prove the charge substantially as laid. The guilt of the accused must be proved beyond a reasonable doubt. The gravest suspicion against the accused will not suffice to convict him of a crime, unless evidence establishes it beyond doubt. Ram Dass, complainant states in his cross-examination that at the time he had lodged the complaint, he knew that Brij Bihari Lal and Rangi Lall had realized Rs. 366 only as hire of the lorry, but as he had also paid Rs. 75 in cash to them, he had alleged in his complaint that they had misappropriated Rs. 440. He admits in his cross-examination that at the time he had demanded money from the accused they had said to him that they would pay money to him after deducting expenses, etc. He makes the following statement at the end of his cross-examination :

"I have not yet paid the pay due to Rangi Lall, as the accounts have not yet been settled. Rangi Lall himself has incurred expenses of petrol and mobil oil for the lorry over and above Rs. 25 (not Rs. 75 as stated before) which I had paid to him. Rangi Lall himself has paid the price of all the things which he has purchased (for the lorry). The dispute between me and Rangi Lal is this : Rangi Lal says that the income, after deducting the motor expenses and his pay and the expenses of his daily food, may be taken by me and Brij Bihari Lal in equal shares. However Rangi Lal, is wrong in saying so, as Rangi Lal's father is not my partner in business."

The statement made by the complainant shows clearly that Rangi Lall really never refused to pay the money which might be found due to the complainant on account of his share after deducting the necessary expenses and that he was always ready and willing to pay the income of the complainant's share to him on settlement of accounts. However, the complainant wanted to get the whole income and wanted also to keep the lorry in his exclusive possession. This is clear from the statement

of the complainant's witness, Ram Swarup, P. W. 6. He states that he was present at the time the dispute took place between Ram Dass and the accused over the income of the lorry. Rangi Lall had said at that time that he would pay money at the end of the month after deducting all the expenses, but Ram Dass had insisted on getting the whole income and on keeping the lorry in his own possession. Surely Ram Dass was wrong in doing so when he and Brij Bihari Lal were partners in business. The proposal which the accused had made to him was a reasonable proposal, but he was wrong in refusing to accept it and in demanding the whole income and in insisting on keeping the lorry in his exclusive possession. Ram Dass wanted to deprive Brij Bihari Lal and Rangi Lall of the amounts which were due to them and to which they were legally entitled. It is neither alleged nor shown that Rangi Lall was to pay the income to the complainant daily or within any particular period. He never refused to pay to the complainant the money which might be found due to him on settlement of accounts.

These are the facts which are established by the evidence in this case. In my opinion no charge is made out against Rangi Lal under S. 408, I. P. C. It should be borne in mind that mere retention of money or mere failure to return it does not necessarily raise a presumption of dishonest misappropriation. The mere fact that the payment was delayed is no ground for imputing a criminal intention. Though the ingredients of the offence of criminal breach of trust are somewhat broadly stated, there is no doubt as to their meaning. The sections dealing with the offence of criminal breach of trust were intended to punish an offence of which dishonesty is the essence. Any breach of trust is not an offence. It may be intentional without being dishonest or it may appear dishonest without being really so. In such cases the Magistrate should be slow to move. This caution is all the more necessary since there is a natural desire to secure speedy justice by having recourse to criminal law. As pointed out in the case of *Emperor v. Mohan Singh* (1), although transactions, which

(1) [1920] 42 All. 522=59 I. C. 872=18 A.L.J. 683.

involve civil liabilities may amount to criminal offences, and often do, so that the dividing line between the two in a discussion of the case is almost indistinguishable, the use of the criminal law, not for the purpose of punishing an offender or in the public interest, but as a means of exerting pressure to extract money from an agent, is to be discouraged. I say nothing about the civil liability of Rangī Lāl or his father Brij Bihari Lāl, but I am not satisfied that the charge under S. 408, I. P. C., is made out against Rangī Lāl. He should at all events be given the benefit of doubt.

The result is that I accept the application for revision and setting aside the conviction and sentence of Rangī Lāl direct that he be acquitted and released. His bail bond may be discharged.

V.B./R.K. *Conviction set aside.*

1930 Cr. Cases 728

(Oudh)

NANAVUTTY, J.

Chandrika Prasad—Accused—Applicant.

v.

Emperor—Complainant—Opposite Party.

Criminal Revn. Appn. No. 19 of 1930, Decided on 31st March 1930.

(a) Penal Code, S. 409—Appropriation of money drawn from Bank for payment of one bill towards another bill of same firm does not amount to embezzlement.

Appropriation of money drawn from the Bank for payment of particular bill, towards payment of another bill due to the same firm or person does not amount to embezzlement of Government money; it may at the most amount to deliberate violation of the account rules making the person liable for departmental punishment. [P 729 C 2, P 730 C 1]

(b) Penal Code, S. 409—Wrong account and wrong entry do not by themselves prove criminal breach of trust.

The fact that the accounts have been wrongly kept will not of itself prove that the person keeping the account committed criminal breach of trust unless it can be shown that the person misappropriated proceeds of cheque or remittance transfer receipt or any cash proved to have been received by him; and the wrong entries may raise strong suspicion which may serve as a ground for scrutiny but cannot justify the conviction of the person for criminal breach of trust. [P 730 C 1, P 731 C 1]

(c) Evidence Act, S. 8—Subsequent conduct when relevant as proof of guilt explained.

Different persons are differently constituted and that some accused even though innocent deliberately abscond rather than face the ordeal of a criminal trial and that some other innocent accused do equally foolish things

such as make a false admission of guilt or pay off the amount said to have been stolen or embezzled in the vain hope that they may escape a criminal prosecution or get off with a light punishment. Such subsequent conduct cannot dispense with the positive proof of the guilt of the accused, the burden of which lies upon the prosecution. When once the Crown has established the guilt of the accused by the evidence of prosecution witnesses then such subsequent conduct may be utilized as furnishing further proof of the correctness of the conclusion as to the guilt of the accused drawn from the evidence of the prosecution witnesses; by itself, however, it can furnish no legitimate proof of the guilt of the accused. [P 731 C 2]

St. G. Jackson, and *W. A. Akhgar*—for Applicant.

H. K. Ghosh—for the Crown.

Judgment.—This is an application for revision of an appellate order of the learned Sessions Judge of Lucknow upholding the conviction and sentence passed upon the applicant Chandrika Prasad for an offence under S. 409 I. P. C. The charge framed against the applicant is to the effect that on 31st March 1927 while he was Head Clerk of the Government Technical School at Lucknow and as such entrusted with or having dominion over a sum of Rs. 183-11-0 on account of the price of books purchased for the school from Messrs. Thacker Spink & Co. of Calcutta he committed criminal breach of trust in respect of the said sum. There is absolutely no evidence on the record to prove that the applicant Chandrika Prasad was ever entrusted with this sum of Rs. 183-11-0 or ever had dominion or control over that amount. Even the learned City Magistrate concedes that fact when he writes in his judgment that :

"when there is no cash payment but only book transaction there can be no literal entrusting of money."

He, however, held that the accused had undoubtedly dominion over the money of the cheque Ex. 19. Ex. 19 is a cheque for Rs. 4,393-10-6 drawn by the Pay and Accounts Officer of Allahabad in favour of the Principal of the Government Technical School at Lucknow. It was in payments of three bills, one for Rs. 342-11-0 another for Rs. 2,214-2-0 and the third for Rs. 1,836-13-6. The Principal of the Government Technical School (Mr. Lyons) sent this cheque Ex. 19 duly endorsed to the Imperial Bank of India, Lucknow Branch, along with Rs. 86-0-2

In cash and asked the Bank that in lieu of the cheque Ex. 19 and the money remitted to the Bank nine drafts or remittance transfer receipts payable at sight in favour of the parties noted below should be sent to him by the Bank. The persons in whose favour these drafts were drawn are as under :

1. Manager, Pioneer Press, Allahabad	Rs.	a.	p.
	48	0	0
2. Messrs. Mather & Platt Ltd., Calcutta	3,338	10	8
3. General Electric Co. Ltd., Calcutta	120	11	9
4. Messrs. Martijn & Co., Calcutta	69	4	0
5. Messrs. Birkmyre Bros., Calcutta	253	2	0
6. Messrs. Bishambhar Nath Niranjana Lal, Allahabad	357	11	3
7. Messrs. Jaggi Lal Kam-lapat, Cawnpore	64	0	0
8. Messrs. Jessop & Co., Calcutta	72	11	0
9. Messrs. Thacker Spink & Co., Calcutta	155	8	0
Total ...	4,479	10	8

It is admitted that Messrs. Thacker Spink & Co. of Calcutta received the cheque for Rs. 155-8-0 and realized the amount of that cheque and that all the eight other persons or firms in whose favour drafts were drawn received their money. It is thus clear that out of the sum of Rs. 4,479-10-8 which included the amount of the cheque Ex. 19 from the Pay and Accounts Officer of Allahabad, not a pie was received by the applicant Chandika Prasad but that the whole amount was paid off to the various firms and persons to whom the Government Technical School of Lucknow owed money.

It is argued on behalf of the Crown that while the applicant is not proved of having actually embezzled a single pie, he is nevertheless guilty of constructive criminal breach of trust in that he utilised the cheque of Rs. 155-8-0 to pay the money due to Messrs. Thacker Spink & Co. on their original bill for Rs. 183-11-0, whereas this cheque of Rs. 155-8-0 was meant for payment to that firm in respect of another bill for which the Government was liable. There is no clear and reliable evidence on this point. In the absence of any instructions to the contrary, Messrs. Thacker Spink & Co. would naturally

credit the amount of the cheque for Rs. 155-8-0 towards the payment of their oldest bill outstanding in order to save limitation. The mere fact that Messrs. Thacker Spink & Co's bill for Rs. 183-11-0 was paid off in part by the cheque of Rs. 155-8-0 which was drawn in respect of another bill for that amount due to that firm does not go to prove that the applicant Chandika Prasad embezzled the amount of the original bill for Rs. 183-11-0 (subsequently reduced to Rs. 172-6-0) due to that firm. The presumption of innocence in favour of the applicant must hold good until replaced by cogent and convincing evidence of his guilt. Unfortunately for the prosecution it has not been possible for the Crown to examine Mr. Lyons as a witness in this case to elucidate the crucial facts of the transaction in respect of which criminal breach of trust is said to have been committed. The Financial Hand Book, Vol. 5, p. 75, Art. 169 clearly lays down the responsibility of the head of the department in respect of all items of contract contingent grants. The learned City Magistrate has coolly assumed that Mr. Lyons, the late Principal of the Government Technical School was either an accomplice of the applicant Chandika Prasad or a mere dupe of his. In the circumstances of this case and in the absence of Mr. Lyons it is not permissible for any Court to make this sweeping allegation against one who is not on his defence and who is not in a position to defend himself. Every page and every item of the account books and registers of the school produced in the Court bear the signature or initials of Mr. Lyons, the late Principal of the School. He has not been given an opportunity to explain these entries in his account books which are said to evidence the commission of the alleged offence of embezzlement. It is argued on behalf of the prosecution that money drawn from the Bank for payment of a particular bill has been appropriated towards the payment of another bill due to the same firm or person. Even if this were proved to be the case I fail to see how such conduct amounts to embezzlement of Government money. Taking the matter in its most serious or worst light, I find that it only amounts to a deliberate

violation of the account rules on the subject on the part of the applicant and of his late Principal, Mr. Lyons, rendering them, both liable to severe departmental punishment. But it does not prove that either of them committed the criminal offence of embezzlement. The present case against the applicant was started not upon the complaint of Mr. Lyons but upon a letter sent by Messrs. Thacker Spink & Co. to the present Principal of the School, Mr. Mathewe, asking for payment of Rs. 172-6 which had been long outstanding. This sum of Rs. 172-6 was in respect of items included in the bill for Rs. 342-11, Ex. 22. This bill of Rs. 342-11 is included in the cheque for Rs. 4,393-10-6 (Ex. 19), and when this cheque Ex. 19 was sent to the Imperial Bank of India at Lucknow under the orders of Mr. Lyons together with Rs. 86-0-2 in cash the Principal of the School requisitioned for 9 remittance transfer receipts, one of which was for Rs. 155-8-0 in favour of Messrs Thacker Spink & Co. The learned City Magistrate and the learned Sessions Judge have both laid stress upon the fact that the account books are muddled and that the entries in the cash books and other registers are incorrect.

The fact that the accounts have been wrongly kept will not of itself prove that the applicant committed criminal breach of trust unless it can be shown that the applicant Chandika Prasad misappropriated the proceeds of any cheque or remittance transfer receipt or any cash proved to have been received by him. It is admitted that no cheque was drawn in favour of the applicant Chandika Prasad and that all cheques and drafts or remittance transfer receipts drawn in favour of various persons and firms were duly received and cashed by those persons and firms and that not a pie out of these cheques or drafts came into the pockets of the applicant. Realizing the great difficulties in the way of the prosecution owing to the absence of Mr. Lyons from India the learned Sessions Judge has convicted the applicant not for the offence in respect of which the charge sheet has been framed by the learned City Magistrate but for embezzling certain sums of money said to have been received in hard cash by the applicant from one Ali Naqi. The

learned Sessions Judge himself concedes that the applicant is not charged with any offence in respect of the money said to have been received by him from Ali Naqi but he justifies himself by adding that it forms the basis of the present charge against the applicant. The learned counsel for the applicant, Mr. St. George Jackson, vehemently protested against the conduct of the lower appellate Court in convicting the applicant of an offence in respect of a sum of money said to have been received in cash from Ali Naqi when the charge framed against the accused made no mention at all of this matter. There is no doubt great force in this contention of the learned counsel for the applicant but apart from this technical objection I find that the evidence of Ali Naqi is not only vague but unreliable and does not prove the guilt of the applicant. Ali Naqi does not know the exact amount he gave to Chandika Prasad or when he made those payments in respect of the price of books sold by him. He deposes that Mr. Lyons had told him to sell the books and hand over the price to the applicant. He has produced no written order of Mr. Lyons to that effect and he took no receipts either from Mr. Lyons or from the applicant when he made the alleged payment of the price of the books to the applicant. For aught I know to the contrary, Ali Naqi may have himself embezzled the price of the books which were deposited with him to be sold to the students of the school. He deposes that he sold seventy books at Re. 1-8-0 a book and gave the price Rs. 105 to the applicant and he took no formal receipt or even an informal acknowledgment from Chandika Prasad. There is no documentary evidence of any kind to corroborate the story told by Ali Naqi and I am not prepared to believe implicitly his solitary and unsupported testimony against the applicant, in view of his own conduct in showing Mathura Prasad a retired clerk as still on the establishment working in the name of Ori Lal. If the testimony of Ali Naqi is rejected, there is no evidence to prove that any money in cash was ever received by the applicant. There remain then only the erroneous entries in the cash books and account registers of the school written in the handwriting of the applicant and initialled or signed

and verified by the late Principal of the School. These wrong entries no doubt raise strong suspicion against the applicant, but, as was well pointed out by their Lordships of the Privy Council, suspicion through a ground for scrutiny may not be the basis of a civil Court decree much less can it justify the conviction of an accused person in a criminal trial for an offence under the Penal Code. The case for the prosecution has so far not emerged from the region of suspicion into the arena of proved concrete facts constituting an offence punishable under S. 409, I. P. C. The absence of Mr. Lyons has been a great handicap to the prosecution. The difficulties of the prosecution, however, furnish no legal justification for the conviction of the applicant Chandika Prasad on mere suspicion. These suspicions moreover operate as strongly in the present case against the applicant as against his late principal Mr. Lyons. The learned Sessions Judge very rightly deprecates any expression of opinion as to Mr. Lyons' liability in respect of the sum of money said to have been embezzled. Unfortunately he holds the applicant guilty of criminal breach of trust inasmuch as under the signature of his principal Mr. Lyons he caused the remittance transfer receipt for Rs. 155-8 to be issued at the end of March 1927 in favour of Messrs. Thacker Spink and Co. for payment of a bill for Rs. 183-11 although the money represented by the remittance transfer receipt or draft for Rs. 155-8 had been drawn for payment of another bill to Messrs. Thacker Spink & Co. I regret I find myself unable to accept this reasoning. All that it amounts to is that money drawn by the Principal of the school for payment of a bill due to a particular firm has been under his order appropriated towards the payment of another bill due to the same firm. This may be a serious irregularity in the eyes of the Audit Officer but it does not amount to an offence under S. 409, I. P. C., because no money was actually embezzled by anybody and because no money in fact reached the hands of the accused Chandika Prasad.

The learned City Magistrate as well as the learned Sessions Judge have both laid stress upon the subsequent conduct of the applicant in paying off the amount

due to Messrs. Thacker Spink & Co. and have considered that the fact that this money was paid on behalf of the applicant to this Calcutta firm is further ample proof of the applicant's guilt. I find myself unable to accept this line of reasoning when there is no evidence on behalf of the Crown sufficient to justify the finding that the accused committed the offence of criminal breach of trust. The mere fact that on account of sheer timidity or on account of a desire to avoid running the risk of disgrace of a criminal trial and of dismissal from Government service, either the accused or someone on his behalf paid off the amount said to have been embezzled to the party to whom it was due would not furnish any proof of his guilt. Such subsequent conduct is equally consistent with the innocence of the accused; and no inference adverse to him ought legitimately to be drawn from it. The learned Sessions Judge writes:

"If the appellant (Chandrika Prasad) was not guilty I do not see why he should have caused the bill to be paid in this way".

The simple answer to this method of reasoning is that different persons are differently constituted and that some accused even though innocent deliberately abscond rather than face the ordeal of a criminal trial and that some other innocent accused do equally foolish things such as make false admission of guilt or pay off the amount said to have been stolen or embezzled in the vain hope that they may escape a criminal prosecution or get off with a light punishment. Such subsequent conduct dispenses with the positive proof of the guilt of the accused, the burden of which lies upon the prosecution. When once the Crown has established the guilt of the accused by the evidence of prosecution witnesses then such subsequent conduct may be utilised as furnishing further proof of the correctness of the conclusion; as to guilt of the accused drawn from the evidence of the prosecution witnesses by itself, however, it can furnish no legitimate proof of the guilt of the accused.

For the reasons given above I allow this application for revision, set aside the conviction and sentence passed upon the applicant Chandika Prasad, acquit him of the offence charged and order his immediate release.

V.B./R.K.

Revision allowed.

1930 Cr. Cases 732

(Allahabad)

DALAL, J.

Ram Saran and others—Appellants.

v.

Emperor

Criminal Appeal No. 1109 of 1929, Decided on 27th March 1930.

(a) Penal Code, S. 366-A—Father taking away his unhappy daughter from her husband's house and giving her as wife to another commits offence under S. 366-A.

When a married girl is unhappy with her husband and the father takes her from the husband's house and gives her as a wife to somebody else, that can hardly be called trafficking in women but having regard to the provisions of S. 366-A, the act of the father would come within those provisions. [P 732 C 2]

(b) Penal Code, S. 366-A — "Induce".

The word "induce," is used in its ordinary meaning of any words of inducement flowing from one person to the girl. [P 732 C 2]

(c) Penal Code, S. 366-A—Inducement to leave must have for its object seduction by another person.

The inducement to leave must have for its object seduction by another person and not by the person who himself induces the woman to leave.

K. D. Malaviya — for Appellants.

Sankar Saran—for the Crown.

Judgment.—The facts proved to the satisfaction of the Sessions Judge and all the assessors are that Ram Saran, father of a married woman, Suraj Bali and Jagardeo, went to the house of the woman's husband, took the woman away from the house and left her at Jagardeo's house in the position of the wife of Jagardeo. These facts have been conclusively proved. The only question is whether the acts of the appellants amount to an offence. The principal question from the decision is whether the young woman is under 18 or over 18. The burden of proving that she was over 18 lay on the prosecution. I have gone through the evidence. It is of an exceedingly slight nature. The medical witness was of opinion that the girl was under 18 years of age on the date of the occurrence. He, however, gave his opinion in a very hesitating manner to the effect that there might be a difference in the estimate of a year or so. One year is of great importance when the doctor thinks that she is 17 and it is asserted on behalf of the appellants that she is 18. On the side of the appellant Ram Saran the evidence is produced to the effect that the girl is about 22. The girl appeared in Court yesterday and from her appearance she did not appear that she

was under 19. All these are mere opinions and there is no definite evidence. Under the circumstances the benefit of the doubt must be given to the appellants, particularly in a case like this, where the father himself has taken the girl from her husband.

The next argument is that the act would not be covered by the provisions of S. 366-A. It is true that those provisions were enacted to give effect to the International Convention for the Suppression of Traffic in Women and Children signed at Geneva in 1922. When a married girl is unhappy with her husband and the father takes her from the husband's house and gives her as a wife to somebody else that can hardly be called trafficking in women. At the same time, having regard to the provisions of the section, I am of opinion that the act of the father would come within these provisions. The provisions will apply to Ram Saran and Suraj Bali. The girl was seduced to illicit intercourse and induced to leave her husband's house for the purpose. It was objected that there was no evidence of inducement. The word "induce," however, is used in its ordinary meaning of any words of inducement flowing from one person to the girl. The father's telling the girl to come away with him from a house where she was unhappy would amount to an inducement. If the girl had been held by me to be under 18 years of age, I am of opinion, that Ram Saran and Suraj Bali would have been guilty under S. 366-A. As regards Jagardeo, the principal offender, who had kept the girl as his wife, the provisions would not apply as the inducement to leave must have for its object seduction by another person and not by the person who himself induces the woman to leave. Very likely the wording of the section makes the offence much wider than may have been intended by the legislature, but the business of a Court is to interpret the words as they stand and not to make an attempt to discover what offence is particularly meant and what kind of offenders the legislature desired to include in the definition.

In the result I set aside the conviction and sentence and order the release of the appellants. If any of them is on bail his bail bonds shall be cancelled.

V.B./R.K.

Conviction set aside.

1930 Cr. Cases 733

(Allahabad)

BOYS AND NIAMATULLAH, JJ.

Emperor

v.

Nawal Behari Lal—Accused.

Criminal Ref. No. 803 of 1929, Decided on 26th March 1930, made by Assist. Sess. Judge, Allahabad, D/- 22nd November 1929.

Criminal P. C., S. 307—When case is referred, it should be referred as a whole.

When a Sessions Judge refers a case by virtue of the powers given by S. 307 he must refer the whole of the case against the particular accused, and not merely those charges on which there happens to be a finding with which he disagrees. [P 733 C 1]

M. Waliullah—for the Crown.

K. D. Malaviya and *D. P. Malaviya*—for Accused.

Boys, J.—*Nawal Behari Lal* was put on trial upon charges under Ss. 193, 471 and 467/109, I. P. C. The jury convicted him under S. 193, I. P. C., but acquitted him by a majority of three to two on the other two charges. The learned Judge proceeded to accept the finding of guilty as regards S. 193, and to convict and sentence him to five years' rigorous imprisonment and a fine of Rs. 100. Disagreeing with the jury's verdict on the other two charges he has referred the matter to this Court under S. 307. In the first place we must point out an error into which the learned Judge has fallen. When he refers a case by virtue of the powers given by S. 307, Criminal P. C., he must refer the whole of the case against the particular accused, and not merely those charges on which there happens to be a finding with which he disagrees. In this particular case he should have referred the whole of the case against *Nawal Behari Lal* instead of merely referring the case so far as the charges under Ss. 471 and 467/109 are concerned, and he should not have proceeded to a conviction and sentence upon the charge under S. 193, I. P. C. Holding as we do this view we shall have, after dealing with the rest of the case, to set aside the conviction and sentence under S. 193 and pass an appropriate order ourselves. The facts against *Nawal Behari Lal* are very clear. There are four persons concerned in this case *Raghunath Lal* and *Johri Lal*, who are uncle and nephew. One *Sham Behari Lal* was working in part-

nership with *Raghunath Lal* and *Johri Lal*, and it is the case for the accused, and is also admitted by the Crown, that the accused *Nawal Behari Lal* was acting in certain matters relating to the sale and purchase of coal as an agent on behalf of the firm. *Raghunath Lal* appears to have taken little or no part in the conduct of the business. Similarly *Johri Lal* was also practically a sleeping partner, the main conduct of the business being left to *Sham Behari Lal*. As *Johri Lal* was leaving Allahabad to arrange for a wedding and there was litigation in contemplation or proceedings, it was desirable to give *Sham Behari Lal* full authority to act. As *Johri Lal* was busy and had not time to see to the writing out of a complete *mukhtarnamah*, he therefore bought a stamp and signed it at the end on behalf of himself and on behalf of his uncle *Raghunath*, adding, in order to guard against the document being improperly used, the words "*mukhtarnamah likha so sahi*." The stamp was bought on 23rd February 1925, and according to *Johri Lal*, was handed over to *Sham Behari Lal*. Later this stamp appears as the document upon which a suit was filed by *Nawal Behari Lal* against *Johri Lal*. In that suit a claim was made for commission on certain coal sales, and the document as filed purported to be an agreement by *Johri Lal* to pay such commission. The document was manifestly a forgery and it is not now and cannot be denied on behalf of *Nawal Behari Lal* that it is a forgery. In the civil suit *Johri Lal* asked that the document might be photographed, and the suit was promptly withdrawn. The criminal proceedings followed.

We have heard Mr. *K. D. Malaviya* on behalf of the accused. It is quite unnecessary to enter into detailed argument about the case or the charges that were framed in the criminal proceedings. We entirely agree with the order referring the case to this Court which we might amplify, but which it is not necessary to amplify, that the verdict of the jury in reference to the charges under Ss. 467/109 and 471 was ludicrous, if not actually perverse. We have not the shadow of a doubt that *Nawal Behari Lal* deliberately got the document fabricated and that he used it knowing, of course, that it was fabricated.

We set aside the conviction and sentence under S. 193 arrived at and passed by the Sessions Judge, and for it we substitute a conviction by this Court under S. 193, I. P. C., and further convict Nawal Behari Lal under S. 467/109 and S. 471, I. P. C. In the matter of sentence we have been asked to deal leniently. But arriving at the finding at which we have, there is no shadow of an excuse for dealing with him leniently. The fraud was as deliberate and gross as it could be. We sentence Nawal Behari Lal to five (5) years' rigorous imprisonment under each of the Ss. 193, 471 and 467/109, the sentences to run concurrently; and we further sentence him to a fine of Rs. 100 under S. 467/109. In default of payment of the fine a further three months' rigorous imprisonment will be undergone. The sentence will run as from the date of his conviction by the learned Sessions Judge as the accused has been in jail since that date. A copy of this order will be sent to the learned Sessions Judge in answer to his reference.

V.B./R.K.

Reference answered.

* 1930 Cr. Cases 734

(Allahabad)

BOYS AND YOUNG, JJ.

Emperor

v.

Padam Singh—Respondent.

Criminal Appeal No. 1178 of 1928, Decided on 18th March 1930, against order of Sess. Judge, Saharanpur, D/- 28th September 1929.

* Penal Code, S. 193—Making false verification to written statement of defendant, with knowledge of its falsehood is offence within meaning of S. 193.

Since under O. 6, R. 15, Civil P. C., there is an express provision of law requiring the defendant to confirm the truth of the statement made by him in the preceding clauses of his written statement, if he does so knowing that that verification is false, he is declared by legislature in S. 191 as giving false evidence there' by making him liable under S. 193: 6 *All. 626*; *A. I. R. 1927 All. 838*; 27 *P. R. 1894 Cr.*; 25 *O. W. N. 886*; 43 *Oal. 1001* and *A. I. R. 1927 All. 883, Ref.* [P 726-C 2]

*U. S. Baspai—for the Crown.**Iqbal Ahmad—for Respondent.*

Boys, J.—This is an appeal on behalf of the Local Government from the acquittal of Padam Singh, son of Mohan Singh, who had been found guilty by the trial Court under S. 193, I. P. C., and sentenced to nine months' rigorous im-

prisonment, but who had been acquitted by the learned Sessions Judge on the ground that the facts did not come, at any rate did not clearly come, within Ss. 191 and 193, I. P. C. Before us two questions have been fully argued, one of law and the other of the merits, and it is incumbent on us to deal with both. The plaintiff in a civil suit was Sher Mohammad Khan. The defendant was the present opposite party, Padam Singh. The suit was brought on the basis of a promissory note said to have been executed by Padam Singh on 15th January 1926, supported by a receipt stated to have been taken from Padam Singh on the same date.

The suit was brought on 11th August 1928 and was decreed ex parte on 25th September 1928. An application for restoration made on 15th October 1928 was allowed on 1st December, 1928, and on the same date the defendant, Padam Singh, was directed to file a written statement. He filed the written statement and in it denied execution of the promissory note, denied owing any sum at all and at the end of the written statement he verified these denials stating that the paragraphs in which the denials were made were true to his personal knowledge. No question has been raised before us that the verification was not in the ordinary form called for by O. 6, R. 15.

Having filed this written statement on 1st December 1928, Padam Singh three weeks later, on 20th December 1928, applied that the thumb-impressions on the promissory note and the receipt alleged to be his might be sent for examination.

Police Inspector Gorton of the Finger Print Bureau of the Criminal Investigation Department reported that the finger prints on the promissory note and receipt, which were the basis of the suit, were the finger prints of Padam Singh, the defendant. Padam Singh, having heard that the report was against him, again allowed the suit to be decreed in default. The learned Judge of the Court of Small Causes issued notice under S. 476, Criminal P. C., to Padam Singh to show cause why he should not be prosecuted under S. 193, I. P. C. Padam Singh appeared in response to the notice and threw himself on the mercy of the Court. We have not had his answer

placed before us in detail, but it is common ground between the learned Government Advocate and the counsel for Padam Singh that he did not on that occasion do more than throw himself on the mercy of the Court, more especially he did not set up any defence of any sort that his finger impressions must have been taken from him while he was in a state of intoxication, which was his line of defence at the criminal trial which followed.

As we have said above, Padam Singh was convicted by the Magistrate and has been acquitted by the learned Judge. The Magistrate considered that the only question which he really had to determine was whether the thumb impressions of the accused had been obtained by fraud while the accused was drunk or whether the accused had deliberately perjured himself in the civil Court in order to evade the satisfaction of the loan. Rejecting the accused's defence, he held that Padam Singh was clearly guilty under S. 193, I. P. C., and there is nothing to show that any question was raised before him that if the alleged facts were found against the accused, S. 193, I. P. C., was not applicable. The grounds of appeal to the learned Sessions Judge do not appear to have raised any question but one of fact. But the question of the applicability of S. 193 or, in the alternative, S. 199, I. P. C., was clearly raised before the learned Sessions Judge who was further referred to the decisions in *Queen Empress v. Meharban Singh* (1) and *Emperor v. Janki Rai* (2). After mentioning these cases the learned Judge says :

"In the present case the written statement of Padam Singh is merely a general denial of the claim of the plaintiff, Sher Mohammad Khan, and there is no specific denial of a specific and material fact constituting the plaintiff's claim."

We are unable to attribute any meaning to this statement in view of the actual written statement. The defendant, Padam Singh, began by not admitting the allegations in the plaint, but in his additional pleas he expressly denied that he had executed any pro-note, in favour of the plaintiff or that any amount was due to the plaintiff. What more specific denial of a substantial and material fact constituting the plaintiff's claim there could possibly be, it is impossible to

conceive. Again the learned Sessions Judge says :

"On general grounds I am of the opinion that statements in the pleadings by themselves should not form the subject of a criminal prosecution."

Again it would seem to us that if "general grounds" are entitled to any weight at all, it would prima facie be most desirable that if a party makes deliberately false statements to a Court intending the Court to be influenced thereby, he should be liable to a criminal prosecution. But it is not on any "general grounds" that a judgment should be based in a matter of this description. It is the province of the legislature to declare in what circumstances a person shall be liable to punishment and it is the duty of the Court merely to determine whether the circumstances in the particular case come within the provisions enacted by the legislature. The learned Sessions Judge next says :

"It is true that the Law Commissioners who drafted the Penal Code were anxious to depart from the rule of the English law on this subject."

The learned Judge has, therefore, quite rightly recognized that any practice that may be current in England can be of no weight in applying the law in this country, if the legislature in this country has in fact carried out its intention of declaring different laws. The learned Sessions Judge next says :

"It is doubtful if the law as actually enacted provides for the punishment of a party making a false allegation in a pleading filed in a civil Court in India."

This is a conclusion to which he was entitled to come and, coming to that conclusion, he was bound to acquit the accused.

The Local Government asks us in this appeal to determine whether on this point the learned Judge was right. This question of law was the first to be argued at length by both sides. We are confident that it can be disposed of briefly. In addition to the two cases to which we have above referred the learned Government Advocate brought to our attention the case of *Lakhu Shah v. Queen Empress* (3), the case of *Trailokya Nath Banerji v. Bodaranjan* (4), the case of *J. B. Ross & Co. v. C. B. Scriven* (5) and the case of *Emperor v.*

(3) [1894] 27 P.R. 1894 Cr.

(4) [1921] 25 C.W.N. 886.

(5) [1916] 43 Cal. 361—34 I.O. 235—20 C.W.N. 1192.

(1) [1894] 6 All. 826—(1894) A.W.N. 258.

(2) A.I.R. 1927 All. 888—49 All. 492.

Janki Rai (S). No other case than these was referred to by counsel for Padam Singh. We do not propose to consider in detail the cases to which we have referred, and though there was on both sides frequent reference to the scope of S. 199, I. P. C., we do not feel that it is incumbent upon us in this case to say anything whatever as to what may be the scope of that section. We propose to confine ourselves to declaring our view of the meaning of S. 191, I. P. C. Its interpretation, in our view, gives no rise to serious difficulty. In the case before us we are not concerned with any affidavit or any statement taken from the parties or any oral evidence given by Padam Singh. We are concerned with the written statement, in which of course must be included the verification, and with that only. S. 191 says :

"Whoever being legally bound by an oath or by express provision of law to state the truth makes any statement which is false and which he either knows or believes to be false or does not believe to be true, is said to give false evidence."

We are invited to rely, and we do rely, on the words :

"bound by express provision of law to state the truth."

It is contended by counsel for the opposite party that a defendant is not legally bound either by any express provision of law or in any other way to file a written statement at all. That of course must at once be conceded. But if he does desire to file a written answer to the plaint, he is by express provision of law bound to do something further. He is bound to attach the verification which is called for by O. 6, R. 15, and his written statement is not, until that verification is attached, a written statement in law at all and could not be received for any purpose whatever. When, therefore, filing a written statement he is bound by express provision of law to verify the facts alleged in that written statement as being true either to his own knowledge or to the best of his belief. It is contended that when the law requires a defendant to verify his written statement it does not necessarily require him to tell the truth. This contention, in our view, is manifestly untenable. Words have a certain meaning and we have only to give them their plain and ordinary meaning, in the ab-

sence of any circumstances indicating that that meaning is not permissible. The ordinary dictionary meaning of the word 'verify' used in the present circumstances is : "to confirm the truth or truthfulness of." It was further contended on behalf of the opposite party that the mere fact that in cases under the Income-tax Act and possibly other such Acts a false verification was expressly to be declared to be punishable under S. 177, I. P. C., or some other such section and the absence of any such enactment in connexion with O. 6, R. 15, was sufficient to show that a false verification in accordance with O. 6, R. 15 could be made with impunity.

In other words, we were asked to hold that the legislature orders a defendant to declare that his statements are true and, since it is further emphasised that the same legislature passed all the Acts, in the same breath says that it does not care whether the statements are true or not and that no penalty shall follow the making of a false verification. It is manifest that such an argument would be extremely dangerous. It is not possible for one moment to know what was in the minds of particular individuals when they were considering whether it was necessary or whether it was merely desirable or whether it was undesirable to add a clause declaring under what section of the penal law a person infringing the law should be punishable. We confine ourselves, therefore, to the simple question whether the facts of the case come within S. 191. Here we find that there is an express provision of law requiring the defendant to confirm the truth of the statements made by him in the preceding clauses of his written statement, and if he does so, knowing that that verification is false, he is declared by the legislature in S. 191 itself to be giving false evidence. Whatever may or may not be connoted by the word 'evidence' in other sections, there can be no doubt about the meaning in S. 191 and there can equally be no doubt that the words 'gives false evidence' in S. 193 are used in the same sense as the same words in S. 191, and it has not of course been contended that if S. 191 is applicable to the present case, S. 193 is not applicable. We are, therefore, of opinion that so far as the legal point is concerned the trial Court was right in

holding that an offence had been committed under S. 193, I. P. C.

The next and only other question concerns the merits. The present being an appeal from an acquittal, it was open to counsel on behalf of Padam Singh to contend that on the merits his client should not have been convicted. The trial Court held that there could be no doubt that Padam Singh's defence that the thumb impressions taken from him were taken in a state of intoxication was false. The lower appellate Court, though it has not expressed its opinion so clearly, would at least seem to have been of the opinion that Padam Singh had not substantiated his defence. We have had to hear counsel on both sides on the merits. It is manifest that although the acquittal of Padam Singh by the appellate Court was not an acquittal on merits, it is for the Crown here in appeal to establish that the conviction of the accused on the merits ought to have been sustained, and it is for the Crown to establish that beyond any reasonable doubt. It would serve no useful purpose to enter into the details of the evidence, but we have no hesitation in saying that we are not satisfied beyond reasonable doubt that the conviction of Padam Singh was right. We need only mention one or two outstanding features of the case. When Padam Singh got the suit restored after the first occasion on which it had been decreed in default, he forthwith applied for expert examination of his finger prints. We are informed, and it is not denied, that such expert examination is always carried out by an official of the Criminal Investigation Department, there being no private experts in finger prints. So far then there is no reason for supposing that the accused's application was not bona fide, and this at any rate must stand to his credit. Next we have the fact that the particular promissory note and receipt in question are the only two documents which either side produced before the Court in which Padam Singh signed by means of a thumb impression rather than by his full signature in the Hindi script.

Obviously it might have been difficult for the plaintiff to produce documents on which the defendant had put his thumb impression, but the fact remains that we have several documents of a

similar nature on all of which Padam Singh signed his full signature and there is no evidence of his ever having signed any similar document or any other document at all by affixing his thumb impression. Thirdly, there is evidence, which has been believed by the Court below, to the effect that Padam Singh was what may be described as a habitual drunkard. It is, therefore, at least not impossible that advantage might have been taken of him when he was in a state of intoxication. We do not of course suggest for one moment that he has established this, but he has established circumstances rendering his assertion at least not wholly improbable. Finally, there is no satisfactory reason suggested by the man who was plaintiff in the civil suit and is the principal witness for the Crown in the trial why Padam Singh should have on this one occasion signed by means of his thumb impression. In view of these facts we cannot hold it to be satisfactorily established that Padam Singh knew at the time that he filed his written statement that his denial of execution of the document was false denial. The result is that we are of opinion that the Local Government must succeed in its contention that Ss. 191 and 193 are applicable to the case of deliberately false allegations in a written statement and false verification, but that in the particular case the appeal must fail on merits, and it is dismissed.

V.B./R.K.

Appeal dismissed.

1930 Cr. Cases 737

(Allahabad)

DALAL, J.

Kashi Ram—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 25 of 1930, Decided on 27th March 1930, against order of Sess. Judge, Saharanpur, D/- 2nd December 1929.

Penal Code, S. 500 — Giving out that woman had miscarriage without knowledge of her marriage is defamation and such statement made in witness-box without such question by Court and when character of woman was not fact in issue is not protected by S. 132, Evidence Act—Evidence Act, S. 132.

To give out that a woman had miscarriage without any knowledge whether she was married or not would amount to defamation because the person who makes the statement would have reasonable belief that such imputa-

tion would harm the reputation of the woman in case she was not married and if such statement is made in a witness-box and especially so in examination-in-chief when the character of the woman is not a fact in issue, the witness is not protected by S. 132, Evidence Act, unless the Judge himself asked the question : 32 Cal. 756; 18 A.L.J. and 112, Ref.

[P 788 C 2, P 789 C 1]

P. L. Banerji and *Shabd Saran*—for Applicant.

M. Waliullah—for the Crown.

Saila Nath Mukerji — for Opposite Party.

Judgment.—Kashi Ram has come here in revision from his conviction by a Magistrate of the First Class for an offence under S. 500, I. P. C. The conviction was upheld by the Sessions Judge. Kashi Ram was a plaintiff in a civil suit where the basis of his claim was that Sheoraj was not the daughter's son of Prithi Singh but was the child of some other woman and Prithi Singh's daughter Mt. Bishan Devi pretended that Sheoraj was her own child. The plaintiff was examined as a witness on 18th March and in his statement he elaborated a long story of inquiries made by Mt. Bishan Devi of a likely boy to be smuggled in as her own and finally, the choice falling on a son of Mt. Jamna of Amritsar. He stated that three women were approached, one was Bal Mukand's wife another Mt. Jamna of Amritsar and a third Mt. Jaggo's husband's sister. This was in examination-in-chief when his own counsel was examining him. He further elaborated how Mt. Jamna's boy had to be smuggled in. He said that Bal Makund's wife gave birth to a female child which could not be taken, and Mt. Jaggo's husband's sister had a miscarriage (the word used in the record of the evidence is abortion), so Mt. Jamna's child who happened to be a boy was the one taken advantage of. The defamation alleged against the applicant Kashi Ram is with reference to his statement that Mt. Jaggo's husband's sister had a miscarriage. It turned out that the girl, the daughter of one Ram Karan Das, was only a child of 12 and not married. Kashi Ram was thereupon prosecuted for defaming the girl. In this Court it was argued:

(1) that the statement did not come within the definition of defamation given in S. 499, I. P. C., and (2) that

the statement was privileged under S. 132, Evidence Act.

It was admitted, as it could not be otherwise after the decision of the Full Bench of this Court in *Emperor v. Ganga Prasad* (I. L. R. 29 All. 685), that a witness did not have complete privilege when he made a statement in the witness-box. It was sought to keep the statement out of the definition of defamation on the ground that Kashi Ram himself knew nothing at all about the matter of this woman, that he had received information from one Kishori and that he merely made statements at random without any intention of harming the reputation of any person. I have not examined the record myself, but I was told by Mr. Saila Nath that Kishori denied having given any information to Kashi Ram. The statement, therefore, of Kashi Ram was merely imaginary. A long story was invented by him in order to bolster up his allegation that Sheoraj was not the son of Mt. Bishan Devi. In the definition intending is not the only circumstance of mind of the offender that is included. It is further stated that it will be enough if the offender had knowledge or reasonable belief that such imputation would harm the reputation of any person. To give out that a woman had miscarriage without any knowledge whether she was married or not would amount to defamation because the person who makes the statement would have reasonable belief that such imputation would harm the reputation of the woman in case she was not married. In cross-examination Kashi Ram went to the length of making a reckless statement that he had no knowledge whether Mt. Jaggo's husband's sister was married or not. Obviously what he desired to detail was not an ordinary instance of a miscarriage by a married woman. He was prepared to give out that even if the woman was not married there was certainly a miscarriage. The statement would come within the definition because Kashi Ram being presumably a man of ordinary sense would know that such an imputation about a woman would harm her reputation.

Next we come to the provisions of S. 132, Evidence Act. Two matters are to be kept in mind:

(1) That the matter about which the witness makes a statement is relevant to the matter in issue in any suit; and
 (2) that the witness was compelled to make the statement which is held to be defamatory.

In my opinion the statement is not protected under either ground. The character of Mt. Jaggo's husband's sister was in no way relevant to the question whether Sheoraj was a son or not a son of Mt. Bishan Devi. There was no allegation, that Sheoraj was really the son of Mt. Jaggo's husband's sister. "This woman was dragged in merely to give verisimilitude to Kashi Ram's false details of an elaborate story. Even if Sheoraj was really the son of Mt. Jamna, there was no necessity for him to drag in two other women as being ready to offer their children to Mt. Bishan Devi. Kashi Ram's statement was a tissue of lies as regards Mt. Jaggo's husband's sister and lies were in no way relevant. In *Haidar Ali v. Abru Mia* (1), two learned Judges of the Calcutta High Court dwelt on the relevancy of the matter in determining whether a particular statement was protected under S. 132 or not. The question there was whether one Haidar Ali was in possession of false weights or not, and a witness stated during the trial that Haidar admitted in the panchayat that Kannu beat him with a wooden shoe. The learned Judges pointed out that this statement had no relevancy whatsoever to the possession of false weights and did not make the possession of false weights more or less probable because of the shoe beating. They, therefore, held that the statement was not covered by the provisions of S. 132. In the present case also I have given reasons why I do not consider the statement or even the mention of Mt. Jaggo's husband's sister in the suit as in any way relevant. Secondly, the statement was made in examination-in-chief when there could be no compulsion for Kashi Ram to make any particular statement. His counsel must have examined him on instructions given by him to counsel. Counsel himself presumably did not invent the story of Mt. Jaggo's husband's sister. There may be cases where questions by one's

own counsel may also be taken to be questions to which a witness is compelled to give answers. The present is not such a case. I hold the statement to have been a voluntary statement. Reference was made to the case of *Ganga Sahai v. King Emperor* (2). That was a case where the Court itself put a question to the witness. The Judge himself asked the witness why he was suing for his money. The witness replied that he did not desire to leave it with the defendant who was a badmash and a thief. In such a case where the Court itself asked a question the presumption would be that the witness was compelled to answer it. Such a presumption would not exist when the client himself had given instructions to his counsel and the counsel put questions in accordance with those instructions. The statement in such a case would be considered to be voluntary. I dismiss this application.

V.B./R.K. *Application dismissed.*

(2) [1920] 42 All. 257=54 I.C. 890=18 A.L.J. 112.

1930 Cr. Cases 739

(Allahabad)

DALAL, J.

Baqridee and another—Applicants.

v.

Emperor

Criminal Misc. Case No. 3 of 1930.
 Decided on 23rd January 1930.

(a) Criminal P. C., S. 256—Word 'recall' does not mean re-summon.

The word 'recall' in S. 256 does not mean re-summon. After the examination and cross-examination of the prosecution witnesses, a charge was framed and the Magistrate for reasons recorded in writing required the accused to state forthwith whether they would cross-examine any and what witnesses for prosecution. He further said that the counsel would have opportunity of cross-examining them or never.

Held: that the procedure adopted by the Magistrate was correct: 8 A.L.J. 707, *Rel. on.*

[P 740 C 1]

(b) Criminal Trial—Administrative officer cannot merely by reason of his knowledge of important men and their characters, be deprived of jurisdiction as Magistrate.

So long as executive and judicial powers are combined in the same officer, he cannot but have extra-judicial information about men of importance and position in his sub-division and their characters. Merely by reason of such knowledge an administrative officer cannot be deprived of jurisdiction as Magistrate.

[P 740 C 2]

(c) Criminal P. C., S. 526—Magistrate growing angry with accused in one case—

(1) [1905] 82 Cal. 756=2 C.L.J. 105=9 C.W. N. 911.

Accused's state of mind while deciding upon transfer application by him in another case will be considered if he is ignorant villager who believes that Magistrate's mind is prejudiced against him for such reason and not where he is well versed in litigation.

The state of mind of the accused with whom the Magistrate had grown angry in a case will be taken into consideration while deciding upon an application for transfer made by him in another case if he is an ignorant villager who would be frightened by the Magistrate being angry with him in one case and would believe that in another case the Magistrate would be for that reason prejudiced against him and not where he is well experienced in the art of litigation. [P 740 C 2]

Zahur Ahmad and M. A. Aziz—for Applicants.

U. S. Bajpai—for the Crown.

Judgment.—The main point desired to be made out for this transfer was that the Magistrate hearing the case acted in conflict with the provisions of S. 256, Criminal P. C. After the examination and cross-examination of the prosecution witnesses a charge was framed and the Magistrate for reasons recorded in writing required the accused to state forthwith whether they would cross-examine any, and, if so, which, of the witnesses for the prosecution. The counsel did not desire to do so. The Magistrate said that counsel would have an opportunity of cross-examining then or never. It is suggested in this Court that the provisions of S. 256, Criminal P. C., imply that the question as to re-examination should not be put to an accused person until the next date of hearing. There is a very good answer to this argument given by one of the most experienced Judges of this Court. The learned Judge observed in the case of *Mula v. Sheoraj Singh* (1):

"The word 're-call' is very significant and does not mean re-summon. The grace given of two days for cross-examination was a distinct mistake on the part of the Magistrate and should be avoided in future. If the pleader for the defence who had heard the evidence-in-chief is not prepared to cross-examine then and there after the charge-sheet had been drawn up, he hardly deserves the name and rank of pleader. Cross-examination is intended for testing the accuracy and credibility of the witnesses, not for building up a case for the defence."

After such specific instructions to subordinate Magistrates I am afraid that the eloquence of the learned counsel Mr. *Zahur Ahmad* has not produced much effect on me.

(1) [1911] 8 A.L.J. 707=11 I.O. 1007=12 Cr. L.J. 471.

The next point made was that the Magistrate had some extra-judicial information about Baqridi. So long as executive and judicial powers are combined in the same officer this could not be prevented. Some Magistrates are honest enough to disclose their knowledge; others, more experienced, would take the precaution of not disclosing it. But as an officer in an administrative charge of a subdivision he has by the nature of his office to know men of importance and position in his subdivision and their characters. Merely by reason of such knowledge, an administrative officer cannot be deprived of jurisdiction as Magistrate.

The third point was that the Magistrate had in one case told the applicant Baqridee to go out of his sight. The reasons given by the Magistrate for making such a verbal order are satisfactory. Baqridee tried to interfere with some settlement at which the parties to a litigation had arrived in the Magistrate's Court. Baqridee desired to stir up mischief and prevent accommodation, and the Magistrate naturally was not best pleased with the sight of him. It is finally argued that the state of the mind of Baqridee should be considered. This would have been considered if Baqridee had been an ignorant villager who would be frightened by the Magistrate being angry with him in one case and would believe that in another case the Magistrate would be for that reason prejudiced against him. Baqridee is not a man of that type. When the Magistrate turned him out he presented to the Magistrate a petition inquiring of him why he had been angry. A man who does that must be a man well experienced in the art of litigation and not a simpleton. I am perfectly certain that Baqridee does believe that he will get justice in this Court. His desire for transfer appears to me to be due to the hope that by the change of Court his point of view may have a greater chance of success. This application is dismissed.

F.N./R.K. *Application dismissed.*

1930 Cr. Cases 741
(Calcutta)

C.-C. GHOSE AND GUHA, JJ.

Mahammad Jalaluddin Mandal and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 850 of 1929, Decided on 1st April 1930.

Penal Code, S. 366 — Judge charging jury under S. 366 and explaining whole section to them need not suggest that if they find girl not compelled by force to leave father's house, they should proceed to consider whether deceitful means were practised upon her and thereby induced to leave father's house.

Seduction is a comprehensive expression and it does not exclude the possibility of deceitful means being used in order that seduction may be practised with effect. Where, therefore, a Judge charges the jury under S. 366, and explains the whole section fully to them, he need not suggest that if they find that the girl was not compelled by force to leave her father's house they should next proceed to consider whether deceitful means had been practised upon her by the accused and whether by such means she was induced to leave her father's house. [P 742 C 1]

Arityunjoy Chatterjee — for Appellants.

M. Banerjee—for the Crown.

Judgment.—The appellants in this case have been convicted under Ss. 366 and 368, I. P. C., in manner following, that is, appellant 1 Md. Jalaluddin Mandal has been convicted under S. 366 and sentenced to rigorous imprisonment for five years and to pay a fine of Rs. 200 or, in default, rigorous imprisonment for six months and appellant 2, Kazi Md. Anwarul Haq, has been convicted under S. 368 and sentenced to rigorous imprisonment for five years and to pay a fine of Rs. 200 or, in default rigorous imprisonment for six months. The point taken on behalf of the appellant is a short one and in order to understand Mr. Chatterji's contention, it is necessary to set out at some little length the facts.

It appears that one Tarapada had a widowed daughter, the age of whom, according to the medical evidence, is under 16. Her name is Lilabati. She was married when she was only nine years old but became a widow within a year of her marriage. Since then she had been living at the house of her father under his care and guardianship. The accused Jalaluddin and another person named Badaruddin who was acquitted

by the jury were of the same village. It appears that Lilabati complained to her parents of Jalaluddin having cut jokes with her. This was brought to the notice of the village gomasta, as the result of which Jalaluddin was remonstrated with and he kept quiet for some time. But he commenced after an interval cutting jokes at the girl. On the night of the occurrence at about 8 or 9 p. m. Lilabati came out of her father's house to ease herself in a lane between that house and the house of her uncles. The girl's story is that as soon as she had eased herself, the accused Jalaluddin suddenly fell upon her and gagged her mouth with one hand and caught hold of her arms with the other and began to drag her along the lane towards the other end of it which opened into the garden of a doctor named Rasik Sheikh. When she had been dragged by Jalaluddin along the lane a few cubits, the accused Badaruddin joined and both the accused then dragged her to Jalaluddin's house.

There she was pushed into a room and ravished by Jalaluddin on threat of death if she cried. Later on, she was taken by Jalaluddin and Badaruddin to a village called Bamanpara where she was made over to the accused Anwar at about midnight. Anwar was asked to keep the girl in his house. It is further alleged that on the way to Bamanpara the girl was asked by Jalaluddin to say to the police if they would enquire into the matter that she had become a convert to Mahomedanism and would marry Jalaluddin of her own accord in nika form. It appears that the girl was kept in Anwar's house during the night and the following day. On Tuesday night following she was taken outside Anwar's house where she met Jalaluddin and Badaruddin. Jalaluddin told her that the nika marriage had to be postponed and he reminded her again what she was to tell the police if they should arrive at the scene. On Thursday the police recovered the girl from Anwar's house and she went home. On these facts, the accused, namely, the two appellants before us and the said Badaruddin were sent up for trial before the Sessions Court under Ss. 363, 366 and 368, I. P. C. Now, the learned Judge, after explaining the ingredients which had to be proved under S. 363, reminded the jury that

the case could only be proceeded with if the jury found affirmatively that the girl was below 16. If, on the contrary, upon the evidence before them they came to the conclusion that the girl was above 16, then there was no case under S. 363 but the jury would have to consider whether the girl had been abducted under S. 366.

It is with reference to the charge under S. 366 that the present complaint by Mr. Chatterjee has been made. He says that the whole case under S. 366, according to the prosecution, was that the girl had been compelled by the accused by force to leave her father's place and that there was no suggestion whatsoever in the evidence on behalf of the prosecution that she had been led to leave her father's house by deceitful means being practised upon her by the accused. Now, it is perfectly true that the prosecution case at first sight would seem to indicate that the case, if it had to be brought under S. 366, was one of the girl being compelled by force to leave her father's house. But the entire case was put before the jury and it is not suggested that in the presentation of the facts relating to the occurrence in question, the learned Judge has not been particularly fair and scrupulous. There is no complaint made on that score. The complaint is that it should have been suggested to the jury that if they found that the girl had not been compelled by force to leave her father's house, then they should next proceed to consider whether deceitful means had been practised upon her by the accused and whether by such means she had been induced to leave her parent's house. The section speaks of force being used and of compulsion under force. The section also speaks of a girl having been seduced to leave her parents house with a view to illicit intercourse. Seduction is a comprehensive expression and as one understands the matter, it certainly does not exclude the possibility of deceitful means being used in order that seduction may be practised with effect.

In that view of the matter, can it be suggested that the learned Judge in his charge to the jury in respect of this particular portion has used words which amount to misdirection. In our opinion, the learned Judge was bound to explain the section to the jury comprehensively

and fully after presenting the facts to them for consideration. The jury were the masters of the situation and they were to consider whether under all the circumstances, the accused were guilty under the sections charged. We think there is no substance in Mr. Chatterjee's contention. The appeal, accordingly, fails and must stand dismissed.

S.N./R.K.

Appeal dismissed.

1930 Cr. Cases 742

(Calcutta)

SUHWARADY AND PAGE, JJ.

Jabanullah and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 390 of 1929,
Decided on 11th December 1929.

(a) Criminal P. C., S. 297—Charges to jury must be few, simple and easily capable of explanation to jury—Multitude of charges confuses jury and causes mistrial.

In a case triable by a jury, the charges should be few and simple, and so readily capable of explanation by the Judge that the jury will have no difficulty in appreciating the law which they have to apply to the facts of the case before them. The charge should shortly state the salient points in the case, the evidence adduced in it and the points for determination to the jury with reference to the law. A multitude of charges covering offences subtly distinguished from one another is enough to confuse a jury and cause a mistrial. [P 743 C 1 ; P 744 C 1]

(b) Criminal P. C. S. 298—It is the duty of Judge to place facts clearly before jury and explain law with reference to points of determination—Merely reading out head-notes or portions of reported cases is dangerous—Plea of private defence—Merely indicating argument is not sufficient—Law about must be explained.

It is the duty of the Judge in his charge to the jury to place the facts clearly and explain the law with reference to the points for determination. The Judge must tell the jury how they should apply the law to the facts found by them. The practice of reading out head-notes or other portions of the reports of a case is a dangerous practice likely to confuse the jury. But the Judge may tell the jury how to apply the law laid down by the decisions of the High Court to the facts of the particular case.

When the defence takes up a plea of private defence, it is a serious defect if the charge merely indicates the argument but does not direct the jury how they are to apply the law in deciding the guilt or otherwise if they find facts giving rise to the right of private defence. [P 743 C 2]

Camell and Hemendra Kumar Das—
for Appellants.

Satindra Nath Mukerjee— for the Crown.

Suhrawardy, J.—In this case the appellants who are 18 in number were tried along with another accused on various charges which are too numerous to mention. They were convicted by the unanimous verdict of the jury and sentenced to different terms of imprisonment by the Judge. The accused who has not appealed before us was sentenced to pay a fine which has been paid. There are various grounds taken before us on behalf of the appellants, but it is necessary to refer to a few of them in order to show that the trial has not been conducted in the way in which it should have been. The first is with regard to the charges framed against the accused. There were 11 charges framed in this case and each accused was charged with not less than eight of the offences covered by some of the charges. The charges were under Ss. 304, 147, 148, 323, 324, 304/149, 304/109, 323/109, 324/109, 304/114 and 147/114. This impressive array of charges is enough to confuse any jury.

The case for the prosecution was that the accused in a body attacked the party of the deceased who were said to have been in possession of the land in dispute, and in the course of the riot accused 1 struck a blow on the head of the deceased which ultimately proved fatal. The case as made out by the evidence was a simple one and it was not necessary to charge the accused with so many offences some of which it is difficult to distinguish from some others. We have on several occasions condemned the practice of having a long series of charges in a case triable by jury as it is likely to confuse them. In the present case the learned Judge has devoted eight pages of his charge to the explanation of the several sections of the Penal Code. Now to refer to some of those charges, the accused have been charged under S. 304/109 and they have also been charged under S. 304/114. There is not enough explanation of the fine distinction between Ss. 109 and 114 with the result that the jury have convicted one of the appellants accused 2 under S. 147/114. The case against that accused is that he is the landlord of the deceased and he took men with him to the place of occurrence and gave order to beat the deceased and

his party. On these facts he could either be convicted under S. 147/109 or under S. 147 being member of an unlawful assembly. This indicates that the jury were not able very well to appreciate the law as propounded by the Judge.

Then there is the more serious defect in the charge which it is difficult for us to overlook. The defence argued that if the jury believed that the deceased was dispossessed the day previous to the occurrence and the accused reaped the paddy on the field and stacked it and on the day of occurrence the deceased with a number of men came to snatch the paddy away, the accused had the right of private defence to resist force by force, and the offence they would have committed would be one of trespass but not of rioting. The learned Judge in his charge mentioned this argument on behalf of the defence and then it appears he referred to some decisions of the High Court which are not before us and which we cannot say are how far applicable to the facts of this particular case. He gives no further directions on the question raised by the defence. It is the duty of the Judge to tell the jury how to apply the law to the facts found by them. In a case like this he would be wanting in the proper discharge of his duty to the jury if he places the proper facts to the jury without telling them how they should decide the guilt or otherwise of the accused on the law. In the case of *Meher Sardar v. Emperor* (1) the practice of referring to reported decisions has been condemned. It is not necessary for me to go so far as to say that there is any bar to the Judge in explaining the charge to the jury what particular view was taken by the highest Court of the land, but he must tell the jury how to apply the law laid down by the decisions of this Court to the facts of the particular case. The learned Judge in the case before us has not helped the jury to apply the law if they found that as a matter of fact the deceased was dispossessed the day previous to the date of occurrence. This seems to me to be a very serious matter because we do not know what view of the facts the jury took. It may be that they believed that the deceased was all

(1) [1912] 18 C. W. N. 46=13 I. O. 218=13 Cr. L. J. 26.

along in possession in spite of the rent decree.. It may be that they believed that the landlord who had obtained this decree against the deceased, by getting symbolical possession through the civil Court had succeeded in dislodging the deceased from the land previous to the occurrence or some day previous to it, but still as the accused in a body attacked the deceased and committed murder, they should be convicted of the offences with which they were charged.

We should also refer to the way in which the charge was delivered to the jury. As we have observed the case is not a very difficult one though the evidence is voluminous. The charge should have shortly stated the salient points in the case, the evidence adduced in it and the points for determination to the jury with reference to the law. The learned Judge it seems delivered a very long charge which, though a careful one, may have the effect of confusing the jury as to the way in which the law should be applied to the case. We find that the trial was a very protracted one and entailed a great deal of time and expense but we regret that we have to interfere in this case because of the defects in the charge we have pointed out.

We accordingly set aside the convictions and sentences of the appellants and direct that they be retried. The appellants will remain on the present bail until further orders from the Sessions Judge.

Page, J.—I am of the same opinion, and I think that it is desirable to emphasise one aspect of this case. From an examination of the proceedings it appears that the ultimate cause of this mistrial was the multiplicity of charges upon which the accused were put on their trial. The mere enumeration of the offences with which the accused were charged, and which the jury had to take into consideration, is in itself sufficient in my opinion, to justify this Court in holding that a summing up such as that delivered by the learned Judge was bound to confuse the minds of the jury as to the issues which they had to determine before they could bring in a verdict in respect of the accused or any of them. It is of the utmost importance that proceedings in a criminal trial should be as

simple as possible, and that the Judge and the jury should not be compelled to wade through a morass of confused and varied charges. The practice in the *moffusil* appears to be to lump together and to try the accused upon as many charges as the ingenuity of those whose duty it is to frame them can devise. This practice has repeatedly been condemned, and for the reason that where an accused person is put upon his trial the charges against him should be so clear and so readily capable of explanation by the trial Judge that the jury will have no difficulty in appreciating the law which they have to apply to the facts of the case before them. In this case the nature of charges against the accused has been referred to by my learned brother, and the trial Judge in his summing up proceeded apparently to give an exposition of the law of inordinate length upon each of these intricate and confused charges.

Having regard to the nature of the charges and the manner in which the learned Judge endeavoured to explain their meaning I do not believe that the jury could have understood the law which was to be applied to the facts of the very simple case before them. It would be a much better practice, I think, that those responsible for framing charges against an accused person should make them not as numerous, but as few, as possible, for such a course would obviate what otherwise must often result in a misunderstanding of the law on the part of the jury. The learned Judge in this case, however, notwithstanding his lengthy exposition of the law does not appear adequately to have discriminated between the different charges preferred against the accused, and not content with leaving to the jury all these charges with an insufficient explanation of their meaning, the learned Judge, after expounding what he himself stated to be an intricate matter of law relating to the right of private defence, proceeded to read to the jury head notes of a number of cases decided in this Court with a view apparently to enable the jury the better to appreciate the meaning of the doctrine of the right of private defence in relation to the particular facts of the case before them. Of course, it is often useful to illus-

trate the meaning of a legal doctrine by relevant example culled from the books or stated by the learned Judge in his own words, but the practice of reading out head notes or other portions of the report of a case not before them to the members of the jury is a dangerous practice which is to be discouraged as more likely to mystify than enlighten the jurors. In the present case the effect of so doing must have been to plunge the facts of the case still more deeply into a legal morass, and make confusion worse confounded.

The result is that the time spent upon this case has been wasted, and it is to be hoped that when the retrial takes place this simple case will be placed before the jury in a manner and in a proceeding where the issues before them are clearly defined and the jury need have no difficulty in applying their minds to the facts of the case in order to ascertain whether the accused are guilty or not guilty of the charges which are framed against them.

R.M./R.K. *Order accordingly.*

1930 Cr. Cases. 745

(Calcutta)

C. C. GHOSE AND GUHA, JJ.

Mohiuddin and another—Appellants.

v.

Emperor

Criminal Appeals Nos. 2 and 3 of 1930, Decided on 8th April 1930, against order of Sess. Judge, Bakargunge.

Criminal P.C., S. 423 (2)—Powers of High Court in appeal from verdict of jury are limited to charge and misdirection.

The High Court's powers of interference in an appeal from the verdict of the jury are strictly limited and can only arise if the accused succeed in showing that there are misdirections in the Judge's charge to the jury.

[P 747 C 1]

(b) Penal Code, Ss. 366 and 376 — Question of age of girl very material and if girl below 14 that she was love smitten, wrote love letters and consented is immaterial in law.

On a charge under Ss. 366 and 376, the question of the age of the girl is very material and if the girl is less than 14 years of age, although she may have been love smitten and wrote love letters, her consent to acts referred to in Ss. 366 and 376 is in law immaterial. [P 749 C 1]

(c) Criminal P. C., S. 278—Provided there is lottery mere fact that jury were chosen from amongst those able to read English where identity of handwriting was fact in issue does not vitiate constitution of jury.

Provided there is lottery, the mere fact that the Court proceeded to choose jury from

amongst those able to read English, on the suggestion of the Public Prosecutor to which the counsel for the accused consented as there were certain documents in English and identity of handwriting of which was fact in issue, does not in any way vitiate the constitution of jury and amount to excess in exercise of inherent powers that the Court has in ensuring a fair trial or infringe in any way the provisions of S. 278. [P 748 C 1]

W. Gregory, C. Bagram, E. Mingail, Nurul Hug, Amiruddin Ahmad and Atikulla—for Appellants.

D. N. Bhattacharyya—for the Crown.

S. C. Talukdar and Radhikaranjan Guha—for Complainant.

C. C. Ghose, J. — In appeal 2 of 1930 the appellant is one Mohiuddin Ahmed and in appeal 3 of 1930 the appellant is one Hemayetuddin Mukhtear. They have been found guilty by the jury in the proportion of 3 to 2 in manner following: the accused Mohiuddin and the accused Hemayetuddin have both been found guilty under S. 120-B read with S. 366, I. P. C., the accused Mohiuddin guilty under Ss. 366 and 376, I. P. C. and the accused Hemayetuddin guilty under S. 366/114 I. P. C. The learned Sessions Judge, agreeing with the verdict of the jury, has convicted both the accused under the sections referred to above and he has sentenced them as follows: the accused Mohiuddin to suffer rigorous imprisonment for a period of two years on each of the three charges, namely under Ss. 366 and 376 (two counts) and to suffer rigorous imprisonment for a period of 18 months under Ss. 120-B/366, I. P. C., the sentences to run concurrently: the accused Hemayetuddin to rigorous imprisonment for a period of 18 months on each charge under Ss. 120-B/366 and 366/114, I. P. C., the sentences to run concurrently.

Against this conviction and sentence the above appeals have been preferred to this Court. They have been separately argued before us by Mr. Bagram and Mr. Mingail on behalf of the accused Mohiuddin and by Mr. Gregory on behalf of the accused Hemayetuddin and the main point that has been argued in these appeals is that the selection and empanelment of the jury in this case were irregular and unwarranted by law. Various other points were taken and in order to understand these other points, which will be indicated later on, it is necessary to set out the facts shortly.

Babu Charu Chandra Roy is a pleader at present, practising at Barisal. From September 1928 to 22nd December 1928 he used to occupy a house at Barisal which was next door to the house of a Deputy Magistrate named Moulvi Panaulla. With him were his wife and his daughter named Sovana, an unmarried girl aged about 13 years and odd months. The adjoining house which was occupied as stated above by Moulvi Panaulla, was only a few cubits off. Moulvi Panaulla had with him his wife named Latifa, and there used to live in Moulvi Panaulla's house the accused Mohiuddin who is said to be a cousin of Latifa. It is stated that Latifa, who is a young lady aged about 16 or 17 years, used to come to Babu Charu Chandra Roy's house and visit the latter's wife and daughter and Sovana used to visit Latifa at the latter's house. The ladies of the two houses apparently became very friendly and Sovana was introduced by Latifa to Mohiuddin and to one Golapjan who is Moulvi Panaulla's sister-in-law. On one occasion Mohiuddin, Latifa and Golapjan took Sovana to see an exhibition which was being held in Barisal. On two other occasions these four persons went to a local theatre in the evenings, all four of them going in the same carriage. They returned from the theatre shortly after midnight. It is said that on all these occasions Sovana had her mother's permission to go with Mohiuddin and his party. Be that as it may, Mohiuddin and Sovana fell in love with each other and there followed exchange of letters between Sovana and Mohiuddin. These letters, at any rate, a large number of them, are exhibits in this case and have been marked Z. The letters written by Sovana are addressed "Praner Mohi," "Praner Swami" and in such like terms and they breathe ardent and passionate love. Some of these letters ultimately came to the knowledge of Sovana's father: but before that he had apparently noticed that Mohiuddin was paying undesirable attentions to his daughter Sovana. He thereupon brought the matter to the notice of Moulvi Panaullah and asked him to send Mohiuddin away.

This, however, Moulvi Panaullah was for various reasons, not in a position to agree to; and Babu Charu Chandra Roy thereupon removed to a house, a short

distance away, near the house of one Bazlur Rahaman, River Police Inspector in Barisal. Meanwhile Mohiuddin used to come and peep through a window into the inner apartments of Charu Babu's house and he renewed sending letters to Sovana through Bazlur Rahman's servant Hariz. It appears Mohiuddin on one occasion sent a gold ring to Sovana which, however, was made over by Sovana to her mother who again made it over to Charu Babu. This fact was brought to the notice of Moulvi Panaulla and the latter eventually i. e., by the middle of April 1929, sent Mohiuddin away to his home in Kuligram in the District of Rangpur. On 30th April 1929 Sovana's father had to leave Barisal on urgent professional work and Sovana and her mother stayed in Barisal. The accused Mohiuddin had returned meanwhile to Barisal and it is alleged that he kidnapped and abducted Sovana on the night of 30th April 1929. At noon on that date Sovana got a letter from Mohiuddin through Hariz saying that he would take her away that night and asking her to be ready. This letter is not forthcoming and a detailed account of how it was got hold of and burnt by the accused Hemayetuddin is given by the witness Sisir Kumar Guha.

To continue the story. Sovana describes how she awoke on hearing a noise near her window and how she came out after opening the door of her room. She apparently occupied the room in question by herself. Mohiuddin joined her and there was also a young man named Khaleq. They, i. e. Mohiuddin and Khaleq took her to the house of a constable named Gani. At Gani's house there was present, apparently by previous arrangement the appellant Hemayetuddin. The three, i. e., Mohiuddin, Hemayetuddin and Khaleq left Sovana in the constable's house and went to buy tickets for the steamer journey to Chandpur. Thereafter Mohiuddin and Khaleq came back and took Sovana to the steamer ghat, Hemayetuddin accompanying the party to the steamer ghat. Mohiuddin and Khaleq and Sovana went to Chandpur by steamer. At Chandpur they got down from the steamer and went by boat to the house of Khaleq's aunt. Mohiuddin and Sovana got into

one boat and Khaleq into another. It is alleged that Mohiuddin ravished Sovana in the boat. After a short rest at Chandpur, Mohiuddin and Sovana proceeded to Goalundo by steamer. From Goalundo, they went by train to Niahati and thence to Bandel and Howrah. They then went to Balasore and from Balasore to Waltair and Vizagapatam. From Vizagapatam they went to Hyderabad and thence to Bombay. It is not denied that while Mohiuddin and Sovana were together they had sexual intercourse. The father Charu Babu returned to Barisal several weeks after at the conclusion of his professional business and complained before the Magistrate. We will not pause to comment on the extraordinary conduct of the father and we would fain hope that such conduct is rare. However, there was a full and complete investigation by the police with the result that the two accused before us were committed on 30th September 1929 to take their trial in the Sessions Court on the charges mentioned above.

I will deal with the question of the constitution of the jury in a few moments but before I do so I desire to say at once that I have perused and reperused the learned Sessions Judge's charge to the jury and I am satisfied that it is an eminently fair, impartial and dispassionate summing up of the whole case and that everything that could be urged in favour of the accused has been placed before the jury in a thoroughly satisfactory manner. I have listened with very great care to the earnest and vigorous addresses of learned counsel for the two accused; I was then of opinion and I am still of opinion that many of their points would only be admissible if we were hearing an appeal on facts; that is not the position with reference to these appeals at present and our powers of interference with the verdict of the jury are strictly limited and can only arise if the accused succeed in showing that there are misdirections in the learned Judge's charge to the jury.

Now, as regards the question of the constitution of the jury. The accused have raised this question in an affidavit which was put in at the time of the admission of these appeals; they have

also taken this point in their grounds of appeal. That affidavit must have been allowed to be put in per incuriam. The deponent of the affidavit does not say that he knows the English language or he understands the same; indeed, there is internal evidence in the affidavit itself that he does not know English; in these circumstances, the statements in the affidavit in question cannot be relied upon for the purposes of this judgment and we have accordingly excluded the same from our consideration.

Mr. Mingail stated before us that he was one of the counsel who appeared before the learned Sessions Judge on behalf of the accused Mohiuddin and that he was in a position to state before us what happened in the Court below at the time of the empanelment of the jury. The matter is of very great importance and we have allowed Mr. Mingail to make a statement from his place at the Bar. Mr. Mingail stated as follows :

"Fifteen jurors attended, Charges were read out and the pleas of the accused taken. Before the selection of the jury actually commenced, the learned Public Prosecutor observed to the Court that he would rather have a jury composed of English-knowing people, inasmuch as some of the documents were in English and they would need to be shown to the jury. The learned Judge agreed to this and on asking me, I said that that course would certainly be desirable from my point of view. One juror was then called. The learned Public Prosecutor objected to this juror being empanelled on the ground that he did not know English, basing his objection on S. 278, Cl. (g), Criminal P. C. I protested against this objection maintaining that it could not be sustained under that section, as Cl. (g) provided that the objection could only be made if the juror neither understood English nor the language into which it was interpreted. The learned Judge did not pass any order on this at the time. He called out the name of another juror. He said he knew English and he was empanelled. He then called out the names of all the remaining jurors and each one was asked, if he knew or could read English. Some said they knew a little, some said they did not know at all. They were all made to sit in the body of the Court. The learned Judge then called out four names from amongst those who were sitting in the body of the Court and put them in the jury box. I believe that the four other jurors who were selected were taken out of those who had said that they knew English."

It is important in this connexion to look into the order-sheet of the learned Sessions Judge.

The learned Sessions Judge in his order-sheet notes as follows :

"When the Court began the selection of the jurors, the learned Public Prosecutor pointed out that there were certain documents in English the identity of the handwriting of which was a fact in issue. The prosecution purpose to examine a handwriting expert, and the jury have to decide on such a question of fact, with the assistance of the evidence of such a witness. It was suggested by the learned Public Prosecutor, and agreed to by the Court, and to the best of my belief by learned counsel for accused, that it was desirable that the jurors should be able to read English. Amongst the jurors present were a number who could do so. The learned Public Prosecutor actually objected to an individual jurymen on the ground that he was unable to read English, basing his objection on S. 278 (g), Criminal P. C. This was objected to by learned counsel for the accused, and the Court agreed with his view that objection on these grounds could not be raised under that section. That is as far as the defence objection went, and it was agreed to by the Court, who proceeded to choose the jury from amongst those able to read English."

"The defence objected against three jurors individually. One is a Head Master of a School at Sadar, and was said to have stayed with a Hindu pleader of the local Bar. This objection was allowed. Another was said to have had a discussion on the case with another Hindu pleader; this objection was considered distinctly weak and was disallowed; the case has been discussed throughout the District, and there are no grounds for assailing the impartiality of this juror even if the facts are as alleged. He comes from the mofussil. A third objection was allowed on the ground that the juror was concerned in a dispute over a hat in which the accused was also concerned. Against the other four jurors selected, no objection was raised, and no objection was raised against the constitution of the jury as a whole. These remarks are considered a necessary part of the order-sheet in view of the petition submitted after the jury had been sworn and the case opened for the Crown. I am satisfied that the accused have been in no way prejudiced."

In my opinion, there is no substance in the argument which was sought to be advanced before us that there was no lottery. The record shows that there was a lottery; the only thing that happened was that the Judge proceeded to choose the jury from amongst those able to read English. In doing what he did, the learned Judge did not in my opinion exceed the inherent powers that he had in ensuring a fair trial or infringe in any way the provisions of S. 278, Criminal P. C. It is really not necessary to go to the last clause of S. 278, Criminal P. C., for authority for the procedure adopted by the learned

Judge. As far as I can make out, what was done could not possibly raise any question of jurisdiction and it was done with the entire concurrence of learned counsel for the accused. I deprecate most strongly the attempt to give a communal complexion to the affair in the grounds of appeal in this Court. The learned Sessions Judge Mr. Stork cannot be accused of any bias and the attempt in this Court by means of the said affidavit is incompatible with one's notion of what we are used to in this Court. Each case must depend upon its own facts and I am unable to say that on the facts of this case the learned Judge's action was in any way irregular or contrary to law. I am therefore of opinion that this point about the constitution of the jury which has been urged by both the accused must fail.

On behalf of the accused Mohiuddin grounds 3, 6, 9, 10 and ground 4 relating to the question of Sovana's age have been urged before us. Ground 3 relates to Sovana's letters. This ground is inseparably connected with the question of Sovana's age on 30th April when she was taken away by Mohiuddin and during the month of May and until she was recovered. Now the question of Sovana's age is of course all important having regard to the charge under S. 366 and it is dealt with in paras. 7-14 of the learned Judge's charge to the jury. All the material evidence on record was placed by the learned Judge before the jury; the question was viewed in the light of the medical evidence and from various angles and it is difficult to suggest that this portion of the learned Judge's charge suffers either from under-statement or over-statement. A great deal of Mr. Bagram's forensic wrath was centred on Ex. 26 for no earthly reason whatsoever. The jury were left a free hand; the jury were told that it was for them to consider whether the document in question which the prosecution claimed was a horoscope had been manufactured for the purposes of this case and whether Gharu Babu's word that it was a horoscope written by him and containing the dates of the births of his several children could be accepted. What more the learned Judge was to do or could have done has not been made clear to us. Nothing more need be said about this point.

On the charge under S. 366 and 376, as indicated above the question of Sovana's age was very material. If in fact Sovana was less than 14 years of age although she had been love-smitten and could write the letters referred to above, her consent to the acts referred to in Ss. 366 and 376, I. P. C., was in law immaterial; and this question has been brought out prominently in the learned Judge's charge to the jury. The whole of Sovana's present story is referred to in paras. 17-22 in the learned Judge's charge to the jury at very great length and the jury were definitely asked to come to a conclusion having regard to Sovana's letters whether Sovana actually consented to go away with Mohiuddin. Here again the learned Judge has been scrupulously fair to the accused. The question of age and her consent, if any, have an important bearing on the question of the charge under S. 376, I. P. C., and this was dwelt upon by the learned Judge. He points out all the circumstances that could be urged on behalf of the accused, such as Sovana's previous relationship with Mohiuddin, the visits to the theatre, the presentation of the ring and the exchange of letters. The learned Judge goes on to discuss the conduct of Sovana's father up to 31st May 1929 and he has said enough from which the jury could, if they had liked, have drawn an inference that Sovana's father was supremely indifferent and that he gave implied consent to what happened. Lastly there was the question as to whether a marriage has been celebrated between Mohiuddin and Sovana. On this point too, the learned Judge's summing up was adequate, clear and exhaustive.

There remains the question of the withholding of certain witnesses by the prosecution. Now it may be said at once that para. 4 of the learned Judge's charge dealing with this point may at first sight be open to certain verbal criticism; but when the facts are gone into and the evidence perused, one must come to the conclusion that there is nothing in that paragraph to which any objection can be sustained in law. In my opinion the jury were given proper directions and no prejudice to the accused has been shown to our satisfaction.

Now, as regards the accused Hemayetuddin in addition to the grounds re-

ferred to above, grounds 7, 8, 9, 10, 11, 12, 13, 14 and 15 in his grounds of appeal were urged. The accused Hemayetuddin was charged with having abetted Mohiuddin in the commission of the offence of kidnapping by taking part in the removal of the girl immediately after she was taken out of her father's house and by procuring steamer tickets for them. The learned Judge in paras. 60-62 has referred to the matter at very considerable length, leaving to the jury to determine for themselves whether or not compulsion was being continuously brought to bear on Sovana in order to prevent her from returning while she had an opportunity. The threat to publish to the world Sovana's letters and thereby bring disgrace on her, was that not compulsion? However, the matter was for the jury and I can see nothing in the charge of the learned Judge to which any exception can be taken by anyone acquainted with the facts. Indeed this portion of the charge was distinctly in favour of the accused Hemayetuddin. Then as regards the charge of conspiracy there was an abundance of material on the record to which the jury's attention has to be directed and the learned Judge did it in an extremely careful and satisfactory manner. The grounds taken on behalf of the accused Hemayetuddin have no substance and must be negatived.

On the question of sentence I am unable to reduce the sentence in Mohiuddin's case. I am fully aware that the crime in respect of which Mohiuddin has been convicted would have been impossible, were it not for the negligence, to put it very mildly, of Sovana's parents but I cannot take that fact into consideration for a further reduction of the sentence, because the learned Judge in passing the sentence he did has already taken this and various other circumstances into his consideration.

As regards Hemayetuddin, the record shows that he has been throughout the most resourceful ally of Mohiuddin and I fail to find anything on the record which can induce me to order a further reduction in the sentence passed on him. In his case too, the learned Judge has passed a moderate sentence.

The result is that both these appeals will stand dismissed. The accused who are on bail must surrender to their bail

bonds and serve out the remainder of the sentences imposed on them.

Guha, J.—I agree.

V.B./R.K. . *Appeals dismissed.*

1930 Cr. Cases 750

(Calcutta)

PEARSON AND PATTERSON, JJ.

Kuti and others—Appellants.

v.

Emperor

Criminal Appeal No. 486 of 1929, Decided on 15th January 1930, against order of Offg. Addl. Sess. Judge, Faridpur, D/- 14th June 1929.

(a) Criminal Trial—Defence — Nature of defence to be ascertained from statements of accused persons and trend of cross-examination of prosecution witnesses.

The nature of the defence is to be ascertained not only from the statements of the accused persons themselves, but also from the trend of the cross-examination of the prosecution witnesses and from the arguments of the accused's pleader at the close of the trial.

[P 750 C 2; P 751 C 1]

(b) Criminal P. C., Ss. 297 and 299—Plea of private right of defence could have been put forward as disclosed from cross-examination of prosecution witnesses but not put forward—Charge to jury expressly calling upon jury not to consider plea of private right of defence amounts to misdirection—Duty of Court explained.

It was clear from the cross-examination of the prosecution witnesses that occurrence in connexion with which the accused were tried on the charge of rioting attended by murder of one of the opposite party, took place in consequence of the complainant and his party coming to the land with a large body of armed men and having attempted to forcibly cut the paddy grown by the accused. In his charge to the jury as the plea of right of private defence was not expressly raised by the defence counsel, the Judge after discussing evidence regarding possession and actual occurrence at considerable length expressed himself in following terms with regard to the plea of right of private defence: "The accused have not set up right of private defence, in answer to the charge against them, and there are not also circumstances appearing upon the evidence in the case justifying the exercise of right. The learned prosecutor had argued the matter by way of anticipation but as it is not necessary for you to consider in this case, I do not think it necessary to place the law on the subject before you."

Held: that the charge to the jury amounted to misdirection which occasioned failure of justice in the sense that it has the effect of depriving the accused of their undoubted right to have the question of the existence of the right of private defence and other questions of fact arising therefrom decided by the jury;

Held further: that it ought to have been left to the jury to decide on a consideration of

evidence as a whole, whether the existence of the right of private defence had or had not been established and if so what would be the effect of the existence of that right on the question of the liability of the various accused persons in respect of the charges on which they had been tried. [P 750 C 2; P 751 C 1, 2]

S. G. Taluqdar and Jyotish Chandra Guha—for Accused:

Khundkar and Anil Chandra Ray Chowdhury—for the Crown.

Judgment.—This case arises out of a riot that is said to have taken place over the cutting of paddy, in the course of which one of the members of the complainant's party was killed.

At the trial both sides claimed to have been in possession of the land and to have grown the disputed crop, and each party alleged that the members of the other party had been the aggressors.

In his charge to the jury the learned Additional Sessions Judge discussed the evidence regarding possession, and the evidence regarding the details of the actual occurrence at considerable length, and he expressly left these matters to the decision of the jury.

As regards the question of the right of private defence, however, the Judge expressed himself in the following terms:

"The accused have not set up the right of private defence in answer to the charge against them, and there are not also circumstances appearing upon the evidence in the case justifying the exercise of that right. The learned Public Prosecutor had argued the matter by way of anticipation, but as it is not necessary for you to consider in this case, I do not think it necessary to place the law on the subject before you."

This, in our opinion, amounted to a misdirection such as makes it necessary that the case should be sent back for retrial.

It is true that none of the accused in their statements in Court, expressly claimed to have grown the disputed crop or gave their own version of the occurrence or put forward the plea that they had asked in the exercise of the right of private defence; most of them merely stated that they were innocent and that false evidence had been given against them out of enmity, while some of them said that they had been elsewhere at the time of occurrence. The nature of the defence is, however, to be ascertained not only from the statements of the accused persons themselves, but also from the trend of the cross-examination

of the prosecution witnesses and from the arguments of the accuseds' pleader at the close of the trial. To hold otherwise would be to run the risk of grave injustice being done in certain classes of cases, for it is a matter of common experience that ignorant people who have been directly or indirectly concerned in causing a man's death will seldom admit that they have been so concerned, even though death may have been caused in the lawful exercise of the right of private defence. Now it is clear from the trend of the cross-examination of the prosecution witnesses in the present case, that the defence sought to be set up by the accuseds' pleader was that the alleged delivery of possession to Bani Kanta Chakravarti and his brothers in execution of a decree of the civil Court, had never actually taken place, that the disputed crop had been grown by the accused Mazaffar and others of his party, and that the occurrence had taken place not in the manner alleged by the prosecution, but in consequence of the complainant and his party having come to the land with a large body of armed men and having attempted to cut the paddy by force. The case for the defence as put forward by the accuseds' pleader in the course of his argument has nowhere been clearly stated in the charge to the jury, but it would appear from various passages in the charge that it was of the nature indicated above, and it is hardly conceivable that the accuseds' pleader would not have pursued his argument to its logical conclusion, and would not have expressly raised the plea of private defence.

The mere fact of this plea having been so raised, would not, however, have made it incumbent on the Judge to place this aspect of the matter before the jury, unless there was some evidence in support of the plea.

There is, however, some such evidence on the record, not only as regards the question of possession but also as regards the nature of the actual occurrence, (there is, for example, the deposition of prosecution witness Kamini Kumar Das before the committing Magistrate), and it ought in our opinion, to have been left to the jury to decide on a consideration of the evidence as a whole, whether the existence of the right of private defence had or had not been established,

and if so, what would be the effect of the existence of that right on the question of the liability of the various accused persons in respect of the charges on which they had been tried.

The only question that remains to be considered is whether the misdirection referred to above, has in fact occasioned a failure of justice. In our opinion it has, in the sense that it has had the effect of depriving the accused of their undoubted right to have the question of the existence of the right of private defence, and the other questions of fact arising therefrom, decided by the jury.

In this view of the matter, the convictions and sentences must be set aside, and the case must go back for retrial.

V.B./R.K.

Case remanded.

* 1930 Cr. Cases 751

(Calcutta)

SUHWARDEY AND PAGE, JJ.

Emperor

v.

Derajtulla Sheikh and others — Accused.

Death Ref. 4 and Criminal Appeal No. 230 of 1929, Decided on 18th December 1929, made by Sess. Judge, Faridpur, D/- 24th September 1929.

* Criminal P. C., S. 303—Judge can question jury only to ascertain verdict and for no other purpose.

The object of S. 303 is merely to enable the Court to ascertain whether the jury intended to bring in a verdict of guilty or not guilty. For no other purpose is a Judge entitled to interrogate the jury under S. 303 after they have given their verdict. A Judge is not entitled to examine the jurors as to the grounds upon which they have based their verdict.

[P 752 C 1]

B. C. Chatterjee and Nurul Haq—for Accused.

D. N. Bhattacharjee—for the Crown.

Page, J.—In this case the three appellants were charged with the offence of murder under S 302, I. P. C. The accused Derajtulla was unanimously found guilty, and the accused Erfan and Surat were found guilty by a majority of 7 to 2. The learned Sessions Judge, agreeing with the verdict of the jury in the case of each of the accused, sentenced Derajtulla to death and Erfan and Surat to transportation for life. The three accused have now appealed against their conviction and respective sentences to this Court. It is expedient, I think, that we should say something

about the action of the learned Sessions Judge in taking the verdict of the jury. The jury having brought in a clean and clear verdict of guilty as against the accused, the learned Judge proceeded to examine the jurors, apparently with the object of ascertaining the ground upon which their verdict was based, in the following manner :

Q. Have you believed the evidence of Anath and Ajmal?

A. We are unanimous in believing the evidence of Anath. We have believed the evidence of Ajmal by a majority of 7 to 2.

In our opinion such a question the learned Judge was not permitted by law to ask. S. 303, Criminal P. C., provides suitable procedure, where the answer of the jury to the question put to them as to whether an accused person is guilty or not guilty is so vague and uncertain that in order to ascertain whether the jury intended to bring in a verdict of guilty or not guilty it is necessary to ask supplementary questions. The object of S. 303 is merely to enable the Court to ascertain whether the jury intended to bring in a verdict of guilty or not guilty, and for no other purpose, in our opinion, is a learned Judge entitled to interrogate the jury under S. 303 after they have given their verdict. In this case the verdict of the jury was clear and precise, but for some reason or other the learned Judge took upon himself to examine the jurors with a view to ascertain whether their verdict was based upon the evidence of one or other or both of two important witnesses who had been called for the Crown. Such an interrogatory, in our opinion, the learned Judge was not permitted by law to administer, and the course taken by him has repeatedly been condemned by this Court, which has laid down that a Judge is not entitled to examine the jurors as to the grounds upon which they have based their verdict.

Now, the fact that a murder was committed on the night of 5th March 1929 is not and cannot be challenged. By a deodar tree at the entrance to a path leading through a bamboo jungle the trunk of the body of Sushil Bhaduri was discovered about 10-30 on the night of 5th March 1929; but the head had been severed from the trunk by some sharp and heavy weapon and has never been found. Where it is, and what

happened to it, nobody knows, and it is idle to speculate. The question to be determined in this case is whether the accused or any of them took part in the murder of Sushil Bhaduri. (After discussing the evidence in the case, his Lordship concluded.) In these circumstances, in our opinion, the case on behalf of the Crown was so strong that the only verdict which a jury of reasonable men would be justified in returning was one of guilty of wilful murder under S. 302 against each of the accused.

With regard to the sentences that ought to be imposed upon the accused it is enough to say that the perpetrators of a crime so callous and brutal as the murder of Sushil Kumar Bhaduri rendered each of them amenable to the extreme penalty of the law. The sentence of death passed upon Derajtulla Sheik is confirmed, and if a like sentence had been passed upon Erfan and Surat we should not have been disposed to disturb it. The learned Sessions Judge, however, for three reasons (none of which we think should have weighed with him in considering the sentence), has sentenced Erfan Sardar and Surat Sardar to transportation for life, and in all the circumstances we do not feel it necessary to alter that sentence which will stand.

The appeal, therefore, of all the appellants is dismissed, the sentence of death passed upon Derajtulla Sheikh is confirmed, and that of transportation for life upon Erfan Sardar and Surat Sardar will also stand.

Suhrawardy, J.—I agree.

R.M./R.K.

Appeal dismissed.

1930 Cr. Cases 752

(Calcutta)

C. C. GHOSE AND GUHA, JJ.

Emperor

v.

Chauthmall and another—Accused.

Government Appeal No. 8 of 1929,
Decided on 2nd April 1930.

(a) Police Act (5 of 1861), S. 34 (7)—
Making water is easing oneself.

The expression "easing oneself" comprises within its ambit "making water" so as to constitute it an offence within Cl. 7, S. 34.

[P 754 C 1]

(b) Police Act (5 of 1861), S. 34 (7)—
Making water by side of road—High Court
taking into consideration evidence of anno-

yance and hour of occurrence refused to set aside order of acquittal.

Although making water by the side of road was an offence under S. 34 (7) where the Sessions Judge had acquitted the accused on wrong construction of the section, High Court taking into consideration the evidence of annoyance on record and the hour of occurrence refused to set aside order of acquittal.

[P 754 C 1]

D. N. Bhattacharjee—for the Crown.

Ramendra Chandra Roy, Amicus curiae.

C. C. Ghose, J.—This is an appeal by the Government of Assam and it arises out of the following circumstances :

On 9th March 1929, at about 10 p. m. two constables of Jorhat Town Police in the District of Sibsagar, named Phanidhar Aham and Bibhu Ram Chutia, while on duty were passing along the Trunk Road. They saw accused 1, Chauthmall making water by the side of the road. The constable thereupon went up to the said accused and told him that he had committed an offence punishable under the Police Act and asked for his name. The accused refused to give his name and thereupon the constable, Phanidhar, gave him a piece of paper and pencil and asked him to write his name thereon. The accused having refused to do that either, the constables arrested the accused by seizing his two hands. The constables thereafter asked the accused to go with them to the thana and he having refused to go to the thana, the constables tried to take him by force. It is said that thereupon Chauthmall called out to his friends who with the accused 2 came up, assaulted the constables and rescued accused 1 from their custody. The accused were thereafter placed on their trial before the Magistrate, First Class, Jorhat under Ss. 147 (rioting), 225-B (escaping from lawful custody) and 353 (assaulting a public servant), I. P. C. The trying Magistrate by his order dated 4th July 1929, negatived the case against the accused under S. 147. He, however, was of opinion that the accused had committed the offences punishable under sections 225-B and 353, I. P. C., and he thereupon convicted them under those sections and sentenced them to pay certain fines. The accused then preferred an appeal to the learned Sessions Judge of the Assam Valley Districts and that officer by his judgment and order dated 23rd Septem-

ber acquitted both the accused, holding that 'making water' was not included within the expression 'commits nuisance by easing himself' as used in Cl. 7, S. 34, Act 5 of 1861. Now, having regard to the view which we have taken it is only right and proper that we should set out herein a short extract from the judgment of the learned Sessions Judge, Mr. Patterson, dealing with this question. The Sessions Judge observes as follows :

"The act in respect of which Chauthmall was arrested by the constable was that of making water by the side of the public road, and the only point that has been discussed before me on appeal is whether this was, or was not an offence under S. 34, Act 5 of 1861. Under that section, a person who 'commits nuisance by easing himself' is under certain circumstances, liable to punishment, and may be arrested without a warrant by any police officer in whose view the offence is committed. The section is, however, silent as to whether, 'making water,' in similar circumstances is an offence or not. The question is, therefore, whether the act of making water is, or is not covered by the term 'easing himself.' I am definitely of opinion that it is not covered thereby. 'Easing oneself' means, 'evacuating the bowels,' whereas 'making water' means 'evacuating the bladder.' The two things are quite distinct, and there are obvious reasons why the former has in certain circumstances, been made a cognizable offence under the Police Act, while the latter has not been declared to be punishable and cognizable under that Act though it might be, and often is, declared so to be under by-laws framed by the local authorities."

It is argued on behalf of the Local Government in this appeal that the learned Judge's construction of the expression referred to above is much too narrow and is indeed wrong in law and that such construction has occasioned a failure of justice. The accused did not appear by an advocate before us but we invited Mr. Ramendra Chandra Roy to assist us in this matter as an *amicus curiae*. Mr. Roy has contended that the learned Sessions Judge's construction is by no means to be summarily rejected and has further argued that on the evidence on record there is no case for action under S. 34, Police Act, inasmuch as there is no evidence of any obstruction, inconvenience, annoyance, risk, danger of damage, or resistance of passengers. He has, therefore, submitted that it was not lawful in the circumstances for the constables to take accused 1 into custody without a warrant. Now the expression 'easing one-

'self' means 'relieving nature' and the expression 'relieving nature' means 'evacuating the bladder or bowels': (see Fowler's Concise Oxford Dictionary); the underlying idea being that of relief or comfort to one's person or freedom from strain. If that is so, then it is difficult to hold that 'making water' is not within the ambit of the expression "easing oneself." I am not unaware that in Murray's Oxford Dictionary the expression 'to ease nature' is put down as being absolute but equivalent to the expression 'to ease oneself' which again is put down as equivalent to 'relieve the bowels.' The word 'ease' is of French origin and the word 'nature' is of Latin origin; and going by the etymological meaning of the word 'nature' it would include the bowels as well as the bladder. In an ancient book called Potter's Antiquities of Greece (1715) the expression occurs "Whosoever easeth nature in Appollo's Temple shall be indicted." Having regard to the context in which it appears, the expression would include 'evacuating the bladder as well as the bowels.' It is, however, not necessary for us to go into the lexicographical meaning of the expression in older days. It is sufficient to observe that the expression in modern times means what has been given in Fowler's Oxford Dictionary. We are, therefore, of opinion that the learned Sessions Judge in the view he has taken has placed an unduly narrow construction on the expression and to that extent he is wrong in law.

The question, however, arises whether on the evidence on record this is a fit and proper case for interference by this Court with an order of acquittal. We, have, therefore, made ourselves acquainted with the entire record and we are satisfied that in this case there is no evidence on record of any annoyance or inconvenience caused to anybody, having regard to the hour of the occurrence alleged. Therefore, on the facts, we are of opinion that this is not a fit and proper case for interference with an order of acquittal. The result therefore is that the present appeal stands dismissed on the facts, it being held that the learned Judge's constructions of the expression in Cl. 7; S. 34, Act 5 of 1861 is wrong.

The accused who are on bail will be discharged from their bail bonds forthwith.

Guha, J.—I agree.

V.B./R.K.

Appeal dismissed.

* 1930 Cr. Cases 754

(Madras)

PANDALAI, J.

Burham Sahib—Accused—Petitioner.

v.

Emperor

Criminal Revn. No. 670 of 1929 and Criminal Revn. Petn. No. 606 of 1929, Decided on 22nd January 1930 from decision of Sessions Judge, Madura, in Criminal Appeal No. 65 of 1928.

* Penal Code, Ss. 161 and 116—Patient ordered to be discharged but still in hospital—Bribe offered to doctor in charge but not accepted—Doctor is not "functus officii" and offence falls under Ss. 161 and 116.

Where the doctor in charge of a Government hospital has already decided to discharge a patient but that patient is still in the hospital he cannot be regarded to be functus officii as his duties and responsibilities to the patient still remain and an offer of a bribe to him to retain the patient for a longer period is an offence under S. 161 and the refusal of the bribe brings the case under illustration (a), S. 113: *A. I. R. 1929 Mad. 753, Dist.*

[P 753 C 2]

V. I. Ethiraj and *S. K. Ahmed Meeran*—for Petitioner.

K. S. Vasudevan—for the Crown.

Order.—The petitioner was convicted under Ss. 161 and 116, I. P. C. of abetment of bribery by the Sub-Divisional Magistrate of Madura and sentenced to pay a fine of Rs. 300 and this conviction and sentence were confirmed on appeal by the learned Sessions Judge of Madura. The present petition is by the accused to have the conviction and sentence set aside.

The learned advocate for the petitioner argued in the first instance that of the witnesses who spoke to the petitioner's act only one had actually seen the offer of the money and the others had only seen him in Col. Harley's bungalow, that Col. Harley himself was unable to identify the petitioner and that his description of the petitioner as a revenue inspector was belated and that the whole case was due to the influence of the petitioner's enemies who were friends of Col. Harley. This is an argument purely upon the evidence in the case and all these aspects of the

evidence have been considered by both the Courts below. They have accepted the evidence and I am not in a position to say that their conclusion is incorrect, that the petitioner went to the house of Col. Harley, P. W. 1 and there offered him money to induce him to retain in hospital as an inpatient a brother of the petitioner who had been injured in a fracas with the object, no doubt, of making out that the injury caused was grievous hurt and not simple hurt. With these conclusions, I agree.

The learned advocate then raised the point that the facts established do not amount to an offence under S. 161 read with S. 116; and for this he relied upon the decision in *In re, Venkatarama Naidu* (1). In that case a Police Inspector had passed orders rejecting the application of Venkatarama Naidu to be enlisted as a police-man. After he had rejected this application, Venkatarama Naidu offered Rs. 5 to the Inspector of Police to take him. The Bench held the Inspector had become *functus officii*, in other words, his official duties had become spent so far as accepting Venkatarama Naidu as a police-man was concerned and that therefore according to decisions of Indian Courts there could no longer be in that matter any bribery of a public servant or abetment of such bribery. In my opinion that decision does not apply to the facts of this case. If I held that the facts were very similar, I should, as at present inclined, have thought it my duty to refer the question to a Bench because in my opinion the point requires reconsideration. But the facts of the two cases are entirely dissimilar. In this case Col. Harley was not *functus officii* as his duties and responsibilities to the patient still in the hospital were by no means over. It is true, that he had decided or proposed to discharge him the next day but the man was not discharged and if Col. Harley could have been illegally influenced it would still have been possible for him by reason of that influence to detain the patient further in the hospital than he was bound to do according to his official duties. That fact distinguishes this case from the facts of the decision relied upon. In my opinion the facts proved clearly come

within S. 161 as they amount to an offer of illegal gratification to a public servant as a motive or reward for showing favour to a patient in the discharge of that public servant's official duties. As the offence was not completed by reason of the refusal of the offered bribe, the case comes strictly within Illus. (a), S. 116, I. P. C. and is covered by it.

The petition must be dismissed.

J.M./P.R.S¹

Petition dismissed.

1930 Cr. Cases 755

(Madras)

PANDALAI, J.

Pinnamraju Rajamraju — Complainant—Petitioner.

v.

Potturi Tirupatiraju and others—Accused—Respondents.

Criminal Revn. No. 789 of 1929 and Crim. Revn. Petn. No. 710 of 1929, Decided on 20th January 1930.

(a) Penal Code, S. 424—Concealment by debtors or removal by others of property to avoid attachment with dishonest intention is offence.

Concealment of property by debtors or taking away of property by others to avoid its attachment if done with a dishonest intention is an offence under S. 424. [P 756 C 1]

(b) Civil P. C., O. 21, R. 43 — Attachment of cattle securely tied — Actual contact is not necessary—Mere declaration by Court officer of intention to attach is enough.

Actual seizure of moveables to be attached does not always require physical contact but this depends upon the particular fact.

Where the goods to be seized were cattle securely tied by ropes so that they could not run away of their own accord.

Held: that it was sufficient for the officer of the Court to go sufficiently near the cattle and declare to others his intention to attach the cattle: 27 *Mad. 346, Appr.* [P 756 C 2]

C. Rama Rao—for Petitioner.

K. S. Vasudevan—for Respondents.

Order.—Four persons were accused before the Stationary Sub-Magistrate of Amalapur for offences under Ss. 424 and 379, I. P. C. The facts alleged against them were that in execution of a decree obtained by P. W. 2 against one P. Subbaraju, since deceased, the decree-holder accompanied by an amin of the Munsiff's Court P. W. 1 went to attach cattle belonging to the estate of the deceased, and that after the amin had attached one cow, a calf and a she-buffalo, the accused drove them away. The Stationary Sub-Magistrate examined witnesses including P. W. 1 the Court

(1) A. I. R., 1929 *Mad.* 756.

amin, P. W. 2 the decree-holder and P. W's. 3, 4 and 5 attestors to the attachment list. The Stationary Sub-Magistrate discharged the accused under S. 253 (1) on the ground that the proceedings conducted by the amin P. W. 1 did not in law amount to actual attachment. He says :

"He (the amin) did not know what he had to do when he attached the property and so in the cross examination he merely stated that he did nothing beyond notifying the distraint and writing up the attachment list. The omission was noticed by the counsel for the complainant and all the P. W's. 2 to 4 that came afterwards on subsequent dates were prepared with an answer on this point. In the circumstances, I consider that there was no valid attachment at all and that any obstruction to such an illegal attachment was not certainly punishable by law."

The complainant applied to the District Magistrate of East Godavari to revise the above order of discharge but that application was dismissed, the District Magistrate making the following observation:

"It is quite clear from the evidence of P. W. 1, the amin, that he simply went to the place where the cattle were tied and proceeded to write up the distraint list and that the accused came up and removed the cattle from the place where they had been tied all the time. The amin did not take actual possession of the cattle at any time. The lower Court rightly in my opinion held that there had been no legal distraint of the cattle and that the accused committed no offence in removing the cattle."

On this ground the District Magistrate dismissed the revision petition. The complainant has applied to this Court to set aside the discharge and order a fresh enquiry.

It is clear that the view of the lower Courts is wrong in two particulars. In the first place assuming that their view as to completed attachment was right, as to which I will speak presently, still there was the charge under S. 424 made in the complaint about which the Courts have said nothing. The offence under S. 424 is dishonestly removing any property and the dishonesty in such a case consists of the intention to avoid attachment for a debt. Therefore concealment by debtors themselves is an offence. Similarly taking away property by others with a view that it may not be attached, if done with a dishonest intention would fall under S. 424. The act of the accused would amount to an offence under that section and this matter has been ignored.

The more important point, however, is that the view of the lower Courts as to what constitutes a valid attachment is erroneous. They seem to have been of the opinion that in order to constitute a valid attachment of cattle, it is necessary actually to seize them or do something which would bring them into physical contact with the person attaching. Actual seizure of moveable property to be attached does not always require physical contact. Whether it is so required in any particular case, must be decided upon the particular facts. For instance, property in a locked room may be attached without even seeing the goods, by putting a lock upon the outer door: see *Multan Chand Kanyalal v. Bank of Madras* (1). In England it has been held that

"for an act of the Sheriff or his bailiff to constitute a seizure of goods, it is not necessary that there should be any physical contact with the goods seized, nor does such contact necessarily amount to seizure. An entry upon the premises on which the goods are situate together with an intimation of an intention to seize the goods, will amount to a valid seizure even where the premises are extensive and the property seized widely scattered. But some act must be done sufficient to intimate to the judgment-debtor or his servants that seizure has been made: see *Halsbury's Laws of England*, Vol. 14, p. 54."

In this case, the goods to be seized were cattle. It was not necessary to attach them that they should have been seized by their horns or even by their ropes. From the evidence it appears that they were already tied and secured so that they themselves could not run away of their own accord. All that was necessary to constitute the attachment was that the officer of the Court should go sufficiently near to them to explain to others that he has come to attach the property and to intimate his intention to do so. This the officer did do. What more in the circumstances he could have done or should have done to get possession of these cattle which were already tied up, it is difficult to see. The view of the lower Courts as to the ingredients of a valid attachment is erroneous. The discharge must be set aside and further enquiry into the charges ordered. The case will be sent back to the Stationary Sub-Magistrate, Amalapur for disposal according to law.

J.M./PR.S. Discharge set aside.

1930 Cr. Cases 757

(Allahabad)

BOYS AND YOUNG, JJ.

Emperor

v.

Sikandar—Accused.

Criminal Appeal No. 1059 of 1929,
Decided on 13th March 1930, against
order of Sess. Judge, Aligarh, D/- 5th
September 1929.

(a) Evidence Act, S. 32 (c)—Dying statement not in deceased's own words but being mere note of substance is not sufficient for conviction.

It is unsafe to convict a person merely on the dying statement* when such statement is not recorded in the deceased's own words and contains a note of the substance of what deceased told the police. [P 757 C 2]

(b) Penal Code, S. 302—Evidence—Murder by arsenic poisoning — Examination of viscera is necessary.

In view of the common diseases of this country whose symptoms are almost indistinguishable from that of arsenic poisoning it is very unsafe to convict a person without such evidence as can be obtained from a proper scientific enquiry. The proper enquiry consists in the careful examination of the viscera of the body and an analysis by a competent analyst showing from the amount of arsenic found in the viscera that at least a lethal dose must have been administered. Mere examination of the vomit or night-soil is totally insufficient and it is extremely dangerous to rely upon some traces of arsenic found in either of these two things. [P 759 C 1, P 759 C 1]

U. S. Bajpai—for the Crown.

G. S. Pathak—for Accused.

Young, J.—Sikandar was charged under S. 302, I. P. C., before the Sessions Judge of Aligarh with having poisoned one Mt. Tufania by administering arsenic to her. The learned Sessions Judge acquitted the accused, and the Government has appealed.

The case for the prosecution was that the accused, who had had illicit relations with the deceased woman, and also was in the habit of committing sodomy with her son, because the woman refused to leave the place in which she was then living and go and live with him, administered arsenic to her in *gur* on 22nd June 1929, and thereafter, within some twenty-four hours, she died as a result of arsenic poisoning.

The prosecution called three eyewitnesses who deposed that they had seen the accused giving the deceased *gur*. The witnesses also gave evidence that shortly afterwards the woman became very ill and vomited and purged. There was also on the record the state-

ment of Mt. Tufania herself made to the police, which was admitted in evidence as a dying declaration. In that statement the woman said that the accused had illicit intimacy* with her and also with her son; that she refused to go to Aligarh with him, and that afterwards he gave her *gur* to eat saying that it was a "parshad" from a Pir; that shortly afterwards she began to feel giddy and thirsty and drank water from a jar and that the water was bitter. She also said that the *gur* tasted bitter, and that she charged Sikandar with administering poison to her mixed with the *gur*. As regards the evidence of the three eyewitnesses, the learned Sessions Judge discards it on the ground that he was not satisfied that they were speaking the truth. We have carefully examined their evidence, and we have no reason to disagree with the finding of the learned Sessions Judge on this point. There remains, then, the evidence of the deceased woman herself as given in her dying statement. As regards the statement, the learned Sessions Judge came to the conclusion, from the internal evidence in the statement itself, that the statement was not given in the woman's own words but that it was merely a note of the substance of what she told the police. The learned Sessions Judge came to the conclusion that it would not be safe to convict the accused merely on the statement. We are in agreement with the learned Sessions Judge in the finding to which he came, and we see no reason to upset that finding and to convict the accused.

While we agree with the Sessions Judge we think we ought to put it on record that there are several other more important reasons than have been given by the learned Sessions Judge, or even discussed by him, for acquitting Sikandar. There is, in our opinion, no evidence on the record worthy of the name to prove that Mt. Tufania died of arsenic poisoning. In a case of arsenic poisoning two things must be proved: firstly, that the person alleged to have been murdered did die of arsenic poisoning; and, secondly, that the arsenic was administered by the accused person. The only evidence in this case of arsenic poisoning is the evidence of the Civil Surgeon who says in his original report that the cause of death was "probably

some irritant poison." Later on the Civil Surgeon was more definite. He said: "Death was due to some irritant poison." But he did not say that death was due to arsenic. Nor was he questioned either by counsel for the defence or by the Judge as to whether the condition of the stomach and the intestines which he found in the post-mortem examination was not consistent with gastro enteritis, cholera, or some similar complaint. Further, some of the vomit and the matter purged was collected from the ground and sent to the Chemical Examiner for report; also the jar which had contained the water which she had drunk and in which, as was alleged by the prosecution, she had washed the *gur*, was sent to the Chemical Examiner. The Chemical Examiner reported, after using the Reinsh test, that arsenic "was detected" in the vomit of Mt. Tufania and also in the night-soil, but arsenic was not detected in the mud jug. The report of the Chemical Examiner is wholly insufficient to prove that the cause of the woman's death was arsenic poisoning. A very small and harmless quantity of arsenic can be "detected" by the Reinsh or Marsh test. It is of the utmost importance in a case of arsenic poisoning that the prosecution should prove that a lethal dose of arsenic that is, two grains or upwards, had been administered. The authorities, such as Taylor, are agreed that there must be unequivocal proof: "that some rational quantity of arsenic was found in the viscera, or good evidence of such a lapse of time after the administration of the last dose as to give a satisfactory explanation of its possible abscence."

In this case there is no lapse of time. In other words, there ought to be a careful examination of the viscera of the body and an analysis by a competent analyser showing from the amount of arsenic found in the viscera that at least a lethal dose must have been administered. Mere examination of vomit or night-soil is totally insufficient and it would be extremely dangerous to rely upon some traces of arsenic found in either of these two things. Arsenic might have been put in the vomit or night-soil after death. Arsenic on the other hand may be legitimately in the body through various causes. Arsenic in some forms is obtained from earth, and as in this case the vomit and night-

soil was taken from the earth, it is not beyond the bounds of reasonable possibility that traces of arsenic might have been detected in these two substances from that cause. It is usual where the matter to be examined has been contaminated with earth to send a sample of the earth from a neighbouring spot to be analysed in order to show whether there is arsenic in the earth or not. In India arsenic is used as a medicine in all manner of diseases, and it is also used as an aphrodisiac. It is, therefore, impossible to take the mere evidence that arsenic was detected as sufficient to prove conclusively death from arsenic poisoning. It is of the utmost importance, before a Court could find any individual guilty of murder by the administration of arsenic, that a very much more complete chemical analysis should be made than in this case. There are several methods of analysing the viscera of a dead body and of making a quantitative analysis. Reference to any of the books on this subject can easily be made. That such analysis has been made in India in the past is clear from a reference to Dr. Chever's Medical Jurisprudence, published in 1870, where he observes at p. 116: "Dr. Macnamara discovered considerable quantities of arsenic in both stomachs." Given the necessary knowledge and the necessary instruments, modern science has no difficulty in coming to a conclusion as to the approximate quantity administered.

There is one other point to which we would like to allude as regards this particular case. From the evidence on the record it is not impossible that the *gur* taken by the deceased did not contain arsenic. The woman said that the *gur* tasted bitter. The authorities are unanimous on the point that arsenic is tasteless, and at p. 507 of Taylor's Medical Jurisprudence it is said:

"Sir T. Stevenson has known an ounce of arsenic homicidally put into a pint of rice pudding. The pudding was eaten without suspicion."

It seems to be a common error to consider that arsenic tastes bitter at the moment of eating, and, therefore, it is suspicious, when the fact is otherwise, to see in the statement of this woman that the *gur* was bitter when she ate it. The most that can be said is that later

it produces a burning sensation in the throat. In every murder case in Britain, where arsenic poisoning is alleged, the contest always is over the evidence as to the amount of arsenic found in the body. We are told that quantitative analyses have been for some years unknown in this country in arsenic cases. It is our opinion that without such evidence as can be obtained from a proper scientific enquiry it would in most cases be very unsafe to convict any person of murder by arsenic, especially in view of the common diseases in this country whose symptoms are almost indistinguishable from that of arsenic poisoning.

The appeal is dismissed. If Sikandar is under arrest he will be set at liberty immediately if he is not wanted on any other charge.

•V.B./R.K.

Appeal dismissed.

1930 Cr. Cases 759

(Allahabad)

DALAL, J.

Suraj Prasad—Appellant.

v.

Emperor

Criminal Appeal No. 1145 of 1929, Decided on 1st April 1930, against order of Addl. Sess. Judge, Benares, D/- 27th November 1929.

Criminal Trial—Court's duty — Sessions Judge's duty in trials.

A Sessions Judge should start his interest in a case at the very beginning of the trial and not when the time comes to write or dictate the judgment. First of all the ingredients of an offence ought to be clearly grasped and then attempts made continuously to discover whether the evidence of the complainant and that of the prosecution witnesses did satisfy those ingredients or not. When a consideration of the facts of the case and of their applicability to a particular section of the law are left to the end, a trial is bound to suffer and often a decision is arrived at in conflict with law. [P 760 C 2]

Captain C. O. Carleton—for Appellant.

Sankar Saran—for the Crown.

Judgment.—I am afraid that the Sessions Judge has not a grip of the facts of the case and misunderstood them. There can be no doubt that the patwari on 17th September 1928, gave a wrong copy of certain entries in the village records to the complainant Ram Nandan. The wrongness of the entries consisted in the patwari (appellant) not noting in the copy that besides Mt.

Jhagri there were other tenants of the plots in suit. It is, however, important to remember that the complainant Ram Nandan had already purchased what he considered a fixed-rate tenancy from Mt. Jhagri prior to 17th September, that is, five days prior, on 12th September 1928. It cannot, therefore, be said that the wrong copy induced him to spend money in making the purchase.

On 24th September he sued not only Mt. Jhagri but the others whose names appeared in the records for a declaration that the others were not tenants of the land. This suit was brought for a declaration under S. 123, Tenancy Act of 1926. His suit was dismissed on the ground that Mt. Jhagri was not a fixed-rate tenant and had no right of transfer. The incorrect copy was filed by the complainant in the suit which he filed on 24th September. He, however, refused to summon the patwari and on 19th November made a statement to the revenue Court that the patwari be not summoned as he was an enemy. Subsequently the patwari was summoned by the defendant Mangal of that suit and then it was discovered that Mangal was also a tenant of the land. I have not the slightest doubt that the patwari knowingly made a false copy, but there are further points to be considered whether the false copy was made with the connivance of Ram Nandan himself and whether there could have been any intention on the part of the patwari to cause harm to Ram Nandan. After reading the evidence I have come to the conclusion that the patwari is a black-guard. He has, fortunately for him, escaped the clutches of the criminal law. It is certain that Ram Nandan to bolster up his claim of a declaration that Mangal was not a tenant induced the patwari to give a false copy, and the patwari, presumably for consideration, did so. Ram Nandan hoped that the original would not be sent for and actually went to the length of refusing to summon the patwari. I cannot possibly believe that after obtaining the copy he could have feared that the patwari would depose against the copy, if in reality he had not known that the copy was falsely prepared. Mangal, however, insisted on summoning the patwari, and the patwari had not the courage in Court to depose falsely about

the entries in his papers. The trick to be played on Mangal was by collusion between Ram Nandan and the patwari to avoid the summoning of the original papers. Possibly Ram Nandan hoped that even if the patwari was summoned he would favour his cause and make a false deposition. When the patwari failed to oblige him to that extreme extent Ram Nandan filed a complaint. As I often observed in these cases it is unfortunate that a private person can prosecute a patwari without any departmental inquiry being made on the subject. These prosecutions have recently been so frequent that a suggestion may be made that some kind of protection may be given to these revenue officials by making a departmental inquiry necessary before a criminal prosecution is launched. Anyone acquainted with revenue law like a qanungo or a tahsildar would have discovered at once that Ram Nandan and the patwari were colluding at first and that Ram Nandan knew well that the copy which he obtained was a false copy.

The Judge does not seem to have read the charge framed against the patwari. The charge was that he gave wrong copy with the intention of inducing Ram Nandan to file a suit, and thereby incur expense which would cause him harm in money. This is the only possible harm which the patwari may have contemplated. The harm is far too remote. Even if the patwari was an enemy it would hardly be worth his while to damage Ram Nandan by inducing him to bring a suit in which he was sure not to succeed. I cannot believe that such harm would be contemplated by one enemy for another. The Judge, however, takes a totally different view. What he says is :

"It is thus clear that the accused gave an incorrect copy to the mukhtar "

(meaning the complainant)

"with a view that he would thereby cause injury to the complainant, inasmuch as the mukhtar lost his case for the declaration that Mangal and others were no tenants of the plots."

The harm intended was, according to the Sessions Judge, that the complainant may lose his suit. It is obvious that the complainant did not lose his suit because of the wrong copy, and the wrong copy, therefore, did not harm the complainant in that manner.

It is not necessary to examine the false defence of the patwari that the wrong copy was extorted from him. It may, however, be pointed out to the Sessions Judge that he took no trouble to obtain from Ram Nandan's own mouth what the harm was which he suffered by the wrong copy. A judicial officer who had understood the case from the commencement would have made an inquiry as to how when Ram Nandan got a wrong copy in which the interest of Mangal was not mentioned, he happened to sue Mangal seven days later for a declaration. It is my belief that during trials Sessions Judges rely far too much on a badly instructed Government Pleader or on the evidence of the prosecution shaping itself as best it may. It is much to be desired that a Sessions Judge should start his interest in a case at the very beginning of the trial and not when the time comes to write or dictate the judgment. First of all the ingredients of an offence ought to be clearly grasped and then attempts made continuously to discover whether the evidence of the complainant and that of the prosecution witnesses did satisfy those ingredients or not. When a consideration of the facts of the case and of their applicability to a particular section of the law are left to the end, a trial is bound to suffer and often a decision is arrived at in conflict with law.

I set aside the conviction and sentence of Suraj Prasad and order his bail bond to be cancelled.

V.B./R.K. *Conviction set aside.*

1930 Cr. Cases 760

(Madras)

PANDALAI, J.

(Pulavarthi) Lakshmanaswami—Petitioner.

v.

Abdul Khudavande Sahib Garu and others—Respondents.

Criminal Revn. No. 887 of 1929 and Criminal Revn. Petn. No. 797 of 1929, Decided on 30th January 1930.

Madras Local Boards Act, S. 221—Application under S. 221 for recovery of dues—Other remedies not exhausted as enjoined by Government Orders—Government Orders being merely advisory, Magistrate cannot decline to consider application.

The Government Orders enjoining on the Local Boards to exhaust all other remedies of

realizing dues before having recourse to S. 221 before a Magistrate are only advisory and merely administrative direction and a Magistrate cannot decline to consider an application under this section where other remedies have not been exhausted. [P 761 C 1]

Ch. Raghava Rao—for Petitioner.

K. Venkatarama Raju—for Respondents.

Public Prosecutor—for the Crown.

Order.—This petition arises from an application to the Stationary Sub-Magistrate of Bhimavaram by the Union Board of Akiveedu under S. 221, Local Boards Act, to realize from the respondents the amount of a penalty which the Union Board alleged the respondents had incurred by reason of unauthorised occupation or encroachment upon the property of the Union Board. The Sub-Magistrate, instead of proceeding under the section to hear the application and the objections if any and to determine them, made an order on 27th March 1929 that in pursuance of two Government Orders respectively 4657 L & M dated 23rd November 1928 and 770 L & M dated 13th February 1929, the Union Board could not proceed before the Magistrate, before it had exhausted all other processes for the recovery of the dues. The Board has petitioned this Court to revise the said order.

I think the order of the Sub-Magistrate was wrong. The Government Orders, mentioned above are at best only advisory and amount to a caution to the Local Boards that it is proper to exhaust the other available means of realising dues before having recourse to S. 221 before a Magistrate. Government Orders as such have no force of law and were merely administrative directions. Once the matter was placed before the Magistrate, it was his duty to enquire into it according to law, i. e., S. 221. He has practically declined to do so and therefore the order is set aside and the papers will be remitted to him for disposal according to law.

P.R.S./J.M.

Order set aside.

1930 Cr. Cases 761

(Madras)

BEASLEY, C. J. AND PANDALAI, J.
Public Prosecutor—Appellant.

v.

Lakshamma—Accused.

Criminal Appeal No 420 of 1929,
Decided on 27th November 1929.

1930 Cr. C. 96

Criminal P. C., S. 417 — Appeal by Government against acquittal—High Court should not interfere if trial Court's judgment is neither perverse nor such as no reasonable man shall come to even if it comes to conclusion that prosecution case upon evidence was strong enough to justify conviction.

An appeal on behalf of Government in the exercise of the powers conferred by S. 417 should not be entertained when the judgment appealed from is based upon facts and the conclusions of the Court are such as may reasonably be arrived at upon the facts found. Where, therefore, the High Court cannot say that there were not some grounds which might justify the acquittal of the respondent and that the judgment of the learned Sessions Judge is perverse or one which no reasonable man could have come to, on the facts, it should not interfere with that judgment even if it comes to the conclusion that upon the evidence the prosecution case was sufficiently strong to justify a conviction: 16 All. 212 and 16 Cr. L. J. 529, Appl. [P 762 C 1]

K. S. Vasudevan—for Accused.

Beasley, C. J.—On the 9th February last the deceased a young boy had climbed a fruit tree to get some berries or some other fruits which had grown on that tree. Beneath the tree was a little girl, the daughter of the accused, the respondent here. The little boy threw the fruits down on to the ground from the tree above and the little girl picked up those fruits whereupon the little boy climbed down from the tree and beat the little girl with a cholam stick. She went off to her home and complained to her mother (the respondent) about the beating. The mother then came up and pursued the little boy. Up to this point both the prosecution case and the defence case agree. The little boy sustained very serious injuries. He had three ribs broken on the one side and four on the other penetrating the pleural cavity and causing his death some two days later. The respondent was charged at the Sessions Court with murder under S. 302, I. P. C. The defence put forward by the respondent was that it was true that she pursued the little boy and that he was running away but in the course of his flight he tripped up and fell upon a stone or a boulder well imbedded in the ground and that was how he came by his injuries.

The learned Sessions Judge after hearing the evidence agreed with the opinion of the four assessors in finding that the respondent was not guilty of

the offence and she was accordingly acquitted.

This is an appeal by Government against the acquittal. The case for the prosecution was that the respondent fisted, struck and kneed the little boy and was the cause of his broken ribs. (Here the judgment considered evidence and proceeded.) The conclusion we have come to in this case is that upon the evidence the prosecution case was sufficiently strong to justify a conviction for an offence and that it establishes the fact that the injuries were caused to the little boy by this woman.

But we have got to consider what test should be applied by the High Court on an appeal by Government against an acquittal. Is the test to be that in the opinion of the appellate Bench there should have been a conviction sufficient to justify allowing the appeal or should it be something much more strong on the facts before the High Court is entitled to allow that appeal? We have not had any cases cited to us but we have discovered two cases which lay down a test which we think is the correct one to be applied in such cases as this. The first of them is *Queen Empress v. Robinson* (1). In that case it was held that an appeal on behalf of Government in the exercise of the powers conferred by S. 417, Criminal P. C., should not be entertained when the judgment appealed from is based upon facts and the conclusions of the Court are such as may reasonably be arrived at upon the facts found. The other case is a decision of a single Judge Kumaraswami Sastri, J., in *Public Prosecutor v. Narayana Nayudu* (2). There it was held that in appeals against acquittals the High Court ought not to interfere unless the trying Judge was clearly wrong and the judgment is either perverse or based on obvious error of procedure. That is saying the same thing which was said in the *Allahabad* case in different words. We think that those tests are the proper ones. At the trial in a Sessions Court or in any other Court in which evidence is taken the trial Judge or Magistrate, as the case may be, has the wit-

nesses before him and he is really in a better position to decide whether those witnesses give correct evidence and in this case the Sessions Judge has disbelieved most of the prosecution witnesses. We cannot say that there were not some grounds which might justify the acquittal of the respondent in this case. We are unable to say that the judgment of the learned Sessions Judge is perverse or one which no reasonable man could have come to on the facts. There was just a reasonable doubt and, that being so, we are unable to interfere with that judgment and this appeal by Government must be dismissed.

P.R.S./S.N.

Appeal dismissed.

1930 Cr. Cases 762

(Madras)

BEASLEY, C. J. AND PANDALAI, J.
Polaki Chidambaram—Accused.

v.

Emperor

Criminal Revn. No. 779 of 1929 (Case referred No. 44 of 1929), Decided on 13th November 1929, on reference by Sess. Judge, Ganjam, D/- 11th September 1929.

Explosives Rules (1914), R. 35 — Person accused of having taken delivery of consignments described as fireworks in contravention of R. 35—Burden of proving that they were explosives such as are covered by Explosive Rules is on prosecution—His having signed those consignments does not amount to admission that they were such explosives.

Where a person is accused of having taken delivery of consignments described as "fireworks" in contravention of R. 35, the burden of proving that these were explosives such as are covered by the Explosives Rules is upon the prosecution and the mere fact that the accused took possession of and signed for a consignment which was described as fireworks does not amount to an admission by him that these were explosives such as are within the purview of these rules. [P 763 C 2]

C. Sambastava Rao—for the Accused.

K. N. Ganapati—for the Crown.

Order.—This case comes to us on a reference by the learned Sessions Judge of Ganjam in which reference he recommends that the conviction of a man named Chidambaram for an act in contravention of R. 35, Explosives Rules, 1914 and the fine of Rs. 50 imposed upon him should be set aside. The facts of the case are that a certain firm had consigned some packages described as "fireworks" weighing 52 maunds 36 seers to one Indupuri Narasimham

(1) [1894] 16 All. 212—(1894) A. W. N. 49.

(2) [1915] 16 Cr. L. J. 529—23 I. C. 657.

and that he having no license for explosives did not take delivery of them but Chidambaram did so paying the money into a Bank. He got the railway receipt and received the goods on 8th August 1927. He was thereafter charged with an act in contravention of R. 35, namely, being in possession of explosives not in accordance with the conditions of the license granted under the rules for possession. He had a license entitling him to have explosives weighing up to 200 lbs. The origin of the complaint seems to be that some rival trader in the place complained to the police that the consignment was to be taken possession of by the accused. Certain facts appear and one fact is that at the hearing of the complaint the actual consignment or parts of it were not produced in Court but certain material objects were and the witnesses stated that the crackers taken delivery of by the accused were similar to those material objects. If that is true, then it is obvious that the conviction in this case was wrong because they are clearly toy fireworks and the rules do not apply to the manufacture, possession etc. of those fireworks. But it is said that those material objects are not samples of what the consignment contained; but all we can say with regard to that is that the police had ample opportunities of satisfying themselves when the consignment was at the railway station as to its nature. Certain cases, we are informed, were opened and on examination were seen to contain very small fireworks; and it was sought to collect the amount of gun-powder that these articles contained and after a most diligent attempt the quantity of gun-powder obtained was simply infinitesimal.

The Joint Magistrate seems to have thought that the onus of showing that an offence under the Explosives Rules had not been committed lay upon the accused, namely, that it was for him to produce the fireworks in Court and satisfy the Court that they were only toy fireworks and seems to have proceeded on the assumption that, as the consignment was labelled fireworks and as delivery on the railway receipt was taken of these articles as fireworks by the accused, it was tantamount to an admission that the articles in the consignment were articles coming within

the Explosives Rules. The learned Sessions Judge has taken the view that the prosecution had not proved the case that there had been any contravention of R. 35 by the accused and furthermore that the accused was in possession of explosives and of a greater quantity than 200 lbs. With that view of the learned Sessions Judge we entirely agree. We think that the burden of proving that these were explosives such as are covered by the Explosives Rules is clearly upon the prosecution and that the mere fact that the accused took possession of and signed for a consignment which was described as fireworks does not amount to an admission by him that these were explosives such as are within the purview of these rules. Under these circumstances we set aside the conviction and order the fine, if paid, to be refunded.

P.R.S./S.N.

Conviction set aside.

1930 Cr. Cases 763

(Madras)

PANDALAI, J.

Golusu Appalanarasiah—Petitioner.

v.

Emperor

Criminal Revn. No. 669 of 1929 and Criminal Revn. Petn. No. 605 of 1929, Decided on 22nd January 1930.

(a) Criminal P. C. Ss. 198 and 200—Magistrate proceeding without complaint and without examining complainant in case of defamation—Objection to procedure by accused at earliest stage—Proceedings are vitiated.

Where in a case of defamation the Magistrate proceeded without a complaint and without examining the complainant on oath issued process against the accused and the accused pointed out the irregularity to the Court at the first opportunity but the objection was disallowed.

Held: that there was no acquiescence by the accused in the procedure followed and that the proceedings were vitiated by the irregularity. [P 764 O 2]

(b) Criminal P.C., S. 500—Magistrate trying case transferred to another without retransfer to his own file—Proceedings are void.

The proceedings of a Magistrate trying a case transferred by him to another Magistrate but which has not been retransferred to him are without jurisdiction and altogether void: 30 Cal. 449 and 32 Cal. 783, *Appr.* [P 765 O 1]

V. L. Ethiraj and A. S. Sivakaminathan—for Petitioner.

K. S. Vasudevan—for the Crown.

Order.—This is a petition to revise the conviction of the petitioner for defamation of the complainant recorded by the Sub-Divisional Magistrate of

Vizagapatam in C. C. 33 of 1928 and upheld by the learned Sessions Judge of Vizagapatam on 16th November 1928.

Objection is taken to the legality of the conviction on the ground that the proceedings before the Sub-Divisional Magistrate were vitiated by one of two alternative grounds: (a) that there was no complaint before the Magistrate on which he could take cognizance of the case and that the Magistrate, though informed of this defect at the very outset and objection was taken to his proceeding further with the case, brushed aside and took cognizance of the case i. e. issued process against the accused; (b) if the proceedings before the Sub-Divisional Magistrate be regarded as a continuation of those which were started by a previous complaint instituted by the complainant, the said complaint had been transferred by the Sub-Divisional Magistrate himself to the Sheristadar First Class Magistrate of Vizagapatam and was pending before him and had not been withdrawn from that file to the file of the Sub-Divisional Magistrate. .

To appreciate these objections it is necessary to state that the proceedings against this petitioner originally started upon a complaint filed before the Sub-Divisional Magistrate on 21st December 1927. This complaint was transferred to the Court of the Huzur Sheristadar First Class Magistrate of Vizagapatam and was filed there on 27th December 1927. As shown in the order in C. C. 1 of 1928 of that Magistrate that complaint embraced two distinct matters (1) theft or robbery on 14th December 1927 by the present petitioner and others of a brass vessel and a cloth and (2) defamation of the complainant by this petitioner on and after 18th December 1927, by the pasting of defamatory leaflets and handbills. At the trial of this complaint the present petitioner took objection to the trial of both matters going on together as they constituted distinct offences. On this, the complainant's vakil in the words of the order in C. C. 1 of 1928 dropped that portion of the complaint which relates to the offence of defamation punishable under S. 500, I. P. C. The trial proceeded on the charge of theft and ended in a discharge dated 25th February 1928. Thereupon on 17th April 1928, Mr.

Narasimha Rao, pleader for the complainant, put in a petition to the Sub-Divisional Magistrate accusing the former vakil who had conducted the complainant's case in the Huzur Sheristadar Magistrate's Court of having improperly added a charge of robbery into the complaint and of having dropped the charge of defamation, stating that the same complaint is still pending and that therefore no new complaint is necessary and praying for process on the charge of defamation. The complainant did not sign this petition nor was she examined on oath. But the Sub-Divisional Magistrate on 18th April 1928 passed this order "Take on file under S. 500, I. P. C." and posted the case to the 2nd May 1928. On that day the accused through his vakil put in a long petition pointing out the irregularity, that there was no complaint and that there was no case and that the Court had no jurisdiction to proceed. The pleader Mr. Narayana Rao for the complainant answered these objections and as far as can be gathered, the petitioner's objections were overruled and the trial proceeded and ended in a conviction under S. 500 and a sentence of a fine of Rs. 100.

From the above facts it is quite clear that treated as a new case started before the Sub-Divisional Magistrate there was in C. C. 33 of 1928 no complaint nor was the complainant examined on oath. This is certainly a grave irregularity. Whether it might have been cured or not by acquiescence, there was certainly no acquiescence. This was immediately pointed out but was brushed aside. I can therefore see no ground for saying that this objection was waived or acquiesced in. This would in itself be a sufficiently grave irregularity to vitiate the subsequent proceedings.

The only way in which that objection could be met is by supposing that there was originally a complaint including the charge of defamation, namely, the one made on 21st December 1927. But this supposition only involves a still greater error because in that case the Sub-Divisional Magistrate would have no jurisdiction to proceed with that complaint because it was transferred to the Huzur Sheristadar First Class Magistrate and had not been recalled. Several decisions have been cited to me

to show that once a case is transferred by a Sub-Divisional Magistrate or District Magistrate to another, a Subordinate Magistrate, he cannot proceed with that case without withdrawing or transferring it back again. It is only necessary to refer to *Radha Bullar Roy v. Benode Behari Chatterjee* (1) and *Ajaib Lal v. Emperor* (2). That proposition appears to me not to require any authority for its support and it has not been stated by the Public Prosecutor that there was any order by the Sub-Divisional Magistrate withdrawing the complaint from the Sheristadar Magistrate to himself. It was suggested by the learned Public Prosecutor that that also was a curable defect and must be held to have been cured in this case because that objection was not taken in that form in the Courts below. In the first place I am not at all sure, because no authority has been cited for that proposition, that it is a curable defect. If a Magistrate having no jurisdiction to try a case does so, his proceedings are void (See S. 530, Cl. p) and a Magistrate trying a case which has not been taken cognizance of by him or has not been sent to him in the proper way or withdrawn by him in the proper way has certainly no jurisdiction to try it.

Then assuming it was curable there is nothing in the case to show that it was cured or was acquiesced in. On the contrary at the earliest possible moment the Sub-Divisional Magistrate was informed of the defect that there was no complaint in the case. That was quite sufficient to put the Court and the opposite party upon notice of the objection which went to the root of the case. It could only have been met by the answer that there was a previous complaint in the case which itself would have been met by the still more fatal objection that that complaint was pending in another Court. It seems to me that the prosecution in this case is on the horns of a dilemma as has been stated above and the learned Public Prosecutor has not satisfied me how he can escape from the one or the other horn of this dilemma. The proceedings in the lower Courts must therefore be set aside as without jurisdiction. The complaint was started by a private party

and it is not therefore right that I should not allow her after all this time, further opportunity to prove her case, if she desires it, to the satisfaction of the Magistrate. The records will be sent back to the Huzur Sheristadar First Class Magistrate before whom the first complaint is pending for disposal according to law. The fine, if paid, must be refunded.

P.R.S./J.M. *Proceedings set aside..*

1930 Cr. Cases 765

(Oudh)

RAZA, J.

Mohammad Raza—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 82 of 1930, Decided on 16th April 1930, against order of Sess. Judge, Lucknow, D/- 13th January 1930.

(a) Penal Code, S. 482—Trade-mark used as distinctive mark for over ten years—Firm using it acquires property in it so as to constitute deliberate and dishonest imitation offence under S. 482—Registration of mark is immaterial.

Where a trade-mark in question is a distinctive mark which the firm has been using for over ten years, the firm using it acquires property in that mark as indicating that all goods which bear it have been manufactured by the firm and any flagrant imitation of the same with deliberate and dishonest intention will bring the act within the purview of S. 492. Registration of the mark is not necessary to complete the title to trade-mark in India : *A. I. R. 1928 Lah. 186, Ref.* [P 766 C 1, 2]

(b) Trade-mark — Infringement of trade mark—Although criminal Court has discretion to stay its own hands and direct aggrieved party to establish his right in civil Court, aggrieved party cannot be compelled to seek his remedy in civil Court—Penal Code, S. 482.

Although the criminal Court has a discretion in view of the peculiar circumstances of a particular case, e. g., if there exists a bona fide dispute as to the right to use a trade-mark, or where there has been undue delay in commencing criminal proceedings, to stay its own hands and direct the complainant to establish his rights in a civil Court, it is nowhere laid down by the legislature that an aggrieved person should seek his remedy in a civil Court and not in a criminal Court. [P 766 C 2]

H. C. Dutt and *S. M. Ahmad*—for Applicant.

Iqbal Ahmad, Malik Chand Jain, and Mohammad Hussain Usmani and *H. K. Ghosh*—for the Crown.

(1) [1903] 30 Cal. 449.

(2) [1905] 32 Cal. 783=9 C. W. N. 810.

Judgment.—This is an application in criminal revision. The applicant Mohammad Raza alias Shamshad has been convicted of an offence under S. 482, I. P. C., and sentenced to a fine of Rs. 100 (or in default, two months rigorous imprisonment). His appeal was dismissed by the learned Sessions Judge of Lucknow on 13th January 1930.

It has been found that the applicant used the trade-mark of the firm of Anwar Khan Mahboob who manufacture biris in Jubbulpore, with deliberate and dishonest intention and with the object of passing his biris off as if they had been manufactured by that firm. The learned Sessions Judge has made the following observations in his judgment :

"The learned Magistrate who tried the case found that both the label and the green strip used by the appellant are deliberate imitations of those used by the firm of Anwar Khan Mahboob and before dealing with the points raised in the arguments addressed to me it will be convenient to record at once that I entirely agree with the view taken by the learned Magistrate. In my opinion both the label and green strip are flagrant imitations of those used by Anwar Khan Mahboob, and in my opinion they are imitations used with deliberate and dishonest intention. The imitation is deliberate and the purpose of using the label and strip was to make it appear that the biris sold by the appellant were made by the Jubbulpur firm it is a question of fact whether the imitation has been such as to cause it to be believed that the goods on which it is used were the goods of some one else. We are concerned rather with what, as I have held, is a deliberate attempt to reproduce copies of Anwar Khan Mahboob's label and strip so close as to be calculated to deceive anyone except a very close observer. In fact there is in my opinion no question here of any bona fide dispute which should be settled in a civil Court."

I have read the detailed and careful judgment of the learned Sessions Judge. So far as I see he has considered all the relevant questions very carefully. The applicant's learned counsel has contended before me that the lower Court has not decided that the trade-mark in question is the exclusive property of the opposite party. I think this contention is not well founded. The lower Court has found in effect that the trade-mark in question is the exclusive property of the firm of Anwar Khan Mahboob of Jubbulpur. The trade-mark in question is a distinctive mark which the firm has been using ever since 1919. Anwar Khan Mahboob have acquired property in that mark as indicating that

all goods which bear it have been manufactured by their firm at Jubbulpur. In my opinion the lower Courts were perfectly right in holding that the charge under S. 482 is made out against the applicant. I should like to refer to the case of *Banarsi Das v. Emperor*, A. I. R. 1928 Lah. 186. In that case a manufacturer of cotton thread balls having acquired by user (since 1917) the right to the mark "D. I." for the purpose of denoting his goods, prosecuted the accused who had lately begun to manufacture cotton thread balls and to attach the mark "D. I." and to imitate the mark and the "get up" of the complainant's label so closely that his goods were calculated to deceive purchasers into the belief that the accused's goods were those of the complainant. It was held that in India registration is not necessary in order to complete title to a trade-mark, and there is no warrant for the broad proposition that a letter or a combination of letters cannot constitute a trade-mark. It was further held that a person aggrieved by the infringement of his trade-mark has two remedies open to him (1) he can institute criminal proceedings under the Penal Code, or (2) he can bring an action for an injunction and damages and; although the criminal Court has a discretion in view of the peculiar circumstances of particular cases, e. g., if there exists a bona fide dispute as to the right to use a trade-mark, or where there has been undue delay in commencing criminal proceedings, to stay its own hands and direct the complainant to establish his rights in a civil Court, it is nowhere laid down by the legislature that an aggrieved person should seek his remedy in a civil Court and not in a criminal Court. I take the same view. The application must therefore be rejected.

Hence I dismiss the application.

V.B./R.K. *Application dismissed.*

1930 Cr. Cases 767

(Patna)

ADAMI AND SCROOPE, JJ.

Khatir Jama Khan and another—
Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Nos. 14 and 15 of 1930, Decided on 12th February 1930, against decision of Sess. Judge, Monghyr, D/- 6th November 1929.

(a) Evidence Act, S. 114, Illus. (b)—Confession implicating co-accused requires corroboration.

Confession implicating a co-accused requires corroboration if a co-accused is to be convicted on it: 38 Cal. 559; 15 Bom. 66; 33 Bom. 156, Ref. [P 767 C 2]

(b) Evidence Act, S. 114—Possession of stolen property shortly after theft—Presumption is that possessor is thief.

The fact that a person is found in possession of the stolen property shortly after the theft raises the presumption that he took part in the theft. [P 768 C 1]

(c) Penal Code, Ss. 457 and 380—Separate consecutive sentences cannot be passed.

Separate consecutive sentences under Ss. 457 and 380 cannot be passed: 2 W. R. Cr. 68; 8 W. R. Cr. 31; 6 W. R. Cr. 49; 6 W. R. Cr. 92 and 5 W. R. Cr. 49, Ref. [P 768 C 1]

M. K. Mukharji—for Appellant.

Asst. Govt. Advocate—for the Crown.

Scroope, J.—These two Rules have been obtained by the petitioner in respect of conviction and sentences in two separate trials passed by the Sub-Divisional Magistrate of Begusarai. There were two burglaries, one on the night of 13th June in the house of a local zamindar of Begusarai, Jagarnath Singh, and the other on the night of 4th July 1929, in the shop of one Harbans Lal, a jeweller of Begusarai and as a result of a confession made by Suraj Sekhar Singh the properties stolen in both the burglaries were recovered, and the present petitioner with Suraj Sekhar Singh and others with whom we are not concerned was placed on his trial in two separate cases in respect of each burglary. In respect of the former he was convicted under Ss. 414, 457 and 380, I. P. C., by the Sub-Divisional Magistrate of Begusarai and received respectively under each section (a) three months' rigorous imprisonment and a fine of Rs. 200 (b) eight months' rigorous imprisonment, and (c) three months' rigorous imprisonment and a fine of Rs. 200, that is, in

all 14 months' rigorous imprisonment and a fine of Rs. 400. The conviction and sentence under S. 414 were set aside by the Sessions Judge of Monghyr, but he maintained the conviction and sentence under Ss. 457 and 380, I. P. C. In respect of the second burglary, that of 4th July, the petitioner also received three sentences under Ss. 457, 380 and 414, I. P. C., (a) rigorous imprisonment for a period of 18 months, (b) rigorous imprisonment for six months and a fine of Rs. 500 and (c) rigorous imprisonment for six months and a fine of Rs. 1,000 totalling in all 24 months' rigorous imprisonment and a fine of Rs. 1,500. The Sessions Judge of Monghyr set aside the conviction and sentence under S. 414 but maintained the convictions under Ss. 457 and 380 as well as the sentence of imprisonment, but he also set aside the order of fine passed under S. 380, I. P. C.

The conviction in both cases raises the question of the admissibility against the petitioner of the confession made by his co-accused Suraj Sekhar Singh which is in evidence in both the cases, and the learned Sessions Judge very properly took the view that confession implicating a co-accused required corroboration if a co-accused is to be convicted on it; this has been held in a series of decisions and I will only refer to the cases of *Emperor v. Nani Gopal* (1), *Queen Empress v. Khandia* (2) and *Gangapa Kardepa v. Emperor* (3). The learned Assistant Government Advocate cites the case of *Sheo Narain Singh v. Emperor* (4) in support of his contention that an accused can be convicted on a confession made by his co-accused. Assuming the correctness of the learned Assistant Government Advocate's contention I see nothing in the present confession to lift it out of the ordinary run of confessions that are covered by the series of cases referred to above. The confessing prisoner has several previous convictions, so, obviously his character is not such as to lend any exceptional value to his confession.

(1) [1911] 38 Cal. 553=10 I.C. 582=15 C.W.N. 593.

(2) [1891] 15 Bom. 66.

(3) [1914] 28 Bom. 156=21 I.C. 673=15 Bom. L. R. 975.

(4) A. I. R. 1929 Pat. 212=8 Pat. 262.

Taking first Reference No. 14 of 1930 there is corroborative evidence as the petitioner was found wearing a chaddar which has been identified as part of the property stolen in the burglary. It is contended that the evidence establishing identification of the chaddar is inadequate but both Jagarnath Singh and Brahmdeo Singh who were the victims of the burglary identified it, as also did their dhobi Jaddu. Apparently both Jagarnath Singh and Brahmdeo Singh are men of position and they showed discrimination in their identification as pointed by the learned Sessions Judge. The rebutting evidence as to the identification called by Khatir Jama Khan petitioner has, in my opinion, rightly been disbelieved by both the Courts below, and the fact that a person is found in possession of the stolen property shortly after the theft raises the presumption that he took part in the theft. Apart altogether from the confession which is to the effect that the petitioner took part in the burglary the conviction of the petitioner must be held correct on the facts but separate consecutive sentences under Ss. 457 and 380 cannot be passed: see *Queen v. Sreemunt Adup* (5), *Queen v. Sahrae* (6), *Jogeen v. Nobo* (7), *In re Mussahur Daoudh* (8), *Queen v. Chytum Bowra* (9) and *Makhru Dusadh v. Emperor* (10). I accordingly set aside the conviction and sentence under S. 380, the conviction under S. 457 is maintained and the sentence of eight months' rigorous imprisonment passed thereunder is confirmed.

As regards reference No. 15 of 1930 the confession has been, in my opinion, adequately corroborated. The petitioner is a resident of Basti District in the United Provinces; he has not satisfactorily explained his presence in Begusarai. Sukhan Dhanuk, a chowkidar (P. W. 8), met the petitioner in company with Suraj Sekhar Singh the confessing accused and two others with whom we are not concerned now at Singhouli, 3 or 4 miles from Begusarai on the morning after the burglary; they told him that they were Musalmans from Muzaffarpur. On the same morn-

ing they were seen drinking at the local toddy shop; they were arrested the morning by the police and the Sub-Inspector (P. W. No. 8) states that all were more or less under the influence of liquor; later on same day the stolen property was produced certainly by Suraj if not by Khatir also. The explanation given by Khatir Jama Khan to police for his presence in Begusarai was that he had come to Singhouli on an invitation given by Suraj Sekhar Singh. At the trial the petitioner denied that he knew Suraj Sekhar at all; in fact he denied that he was with him when he was arrested and said that he had come to Begusarai with another man Rasul to search for a relative who had not been heard of for over a year.

In my opinion his association with the prisoner Suraj Sekhar Singh immediately after the theft and his being found drinking with him, the fact that being a man of Basti in the United Provinces he has not been able to account satisfactorily for his presence at Begusarai, taken along with the confession leave no doubt in my mind that he was rightly convicted. It was contended that the confession must be false as according to the confession petitioner must have arrived at Begusarai at 9 p.m., on 4th July whereas according to Harbans Lal the victim of the theft on preceding evening petitioner had come to his shop and bargained for gold bangle. There may be some confusion here, but the discrepancy is not sufficient to justify rejecting entirely the evidence from the confession, seeing that it is corroborated by the discovery of a large quantity of stolen property. In my opinion, therefore, the accused has been rightly convicted for his participating in this burglary but for the reasons given above the conviction under S. 380 must be set aside; the sentence of imprisonment under S. 457, I. P. C., will stand.

Adami, J.—I agree.

V.B./R.K.

Order accordingly.

(5) 2 W. R. Cr. 63.

(6) 8 W. R. Cr. 81.

(7) 6 W. R. Cr. 49.

(8) 6 W. R. Cr. 92.

(9) 5 W. R. Cr. 49.

(10) A. I. R. 1926 Pat. 367=5 Pat. 464

CRIMINAL CASES

JOURNAL SECTION

1930]

[AUGUST

Sir H. S. Gour's "Age of Consent Bill"

(*The prospect and a retrospect*)

BY SRINIVASA RAO, M.A., B.L., Guntur.

The herculean efforts of Rai Sahib Sarda are now over, but not yet of Sir H. S. Gour. In introducing their respective bills in the Central Indian Legislature they have been animated by the same desire. Both of them desired to penalize thereby premature cohabitation and early consummation. But while the former proposed to achieve this purpose by prescribing a statutory age limit for the marriage of boys and girls, the latter endeavoured to bring about the same result, by raising the age of consent, both within and without the marital state. If diehard orthodoxy be conceived as a citadel of effete superstitions and meaningless doctrines, unsuited to the changing requirements of our social organism, Sarda's bill—now transformed into a statute—may be described as a direct attack on the citadel, while the bill of Dr. Gour may well be described as a flank attack on the very same citadel.

It is now within everyone's knowledge how after a vigorous fight the efforts of Sarda have been crowned with well-merited success, and with the assent of the Governor-General of India his bill has found its way to a place on the Statute Book, as Act 19 of 1929. But the purpose and provisions of Dr. Gour's bill have not been sufficiently canvassed outside the Assembly. Hence an attempt is made to present in these columns the interdependence of the two bills, and finally how the bill now before the Assembly is a necessary complement to the bill already passed by it.

In 1927 Dr. H. S. Gour introduced his bill in the Legislative Assembly to amend S. 375, I. P. C., by raising the age of consent to 14 in marital cases, and to 16 in extra-marital cases. The Home Member expressed sympathy with the measure but would do nothing un-

less there is a strong backing in the country for the amendment proposed by the mover. Hence the bill was not pressed for immediate consideration, but a dilatory motion to circulate it for opinion was carried by the House. This led to the appointment of what is known as the Age of Consent Committee presided over by Sir Moropant Joshi and consisting of nine members.

The terms of reference were:

(1) to examine the state of the law relating to the age of consent, as contained in Ss. 375 and 376, I. P. C., specially with regard to its suitability to conditions in India;

(2) to inquire into the effect of the amendment made by the Penal Code (Amendment) Act (29 of 1925), and to report whether any further amendment of the law is necessary; and if so what changes are necessary as regards offences (a) without and (b) within the marital state.

For clearer understanding of the scope of the proposed amendment, the latter as it stands may be briefly noticed. The law relating to age of consent is embodied in Ss. 375 and 376, I. P. C., and are reproduced below:

"Section 375.—Rape—A man is said to commit rape who except in the case hereinafter excepted has sexual intercourse with a woman under circumstances falling under any of the five following descriptions.

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With or without her consent when she is under 14 years of age.

Exception.—Sexual intercourse by a man with his own wife, the wife not being under 13 years of age, is not rape.

Section 376.—Whoever commits rape shall be punished with transportation for life, or imprisonment of either description for a term which may extend to ten years and shall also be liable to fine (unless the woman raped is his own wife, and is not under 12 years of age in which case he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both)."

Dr. Gour proposes to alter 14 into 16 in Cl. (5), S. 375, and altogether omit the portion in brackets in S. 376 beginning from "unless the woman," and add a new section, viz. S. 376-A "entitled *Illicit Married Intercourse*", and running :

"*Section 376-A*—Whoever has sexual intercourse with his own wife, the wife not being under 13 years of age and being under 14 years of age, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both."

The Age of Consent Committee sent out their questionnaire to about 8,000 persons with a view to find out the feeling in the country regarding the necessity and advisability of amending Ss. 375 and 376 on the lines proposed by Dr. Gour. The committee toured throughout the length and breadth of our country, received statements, examined witnesses, and at last presented their report.

The Committee recommended inter alia :

(1) that the age of consent within the marital relation be raised to 15 ;

(2) that sexual intercourse by a man with his wife below 15 be made an offence, designated "marital misbehaviour" and included in Ch. 20, I. P. C. ;

(3) that Ss. 375 and 376, I. P. C., be confined to rape outside the marital relation;

(4) that the age of consent for the protection of a girl against rape by a person who is not her husband be raised to 18 years.

(5) that in order to deal most effectively with the evil of early marriage and early consummation a law be enacted fixing the minimum age of girls at 14;

(6) that the offence of marital misbehaviour do remain bailable and non-cognizable, as in the case of rape by a husband as at present;

(7) that it be punishable with (a) imprisonment of either description for 10 years and fine; when the wife is under 12 and (b), imprisonment of either description which may extend to one year or fine or both when the wife is between 12 and 15;

(8) that women police be employed when available, to aid in the investigation of sexual offences, in taking statements from girls or women witnesses in cases of rape as well as marital misbehaviour;

(9) that the law be amended so that a suit by a husband for the custody of a wife or for restitution of conjugal rights shall not lie when the girl is below 15;

(10) that effective steps be taken to spread general education amongst men and women.

As per recommendation No. 5, Sarda's original bill has been amended fixing the minimum age of marriage for girls at 14. But it is submitted that is not sufficient. That might cope with one phase of our social evil, but leaves untouched the extra-marital relation. Nor does it even adequately cope with the evils within the marital state.

It is one thing for the Legislature to prescribe a minimum age for marriage of girls ; another to prevent premature cohabitation and "illicit married intercourse." To combat the evil has been the desire of both Rai Sahib Sarda and Sir. H. S. Gour. And undoubtedly Sarda has taken us a long way to the solution, but not sufficiently far. And in this sense it may be said that where the former ends, the latter begins.

To borrow a word from the law Courts, the Age of Consent Bill is still "pending" final approval of the Assembly ; and if it should be passed by the Central Legislature, not only would our countrymen be free from some of our age-long social evils, but positive ground would have been paved for a new and better social order.

In passing, however, a few objections may be noticed, regarding the necessity and the advisability of pressing Dr. Gour's bill. In the first place it has been urged, that no law should encroach upon matters of purely domestic and social nature, and that the evil in question ought to be remedied by the zeal of the reformer, and the eventual spread of education. It has next been urged that such an encroachment would amount to a violation of the pledges recited in the Queen's Proclamation, and is bound to create disaffection amongst a considerable section of our society ;

and finally it has been suggested that in view of the unrepresentative character of the present Assembly, it is unsafe to embark on legislation affecting age-long usages and practices of our countrymen.

At first sight these objections may seem formidable, but closer scrutiny would incline dispassionate minds to a contrary conclusion. To the general proposition broadly laid down and universally applied, that under no circumstances should State interference be invoked, the writer respectfully demurs. There is neither principle nor precedent for such an extreme position. Most of the civilized countries, notably Turkey and Egypt, have resorted to legislative checks for putting down some of their shocking social evils. Nearer home, similar laws have been promulgated and are in full swing, in several Native States. The Central Indian Legislature has itself trenched on custom and religious and social usages, in more than one instance. This is not the first time that the question of State interference is mooted. The laws of Sati and widow re-marriage, the removal of ban on inheritance by converts, and the law permitting "civil" marriages, are a few of the many instances in which the aid of State interference has been invoked. Apart from precedent, our critics are also "estopped" from questioning the competence of legislative interference.

Passing now to the second objection, we see no substance in the count. The proclamation merely says :

"... in framing and administering laws due regard be paid to ancient rites, usages and customs of India."

The words in italics neither exclude interference in a just and necessary case, nor guarantee absolute non-interference. Dealing with a similar question in 1891, when Sir Andrew Scoble sought to raise the age of consent from 10 to 12, Lord Lansdowne, the then Viceroy of India, observed :

"... the pledges must be read with a two-fold reservation the first of these is that when demands are preferred in the name of religion leading to practices inconsistent with

individual safety and the public peace, and condemned by every system of law and morality in the world, it is religion and not morality which must give way. Far from absolutely precluding the Government of India from dealing with matters affecting religion, it expressly contemplates the possibility of such legislation, though with adequate safeguards against irresponsible initiation."

Nor is there any force in the objection regarding the unrepresentative character of the Central Legislature. It may be remembered that most of the critics of Dr. H. S. Gour's Bill themselves admit the right of the Assembly to formulate a demand for Dominion Status or for an all-round amnesty for political detainees, or a more substantial reform. If the legislature could be representative enough to formulate such measures one fails to see how its character is lost the moment a social question comes to be discussed on its floor.

But the need for supporting the present Bill is not merely negative—the absence of any reasonable objection to its enactment. The grounds in support thereof are more positive and irresistible. They have been set out with remarkable care and clearness in Ch. 8 of the Report of the Age of Consent Committee, and classified under five heads: (1) Physiological; (2) Eugenic; (3) Social; (4) Educational; and (5) Economic. To traverse all that ground here would be clearly outside the scope of the present article. Suffice it to note that an irresistible case has been made out for acceptance of the bill, by the labours of the Age of Consent Committee. The ball of beneficial social legislation set rolling on the floor of the Assembly by Rai Sahib Sarda should not be allowed to suffer from inertia, but gain momentum and roll on still further, till at least Dr. H. S. Gour's bill be passed into law; when it may legitimately be hoped that the combined operation of the new law of marriage and an enhanced age of consent may result not merely in eradicating some of our persistent social evils, but in actually paving the way for a healthier and sounder social organism.

SEVERE CROSS EXAMINATION

Cross-examination is admittedly the most difficult of all the varied work to which a lawyer is called to turn his hand; how difficult, only those who have tried it, can appreciate. To dwell for a moment on an aspect of the matter somewhat professional, there are, generally speaking, two schools of cross-examination. One is known by the description which is always sure to appear in the headlines to a newspaper report of a sensational trial: "Severe cross-examination." By this method the witness is taken over the whole facts of the case and minutely catechised as to his acquaintance with them. Given a very skilful counsel and a flagrantly dishonest witness, this style may serve its purpose, but, as a general rule, witnesses tell some truth, are not fools and are not inclined to be like clay in the hands of the examiner. Not infrequently, then the "severe cross-examination" gives an able witness the opportunity of emphasizing his evidence-in-chief, and driving home points actually unnoticed in his first examination. But it may be dangerous to ask too little as well as too much. To minutely probe into statements may seem to be, and not seldom is, wasting the time of the Court but not always. What is called a severe cross-examination, when applied to truthful witness, only makes the truth stand out more clearly, and unless counsel is able to arrive in his own mind at a satisfactory opinion, it is far better to ask nothing than to flounder on with the chance of getting out something by a crowd of questions. A truthful witness usually adheres to the dry statement of facts, and avoids diverting attention by introducing irrelevant matter.

It is not always safe to press a question upon a witness who manifests a disinclination to answer. Whether it is or is not safe must depend upon the peculiar circumstances of the case. If it is apparent from the conduct of the witness, or from the general scope of his testimony, that his reluctance proceeds from a desire to give the examiner no comfort, then press the question with decision and energy. But it should never be assumed without

good reason that this is the cause of his reluctance. If the reluctance proceeds from a fear that he will expose himself to censure or disgrace, do not press him if, while his answer may bring disgrace, it will also bring sympathy. If it brings sympathy, it will produce evil not easily remedied. The excitement of forensic contest must at times give rise to a certain degree of heat, and the warm blood of youth is apt to betray itself in altercation. But no one who has seen three decades of the law can fail to observe enormous improvement in the demeanour of counsel towards each other. Moreover, there is a remarkable absence of anything like malice or uncharitableness out of Court. Indeed, the profession, which is by no means the bed of roses which the public fondly imagine, has this to its advantage, that the friendships formed among its members are very numerous and very real. Side by side with the change in manners of counsel, one to another, there has also been an advance in courtesy towards the suitors and witnesses. There must be occasions on which it is necessary to press witnesses into admissions against themselves, and even to recall their past history, but this is now done with the desire to inflict as little pain as possible. No one wishes to arrogate to the Bar any special credit for these reforms. They are only part of the general tendency in the minds of the people at large towards pity for, rather than condemnation of, wrong doers. Indeed it is now a somewhat risky business to cross-examine a witness as to his past career with a view to his discredit, for the foreman of the jury will stand up and say "My Lord, has this anything to do with the case?" And then the counsel begins to think that the verdict is slipping away from his side. Neither the jury nor the public has the least idea how often the brief of counsel contains a mass of information about the suitors and the witnesses with the intention that this shall be used in cross-examination to their discredit, and how often the information is not used in spite of the pressure put upon counsel by the client.

—*Advocacy series.*

1930 Cr. Cases 769

(Bombay)

MIRZA AND BROOMFIELD, JJ.

*In re, Mohaniraj Krishna Korhalkar.*Criminal Revn. Appln. No. 413 of 1929,
Decided on 28th February 1930.

Criminal P. C., S. 195 (b)—Plaintiff challenging evidence that might be produced in defence as being false and fabricated—Evidence not produced—In order to file complaint against other party under Ss. 192 and 193, Penal Code, no complaint by Court necessary.

Where a party who has brought a civil suit has not himself fabricated the evidence in relation to that suit but is challenging certain evidence the opposite party might produce against him, to his prejudice as being false and fabricated and is not produced and the party succeeds in the suit, party is entitled to file a complaint against the other party under Ss. 192 and 193, Penal Code, and it is not necessary that the Court should file complaint under S. 193 (b), Criminal P. C. : *A. I. R. 1923 Bom. 105 and 89 Mad. 677, Dist.* [P 771 C 2]

Chimanlal Setalvad and J. G. Rele—for Applicant.

V. D. Limaye—for Opponent.

P. B. Shingne—for the Crown.

Broomfield, J.—The facts leading to this application for revision are as follows : On 24th July 1924 the present applicant, Mohaniraj Krishna, purchased a house at Kopargaon from Raghunath Balvant Thombare. The sale deed contained certain recitals which are alleged to be untrue and prejudicial to the rights of Damodar Shivram Thombare, the present opponent, who is the owner of a neighbouring house. On 23rd October 1924 Damodar filed a civil suit against Mohaniraj for a declaration that the said recitals were false and fraudulent and for certain injunctions. On 19th April 1926 the Subordinate Judge made a decree declaring plaintiff Damodar's exclusive right to a plot of land between the houses of the parties and negating defendant Mohaniraj's right to do any act interfering with Damodar's enjoyment of the same. This decree involved a finding that the recitals in the sale deed were incorrect. Damodar then moved the Subordinate Judge to take proceedings against Mohaniraj for forgery, fabricating false evidence and perjury, under S. 476, Criminal P. C. The Subordinate Judge rejected the application on 5th April 1927 holding that Ss. 476 and 195 (1) (b) of the Code did not apply and that

Damodar could prosecute Mohaniraj without the intervention of the civil Court. On appeal the District Judge confirmed the order, but left it open to Damodar to apply again to the Subordinate Judge in respect of the allegation of perjury. A revision application made by Damodar to this Court was summarily rejected on 11th January 1928. Damodar then moved the Subordinate Judge again to take action under S. 476 in respect of the perjury allegation, but the Subordinate Judge rejected this application on 9th April 1929 and the District Judge in appeal confirmed that order on 1st August 1929.

In the meantime, on 10th June 1929 Damodar himself presented a criminal complaint against Mohaniraj and others in the Court of the Sub-Divisional Magistrate, N. D. Nagar, for offences under Ss. 193 and 465 I. P. C. The offence under S. 193 is alleged to be not perjury but fabrication of false evidence the details given in the complaint being that the accused got false recitals in the aforesaid sale-deed made

"with the object of securing benefit to themselves and with the object of causing wrongful loss to the complainant and with a view that this fabricated evidence might be of use to them in future."

The accused made an application to the Magistrate objecting that the trial could not proceed on the private complaint of Damodar by reason of S. 195(1) (b), Criminal P. C. which provides that no Court shall take cognizance of an offence under S. 193, I. P. C., when the offence is alleged to have been committed "in or in relation to any proceeding in any Court," except on the complaint of that Court or of a Court superior thereto. The Magistrate, on 2nd October 1929, overruled this objection and rejected the application. It appears from his order that he considered that he was bound by the High Court's order of 11th January 1928 and also that he held on the merits that S. 195 (1) (b), Criminal P. C., does not apply. It is this order of the Magistrate which Mohaniraj now asks us to revise.

It is sufficiently obvious, but should nevertheless be stated that we are not in any way concerned now with the motive of the complainant Damodar in launching this prosecution so long after the event, and that of course we cannot consider the merits of the case. Those

are matters entirely outside the scope of this revision application. The only point we have to decide is whether the Magistrate is right in his view that S. 195 (1) (b), Criminal P. C., does not apply in the circumstances of this case; in other words, was the offence alleged to have been committed by the accused, viz., the fabrication of false recitals in the sale deed of 24th July 1924 committed "in relation to" the civil suit filed by Damodar in October 1924?

Counsel for the applicant Mohaniraj has relied on the following cases: *In re, Vasudeo Ramchandra* (1), *Emperor v. Bhawani Das* (2), *Kanhaiya Lal v. Bhagwan Das* (3), and *Re Parameswaran Nambudri* (4). In *In re, Vasudeo Ramchandra* (1) it was held that the words "in relation to" in S. 195 (1) (b) are very general and are wide enough to cover a proceeding in contemplation before a Court though it may not have begun at the date when the offence was committed. But it was there found that the offence in question which was subornation of perjury related to proceedings which were clearly in contemplation at the time the offence was committed; and the decision will not govern the present case unless it is clear that Damodar's suit, or at any rate some proceeding in Court, was contemplated by the accused at the time of the execution of the sale deed and the recitals were inserted in the sale deed with reference thereto. In *Emperor v. Bhawani Das* (2) it was held that when once a document has been produced or given in evidence before a Court the sanction of that Court is necessary, notwithstanding that the offence alleged was committed before the document came into Court. Both that case, and *Kanhaiya Lal v. Bhagwan* (3), which followed it were cases under S. 195 (1) (c) in which the language to be construed is different. They are distinguishable on that ground and also on the ground that in the present case the document was not in fact produced in the civil proceeding. Mohaniraj refused to produce the sale deed in Damodar's suit, and it was the plaintiff who put in a

copy of it. That is a circumstance which seems to me to have an important bearing on the question whether the alleged offence can be said to have been committed in relation to any proceeding in Court.

In *Re, Parameswaran Nambudri* (4) the facts were these: A complaint of false endorsement on a promissory note to prove a payment of Rs. 1,500 was made to a Second Class Magistrate who had no jurisdiction to try the case. It was transferred for trial to a First Class Magistrate and before the date of transfer the complainant in the criminal case had filed a suit on the promissory note. The Court held that the sanction of the civil Court was necessary under S. 195 (1) (b). There are some passages in the judgment in this case which may perhaps be said to support the very wide construction which the applicant wishes us to put upon this provision of the law. Thus Ayling, J., says in *Re Parameswaran Nambudri* (4), p. 678.

"If it were shown that the accused could have had no other object than the appearance of the endorsement in evidence in a case a suit should be brought on the promissory note, then I do not think the uncertainty at the time of writing the endorsement as to whether any suit would ever actually be brought affects the completeness of the offence."

Again, at p. 679:

"The object of this clause of the section seems to be to save the time of criminal Courts being wasted and accused persons being needlessly harassed by erecting a safeguard against rash, baseless or vexatious prosecutions for the offences specified. It aims at doing so by providing that where, prior to the institution of the criminal prosecution, a properly constituted judicial tribunal had placed itself in a position to determine whether the facts constituting the offence really exist, the criminal Court should decline cognizance unless that tribunal has, in effect, certified that in its opinion the complaint is one worthy of investigation. I see no reason why this safeguard should be limited to cases where the offence is committed pendente lite and should not extend to cases of fabrication of false evidence in advance."

But it is important to note that the Court appears to have been satisfied in that case that the accused could have had no other object than the appearance of the fabricated document in evidence in Court, and that the evidence was fabricated in advance, that is to say, in contemplation of the suit which was filed on the promissory note. I am not at all sure, therefore, that this decision really carries us any further than the

(1) A. I. R. 923 Bom. 105.

(2) [1915] 38 All. 109=35 I. C. 161=14 A. L. J. 74.

(3) A. I. R. 1926 All. 30=48 All. 60.

(4) [1915] 39 Mad. 677=31 I. C. 161=18 M. L. T. 322.

decision of our own High Court in *In re Vasudeo Ramchandra* (1).

In the *Madras* case it appears that the suit on the promissory note was practically inevitable and that being so there is no difficulty in holding that the fabrication of the endorsement on the note was made "in relation to" the suit. But the position is by no means the same in the case with which we have to deal. We do not know how Damodar came to know about this sale deed, but there is no reason at all to suppose that Mohaniraj contemplated that a suit would be brought against him, except perhaps in the distant future, and as the learned Government Pleader on the opponent's behalf has pointed out, it would not be to his interest that there should be litigation about the matter until after the lapse of a considerable time. The suit being, as it appears, unexpectedly filed, Mohaniraj refrained from putting the document in evidence. It would, in my opinion, be a straining of the language of S. 195 (1) (b) to hold that in those circumstances the offence is alleged to have been committed "in relation to" the suit. As I have already mentioned the complaint does not allege an intention to use the evidence in a judicial proceeding.

For these reasons I am of opinion that the view taken by the Magistrate in this case is in accordance with law, and that the rule and interim stay should be discharged.

Mirza, J.—I agree.

The question we have to determine on this application is whether the offence of fabricating false evidence with which the applicant is charged in the complaint can be said to have been committed by the applicant in relation to a proceeding in Court, viz., Civil Suit No. 689 of 1924, brought by the opponent against the applicant in the Court of the Second Class Subordinate Judge of Kopergaon, so as to require a complaint in writing by that Court or a Court superior to it, under the provisions of S. 195 (1) (b), Criminal P. C. Sir Chimanlal Setalvad has put the applicant's contention before us on the broad ground that the intention of the legislature should be taken to be that no one is to be harassed with a criminal prosecution in respect of matters which have come before a civil Court except

on a complaint in writing of the civil Court itself or a Court superior to it where those matters relate to offences which are set out in S. 195. No doubt the offence with which the applicant is charged in the complaint formed part of the subject-matter of the civil suit and the opinion of the civil Court whether the offence if committed, is of sufficient gravity to call for a written complaint by it would be a proper safeguard against the time of the criminal Court being occupied in a futile, unnecessary or trivial prosecution. But can it be said that the alleged offence was committed in relation to this suit?

It would be straining the language of the section too far in my opinion to apply it to a case such as here where the party who has brought the civil suit has not himself fabricated the evidence in relation to that suit but is challenging certain evidence the opposite party might adduce against him to his prejudice as being false and fabricated. The authorities to which our attention has been called do not seem to have gone so far except perhaps in *Re, Parameswaran Nambudri* (4), the facts of which case can be distinguished from the case before us. In that case a false endorsement had been fabricated on a promissory note with a view to resisting a claim which the holder of the note was expected to bring on the note. The maker of the false endorsement had made it with a view that it might be used on his behalf in resisting the suit that was to be brought against him on the note. In the case before us it cannot be reasonably urged that the applicant in fabricating the false evidence had in view that the fabricated evidence would be used by him in a proceeding that was in the contemplation of any party at the time. Lapse of considerable time would be necessary before the fabricated evidence could serve the purpose for which it was designed and it would not be unreasonable to suppose that if considerable delay did take place before the false and fabricated evidence was discovered there would be little likelihood of the party who might be prejudiced proceeding to challenge that evidence. As a matter of fact the applicant probably realizing the futility of the fabricated evidence which was so recent did not produce it

in support of his defence. The opponent adduced a certified copy of the sale deed in evidence in order to challenge some of its recitals as being false and fabricated. It does not appear how the opponent came to know of the sale deed and the recitals it contained. It cannot be said in my opinion that when the false recitals were fabricated in the sale deed a proceeding of the nature subsequently taken by the opponent or any proceeding was in the contemplation of the applicant so as to bring this case within the ruling of our Court in *In re, Vasudeo Ramchandra* (1), which gives a wide and very general interpretation to the words "in relation to" appearing in S. 195 (1) (b), but which none the less requires that a proceeding should be in contemplation.

The view taken by the Sub-Divisional Magistrate appears to me to be correct. I agree that the rule and interim stay should be discharged.

V.B./R.K. *Rule discharged.*

1930 Cr. Cases 772

(Bombay)

MIRZA AND BROOMFIELD, JJ.

Bechardas Narotamdas and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 458 of 1929, with Revn. Applns. Nos. 459 to 461 and 508 of 1929, Decided on 30th March 1930, from orders of Sess. Judge, Broach.

(a) *Bombay City Municipalities Act, Ss. 123 (7) and 118 (4)*—Failure to remove building in respect of which person was convicted under S. 123 (7) or S. 118 (4) is not "continuing contravention."

The failure to remove a building in respect of which a person has been convicted under S. 123 (7) or S. 118 (4) is not a continuing contravention within the meaning of those sections, as the words "continuing contravention" refer to some further construction subsequent to the first conviction and not merely failure to pull down or remove a building in respect of which a conviction has been had: *Marshall v. Smith*, (1878) 8 G. P. 416 and *Welsh & Son v. West Ham Corporation* (1900) 1 Q. B. 324 and *A.I.R. 1928 Cal. 336, Foll.* [P 779 C 1]

(b) *Bombay City Municipalities Act, S. 200*—Limitation for prosecution for continuing offence begins when offence is first committed.

Limitation for a prosecution for a continuing offence runs from the time when the offence was first committed, or where the offence consists in the failure to remove a building after

conviction, from the date of the conviction: 37 *Cal. 545* and *A.I.R. 1927 Bom. 401, Rel. on.*

[P 779 C 2]

(c) *Bombay City Municipalities Act, S. 123*—Direct method provided by the Act—Indirect and capricious method cannot be deemed to have been contemplated by legislature.

When the Act provides a direct, straightforward and perfectly effective method of securing the removal of a building which has been erected in contravention of the law, there is no reason why the legislature should be supposed to have provided an alternative method which is indirect and liable to become both capricious and oppressive. [P 778 C 2]

(d) *Words and Phrases*—Expressions "continuing offence" and "continuing contravention" mean same thing.

The expressions "continuing offence" and "continuing contravention" must mean the same thing since in each case the offence consists of contravention of certain rules.

[P 778 C 2]

R. J. Thakor—for Applicants.

G. N. Thakor and *H. D. Thakor*—for the Crown.

Mirza, J.—These are five revisional applications against the orders of the Sessions Judge of Broach who has confirmed the convictions of the applicants by the First Class Sub-Divisional Magistrate, Broach, for certain offences under the *Bombay City Municipalities Act, 1925*, but has varied the sentences originally imposed. The applications have been heard together.

In Revision Application No. 460 of 1929, the facts found were that the applicant had in 1927 constructed a house without previously obtaining the permission of the Broach Municipality in that behalf. The Broach Municipality prosecuted the applicant for the offence and the applicant was convicted and fined Rs. 100 on 10th October 1927. On 30th April 1929, the municipality filed the present complaint alleging that the house constructed by the applicant and allowed to remain undemolished by her was a continuing contravention of the provisions of S. 123 (7), *Bombay City Municipalities Act*. The First Class Sub-Divisional Magistrate who tried the case convicted the applicant of an offence under S. 123 (7) and sentenced her to pay a fine at the rate of eight annas per day from 21st October 1927 to 30th April 1929. The appeal Court confirmed the conviction but reduced the fine to four annas per day for a period of six months only.

The two main grounds taken up in revision are (1) that the lower Court

have erred in their interpretation of S. 123 (7), and (2) that the lower Courts have erred in holding that the cause of action for the complaint had arisen from day to day. S. 123 (7), Bombay City Municipalities Act, 1925, inter alia, provides as follows:

"Whoever begins any construction . . . in any . . . respect contrary to the provisions of this Act or of any bye-law in force thereunder, shall be punished . . . and in the case of a continuing contravention of any of the aforesaid provisions, he shall be liable to an additional fine which may extend to ten rupees for each day during which such contravention continues after conviction for the first such contravention; and the Chief Officer may

(a) direct that the construction, . . . be stopped, and

(b) upon a conviction being obtained under sub-Cl. 7 by written notice, require such construction, . . . to be altered or demolished in accordance with the provisions of such notice."

It is contended on behalf of the opponents, that the words used in the latter part of sub-S. (7), S. 123 "in the case of a continuing contravention of any of the aforesaid provisions" would include a building which has been completed in contravention of the provisions of the Act and has since been allowed to remain undemolished. The provisions regarding the continuing contravention of the provisions of the Act which appear in sub-S. (7), S. 123, were not contained in the corresponding S. 96 (5), Bombay District Municipal Act, 1901. It is contended* on behalf of the opponent that the object of the amendment was to give the municipality an additional remedy against a party who has completed a building in contravention of the provisions of the Bombay City Municipalities Act, and has not afterwards demolished it. The Sessions Judge observes:

"Section 96 (5), Bombay District Municipal Act, had not provided for punishment of a continuing contravention of the provisions of the section. The present Act makes good the deficiency . . .

"In amending the Act the object of the legislature seems to provide the municipalities with more than one mode of having offenders punished. The municipality could ask for a fine for a continuing contravention and also the Chief Officer could ask for the demolition of the building by giving a written notice. If this be the intention of the legislature it is reasonable to suppose that the legislature did not merely intend that the offence of a continuing contravention should be restricted to a building before it reaches a stage of completion, but also intended that the building, when completed, should come within its scope. There is no reason why in the case of uncompleted buildings

the municipality could have the power to get the offender punished for a continuing offence and also to have the building demolished by giving notice and in the case of completed buildings it should have the power of having the buildings demolished only."

The language of S. 123 (7) would not, in my opinion, justify the construction placed on it by the Sessions Judge. There are no express words used which would indicate that a building when completed in contravention of the Act and allowed to remain is to be regarded as a continuing contravention of the provisions of the Act. Had it been the intention of the legislature to provide a remedy by way of imposing a fine in addition to the right the municipality has of requiring a structure so completed to be altered or demolished, one would expect to find clear words to that effect in this section. It does not seem to follow that because the words "continuing contravention" used in this section are new therefore the legislature intended that the words should apply to a completed structure.

Halsbury in the article on Public Health and Local Administration, Vol. 23 (Laws of England), para 828, p. 425, states:

"Where an authority may under the statutory provision pull down or remove any work begun or executed in contravention of any bye-law, or where the beginning or execution of the work is an offence punishable under a bye-law by penalty, the existence of the work during its continuance in such a form or state as to be in contravention of the bye-law is deemed to be a continuing offence."

In the footnote to this paragraph he states:

"Continuing to build in contravention of bye-laws might be a continuing offence; but without the provision in the text, supra, mere omission to pull down would not."

A reference is made for this statement of the law to the leading case of *Marshall v. Smith* (1), where the Court had to construe certain bye-laws made by the Local Board of Sunderland under the Public Health Act, 1848, S. 115, and the Local Government Act, 1858, S. 34, by one of which all party walls, except in houses of one storey, were required, under a penalty of 40s., to be nine inches at least in thickness, and by another of which it was provided that:

"In case any offence under any of the foregoing bye-laws shall continue, the person offending shall be liable to a further penalty of not exceeding 40s. for each day during

(1) [1873] 8 O.P. 416=42 L.J.M.C. 403=48 L.T. 538.

which such offence shall continue after written notice of the offence has been given by the Local Board to the offender."

The appellant before the Court had been previously convicted and fined for having built a party wall of four and a half inches in thickness instead of nine inches. He was afterwards convicted upon an information which charged him with a continuing offence and was again fined. The Court of Common Pleas held in appeal that suffering the party wall to remain unaltered was not a "continuing offence" within the bye-law, or if it was, that the bye-law was unreasonable, the appropriate remedy being the removal of the structure by the Board, as authorized by S. 34, Local Government Act, 1858. In consequence of this decision the legislature intervened and expressly enacted that the continuance of a completed structure under such circumstances would be regarded as a "continuing offence."

In *Welsh & Son v. West Ham Corporation* (2) Channell, J., has observed on this point (p. 328):

"I can entertain no possible doubt that S. 158, Public Health Act, 1875, was passed in order to meet the case of *Marshall v. Smith* (1), in which the Court held that suffering a wall built of a less thickness than required by a bye-law to remain unaltered was not a continuing offence."

In *The Corporation of Calcutta v. Ananta Dhar* (3), the petitioner had been previously convicted under Cl. 1, R. 7, Sch. 17, Calcutta Municipal Act, 1923, for having put new golpata leaves upon the old frame of the roof of his hut. Subsequently he was prosecuted on the allegation that inasmuch as he had not pulled down the golpata leaves or altered it in accordance with the requirements of R. 7, Sch. 17 of the Act, he was guilty of a continuing offence and was liable to a daily fine. Rankin, C. J., and Ghose, J., held that suffering the roof to remain unaltered was not a continuation of the offence of making the roof within the meaning of S. 488, sub-S. (2). Rankin, C. J., observed in his judgment (p. 698):

"The leading case on this subject is the case of *Marshall v. Smith* (1), and in that case which has never been dissented from in England it was held under a very similar clause that the offence consisted in the building of the wall. It was also held that a mere failure to pull down a wall or rebuild it in accordance with the statutory requirements

was not a continuation of that offence. In consequence of that decision S. 158, Public Health Act, 1875 was made to provide that "where the beginning or the execution of the work is an offence in respect whereof the offender is liable in respect of any bye-law to a penalty the existence of the work during its continuance in such a form and state as to be in contravention of the bye-law shall be deemed to be a continuing offence." No such provision has been incorporated into the Calcutta Municipal Act and if, therefore, we are to hold that the conduct of the opposite party in suffering the roof to remain is a continuation of the offence of making the roof we have to do a certain amount of violence to the language of Cl. (2), S. 488. It is plain as a matter of right reason that suffering the roof to remain is not a continuation of the offence committed, i. e., of making the roof.

The reasoning in this judgment, in my opinion, would equally apply to the construction to be put on S. 123 (7), Bombay City Municipalities Act, 1925. I would hold, therefore, that by allowing the structure to remain undemolished the applicant has not committed a continuing offence under S. 123 (7), Bombay Act 18 of 1925.

The second question which arises on this application is whether the prosecution was competent having regard to the proviso to S. 200, Bombay City Municipalities Act, 1925, which provides that no prosecution for an offence under this Act or bye-laws framed under it shall be instituted except within six months next after the commission of such offence. The prosecution was instituted long after the expiry of six months from the date of the commencement of the offence if allowing the completed building to remain undemolished is to be treated as an offence. It is contended on behalf of the opponent that this was a continuing offence and therefore the rule about bringing a prosecution within six months would not apply to it. The Sessions Judge held that S. 200 would be applicable although this was a continuing offence. He observes:

"A continuing offence is a fresh one and every day it gives rise to a cause of action. The municipality could therefore ask for the infliction of a fine for a period of six months next preceding the complaint."

For that reason the Sessions Judge modified the order of the First Class Magistrate by restricting the fine to a period of six months after reducing the daily quantum. In *The Queen v. Slade* (4) the appeal Court held that the limi-

(1) [1900] 1 Q.B. 324.

(3) A.I.R. 1928 Cal. 386.

(4) [1895] 2 Q. B. 247.

tation of six months, within which complaint must be made, imposed by S. 11. Summary Jurisdiction Act, 1848, applied proceedings for acting contrary to a closing order, in breach of S. 5, sub-S. 9, Public Health (London) Act, 1891, and therefore, a conviction for such an offence, which imposed a fine in respect of every day during a period exceeding six calendar months, was bad. Wills, J., in his judgment observes, p. 248:

"We cannot take the conviction to pieces, so as to reduce the penalty by the amount imposed in respect of those eleven days, and uphold the remainder of the order. In the present case the Magistrate has made no mistake which can be the subject of an amendment such as we have been invited to make. Mr. Saunders was convicted in respect of the whole period of 193 days, and the penalty was imposed in respect of the whole of that period. The motion for a certiorari was made and granted on this ground only and the conviction must be quashed."

In my judgment this case is an authority for holding that a prosecution such as in the case before us was not competent as having been brought six months after the date of the commencement of the alleged offence and that the Magistrate's order imposing a fine for a period in excess of six months could not be cured by restricting it to the six months last preceding as the Sessions Judge has done.

In *Narain Chandra Chatterjee v. Corporation of Calcutta* (5) Jenkins, C. J., expressed the following opinion (p. 548):

Had the bye-law been correctly framed, it would have been a question whether limitation would not run from the time when the offence was first committed, for it is to be noticed that the words of the section are that the complaint must be made within three months next after the commission of such offence. There are authorities which bear on that point, but the question does not arise in the view I take of this case, and I therefore do no more now than guard myself against being taken to accede to the argument that has been addressed to us on that point.

This expression of opinion by the learned Chief Justice is referred to and not dissented from by Fawcett, J., in *Emperor v. Chhaganlal* (6). At p. 738 (of 29 B. L. R.), Fawcett, J., observes:

We still have to consider whether the effect of the proviso to S. 161 (1) necessitates a qualification, by enacting that the prosecution must be within six months of the time when the alleged offence was first committed. Sir Lawrence Jenkins, when Chief Justice at Calcutta, seems to have been inclined to answer that question in the affirmative, because of the use

of the words "next" after the commission of such offence, implying that the six months should be from the very commencement of the offence in question. He did not, however, actually decide that point, because the decision of the Court was on a different question. I refer to *Narain Chandra Chatterjee v. Corporation of Calcutta* (5).

With great respect I am prepared to accept the view to which Sir Lawrence Jenkins inclined in *Narain Chandra Chatterjee v. Corporation of Calcutta* (5) as the correct view. The intention of the legislature appearing in the language of S. 200, Bombay Municipalities Act, 1925, seems to have been that the period of six months within which prosecutions should be brought for contravention of any provisions of the Act should apply to all contraventions continuing as well as not continuing. It would be unjust and unreasonable, in my opinion, to put any other construction on this section. If the view of the lower Court on this point were to be accepted as correct it would be open to a municipality after any period to bring a prosecution against the owner of a completed building, built in contravention of the provisions of the Act and get the owner fined for a period of six months. This, in my opinion, could not have been the intention of the legislature. I would hold on this point that the period of six months within which a prosecution has to be brought under S. 200 of the Act is in the case of a continuing offence to be computed from the commencement of the offence when it came to the notice of the municipality. On both these grounds the conviction and sentence should be set aside and the fine, if paid, should be refunded to the applicants.

In Revision Application No. 458 of 1929 the applicants have been convicted under Ss. 118 (4) and 123 (7) of Bombay Act 18 of 1925. The applicants were prosecuted for building within the alignment line and in excess of the permission granted to them by the Broach City Municipality. They were convicted on 23rd November 1927, and fined Rs. 150. They were prosecuted also under Ss. 118 and 143 for putting up a balcony in excess of the permission granted to them and were convicted and fined Rs. 75. The present convictions were in respect of the completed building and the completed balcony having

(5) [1909] 87 Cal. 545=10 Cr. L.J. 522.

(6) A. I. R. 1927 Bom. 401=103 I. C. 602=28 Cr. L. J. 714=51 Bom. 818.

been allowed to remain undemolished. S. 118 (4) provides:

"Whoever contravenes the provisions of sub-S. (3) shall be punished with fine which may extend to one thousand rupees and, in the case of a continuing contravention with an additional fine which may extend to Rs. 10....."

For the reasons I have already given in construing the proviso to S. 123 (7) I hold that a continuing contravention would not cover the case of a completed building or balcony. The convictions and sentences in this case should be set aside and the fine, if paid, be refunded to the applicants.

In Revision Application No. 459 of 1929, the same applicants have been convicted under Ss. 118 (4) and 143 (2) (b), Bombay Act 18 of 1925 in respect of a building and a balcony which were both completed by them before the prosecution was instituted. S. 143 (2) (b) provides:

"Any such owner or occupier putting up any projection as aforesaid without such permission or in contravention of such permission or orders shall be punished with fine which may extend to twenty-five rupees, and if any such owner or occupier fails to remove any projection in respect of which he has been convicted under this section, he shall be punished with further fine which may extend to five rupees for each day on which such failure or neglect continues."

As the prosecution was brought six months after the first commission of the continuing offence, for reasons I have already given, I hold it was not competent under S. 200 of the Act. The convictions and sentences should be set aside, and the fines, if paid, be refunded to the applicants.

In Revision Application No. 461 of 1929 the applicant was convicted under circumstances similar to those in Criminal Revision Application No. 460 of 1929, under Ss. 118 (4) and 123 (7), Bombay Act 18 of 1925. For reasons already given I hold the convictions and sentences should be set aside, and the fines, if paid, be refunded to the applicant.

In Revision Application No. 508 of 1929, the applicant has been convicted under circumstances similar to those in Criminal Revision Application No. 459, of 1929 of offences under Ss. 118 (4) and 143 (2) (b), Bombay Act 18 of 1925. For reasons already given I hold the convictions and sentences should be set aside and the fines, if paid, be refunded to the applicant.

Broomfield, J.—These five applications for revision, Nos. 458 to 461 and 508 of 1929 involve common points of law and may be disposed of together. The applicants, who reside within the limits of the Municipality of Broach, were all prosecuted for erecting buildings in contravention of the provisions of the Bombay City Municipalities Act 18 of 1925 and were convicted and fined on various dates in October and November 1927. We are not now concerned with those convictions. On 30th April 1929, they were again prosecuted, not for any further constructions (it is admitted that no further building was done after the first convictions), but for not having removed the buildings in respect of which they had been convicted. In one case the conviction was under S. 123 (7) of the Act, in two cases under that section and S. 118 (4) and in two cases under S. 118 (4) and S. 143 (2).

Section 123 is a general provision relating to the construction of new buildings. Cl. (7) of it is as follows:

"Whoever begins any construction, alteration, addition or reconstruction without giving the notice required by sub-S. (1) or without furnishing any plan, information or particulars required by or under this section, or except as provided in sub-S. (5), without awaiting or in any manner contrary to such legal orders of the Chief Officer may be issued under this section, or contrary to the provisions of sub-S. (5) or (6) or in any other respect contrary to the provision of this Act or of any bye-law in force thereunder, shall be punished with fine which may extend to one thousand rupees; and in the case of a continuing contravention of any of the aforesaid provisions, he shall be liable to an additional fine which may extend to ten rupees for each day during which such contravention continues after conviction for the first such contravention and the Chief Officer may,

(a) direct that the construction, alteration, addition or re-construction be stopped, and

(b) upon a conviction being obtained under sub-Cl. 7 by written notice, require such construction, alteration, addition or re-construction to be altered or demolished in accordance with the provisions of such notice."

Section 118 relates to buildings within the regular line of a public street.

Cl. (3) (a) provides:

"Except under the provisions of S. 143 no person shall construct or reconstruct any portion of any building within the regular line of the public street without the permission of the Chief Officer under S. 123."

Clause (4) provides:

"Whoever contravenes the provisions of sub-S. (3) shall be punished with fine which may extend to one thousand rupees and, in

the case of a continuing contravention with an additional fine which may extend to ten rupees for every day during which such contravention continues after the conviction for the first such contravention, and the Chief Officer may

(a) direct that the building be stopped, and

(b) with the previous sanction of the Standing Committee, by written notice, require such building or portion thereof to be altered or demolished in accordance with the provisions of such notice."

Section 143 requires the permission of the Chief Officer to be obtained for certain projections over public streets, and Cl. (2) (b) is as follows:

"Any such owner or occupier putting up any projection as aforesaid without such permission or in contravention of such permission or orders, shall be punished with fine which may extend to twenty-five rupees and if any such owner or occupier fails to remove any projection in respect of which he has been convicted under this section, he shall be punished with further fine which may extend to five rupees for each day on which such failure or neglect continues."

The trial Magistrate convicted the applicants and fined them eight annas a day from the date of the first conviction to the date of the second complaint, a period of about eighteen months. On appeal the Sessions Judge reduced the amount of the daily fines, and also reduced the period to six months, but confirmed the convictions. The period was reduced to six months, by reason of S. 200 of the Act, in which it is enacted in the proviso to Cl. (1):

"that no prosecution for an offence under this Act or bye-laws framed thereunder shall be instituted except within six months next after the commission of such offence."

The first point raised by Mr. R. J. Thakor for the applicants is that there has been no "continuing contravention" of the provisions of the Act. He argues that these words in Ss. 123 (7) and 118 (4) must refer to some further construction subsequent to the first conviction, and not merely to the failure to pull down or remove a building in respect of which a conviction has been had. I think this is the correct view. It appears to me to be the most natural interpretation of the words, considered in their context and in relation to the other provisions of the Act. The original offence made punishable by S. 123 (7) is the beginning of any construction, alteration, addition or reconstruction contrary to the provisions of the Act or any bye-law. The original offence

made punishable by S. 118 (3) is the construction or reconstruction of any portion of a building within the regular line of the public street without permission. Any further construction of the building can quite fairly be described as a continuance of the original offence. But if the building is completed at the time of the first conviction it is difficult to see how the offence described as above can be held to continue, or how there can be said to be a continuing contravention of the prohibitions. It would have been very easy for the legislature to make the failure to remove the building a punishable offence also, as has been done as a matter of fact in S. 143, and as was done in S. 472, City of Bombay Municipal Act 3 of 1888. That section is as follows:

"Whoever, after having been convicted of (a) contravening any provision of any of the sections, subsections or clauses mentioned in the first column of the following table, or of any regulation made thereunder, or (b) failing to comply with any requisition lawfully made upon him under any of the said sections . . .

continues to contravene the said provision or to neglect to comply with the said requisition, or fails to remove or rectify any work or thing done in contravention of the said provision, as the case may be, shall be punished, for each day that he continues so to offend. . . ."

The language of this section is interesting because it provides both for a continuing contravention and, separately, for failure to remove an offending building, the implication being that the latter would not be included in the former. No doubt it does not necessarily follow that the words "continuing contravention" in Ss. 123 and 118 of the Act we are considering have the same restricted meaning as in the City of Bombay Municipal Act. But I think the language employed in the latter does afford some support to the applicants' contention that the restricted meaning suggested by them is the natural one.

On the other hand I do not think that Mr. G. N. Thakor, who appears for the municipality, gains anything by the comparison which he asks to make between the language of S. 123 (7) and that of S. 96 (5) in the District Municipal Act of 1901, to which S. 123 (7) corresponds. The offence made punishable by the old S. 96 (5) was the beginning or making of any building or alteration

or addition contrary to the provisions of the Act or of any bye-law. There was no provision about a continuing contravention, but the insertion of that provision in the new S. 123 (7) does not seem to imply in any way that it was meant to cover a mere failure to remove a building erected contrary to the provisions of the Act. In fact a comparison of the language of the two sections rather suggests that the provision about continuing contravention is meant to apply to further construction of a building after the first beginning. The words in S. 96 (5) of the Act of 1901 are "whoever begins or makes any building ..." Fawcett, J., in *Emperor v. Chhaganlal* (6) said (p. 737 of 29 B. L. R.):

"I think that due effect should be given to the words "or makes" in S. 96 (5). They show that it is not only the mere beginning of a building that is punishable, but its continuance even to completion without the requisite permission. . . . In other words, it is a continuing offence."

Now in the new S. 123 (7) these words "or makes" do not appear; and the provision about continuing contravention was necessary, therefore, to cover the case of a building which has not merely been begun but continued even to completion in contravention of the Act.

The insertion of the provision about continuing contravention in S. 123 (7) can, therefore, be perfectly well explained without supposing that it was intended to cover the failure to remove a building. Moreover, there does not appear to be the slightest necessity for such a wide construction of the words. The new Act, like the old, gives the municipality ample powers for dealing with buildings constructed in contravention of the Act or bye-laws. S. 123 (7) itself provides that the Chief Officer may by notice require that the offending building be demolished. Failure to comply with such a notice is punishable under S. 193, and under S. 192 the Chief Officer may, if necessary, demolish the building himself and recover the cost.

There is this further point to be noticed. Cases may not infrequently occur when it is not necessary to go so far as to demolish a building because of a contravention of the building rules. The person responsible may have to be

prosecuted and fined, because the law must be maintained; but sometimes that may be enough, and the building may be allowed to stand. If, besides being fined, the owner is also to be required to demolish the building, he may fairly expect that he will be so informed by a notice, otherwise how is he to know what his position is? If no notice is sent, it would surely be most unreasonable that the municipality should be able to come down upon him after 18 months, or even within six months (to adopt the Sessions Judge's view of what is permitted by the Act), and get him fined so much a day for the whole period. That seems to me to be the obvious answer to the construction placed upon these sections by the Sessions Judge, namely, that they give the municipality a choice of remedies. When the Act provides a direct, straightforward and perfectly effective method of securing the removal of a building which has been erected in contravention of the law, there is no reason why the legislature should be supposed to have provided an alternative method which is indirect and liable to become both capricious and oppressive.

We have not been referred to any authority which is inconsistent with what is on the face of it the natural interpretation of the words "continuing contravention." But the case of *Marshall v. Smith* (1) is a very good authority in support of it. The facts there were that Marshall was convicted and fined for building a wall four and a half inches in thickness, in contravention of a bye-law requiring party walls to be nine inches at least in thickness. He was afterwards convicted under another bye-law which provided that:

"In case any offence under any of the foregoing bye-laws shall continue, the person offending shall be liable to a further penalty . . . for each day during which such offence shall continue."

It was held that the failure to remove the wall was not a continuing offence and that the conviction was bad. An attempt was made to distinguish this case on the ground that the words in the bye-law were "continuing offence," not "continuing contravention." But as in each case the offence consists of the contravention of certain rules the two expressions must mean the same

thing. It was also pointed out that in consequence of the decision in *Marshall v. Smith* (1) a new S. 158, Public Health Act, 1875, was enacted, which provided that :

"where an urban authority may under this section pull down or remove any work . . . the existence of the work during its continuance in such a form and state as to be in contravention of the bye-law shall be deemed to be a continuing offence, but a penalty shall not be incurred in respect thereof after the expiration of one year from the day when the offence was committed or the bye-law was broken."

Since that change in the law the position of course is different in England. But there is no provision corresponding to the above S. 158 in the Act with which we have to deal. *Marshall v. Smith* (1) was cited by Rankin, C. J., in *The Corporation of Calcutta v. Ananta Dhar* (3) (p. 698 of 32 C. W. N.) as "the leading case . . . which has never been dissented from in England," and he held in the case before him that where the Calcutta Municipal Act made it an offence to make a roof or external wall of inflammable materials, the suffering the roof to remain after conviction was not a continuation of the offence.

I hold, therefore, that the failure to remove a building in respect of which a person has been convicted under S. 123 (7) or 118 (4) is not a continuing contravention within the meaning of those sections. The conviction of the applicants in Applications Nos. 458, 460 and 461 is illegal and must be set aside.

As regards S. 143 (2) (b), on the other hand, the language appears to me to be perfectly explicit :

" . . . if any such owner or occupier fails to remove any projection in respect of which he has been convicted under this section, he shall be punished with further fine . . . "

It was urged that the words "after notice to remove it" should be understood, but the words are plain and unambiguous, and there is no need to imply any such proviso. The convictions under this section in Applications Nos. 459 and 508 are correct; or rather would be correct, provided that the prosecutions were not time-barred.

That brings us to the consideration of S. 200. The trial Magistrate does not seem to have considered the point of limitation. At any rate there is nothing about it in his order; the cases

were tried summarily. The Sessions Judge took the view that as the offences are continuing ones (and the offence under S. 143 (2) (b) is a continuing one) a fresh cause of action arises everyday. The other view, which is the one contended for by the applicants, is that the words "within six months next after the commission of such offence" mean, in the case of a continuing offence, within six months after the first commission thereof. The words would seem to be capable of either construction. But the construction which found favour with the Sessions Judge involves what seems to me the very unreasonable result that there would be practically no bar of limitation at all. The Municipality might do nothing for ten years, or for 50 years, and then, as long as the building continued to exist, might prosecute and recover a fine for the preceding period of six months. This process, moreover, might apparently be continued indefinitely, and turned into a source of revenue. It is pretty obvious, I think, that that is not what the legislature intended. The question of the proper construction of a limitation clause of this kind has arisen before, but, so far as the authorities cited to us are concerned, it has not been necessary to decide it. In *Narain Chandra Chatterjee v. Corporation of Calcutta* (5) there had been a prosecution for failure to comply with a notice to remove an obstruction on a public street, under a bye-law. The bye-law was held to be ultra vires in so far as it created a continuing offence after notice. But Jenkins, C. J. said (p. 548):

"Had the bye-law been correctly framed, it would have been a question whether limitation would not run from the time when the offence was first committed, for it is to be noticed that the words of the section are that the complaint must be made within three months next after the commission of such offence. There are authorities which bear on the point, but the question does not arise in the view I take of this case, and I therefore do no more now than guard myself against being taken to accede to the argument that has been addressed to us on that point."

These remarks of Sir Lawrence Jenkins were referred to by Fawcett, J. in *Emperor v. Chhaganlal* (6), which I have already cited in another connexion. Fawcett, J. said (p. 738 of 29 B. L. R.):

"We still have to consider whether the effect of the proviso to S. 161 (1) (of the Act of 1903)

necessitates a qualification, by enacting that the prosecution must be within six months of the time, when the alleged offence was first committed. Sir Lawrence Jenkins . . . seems to have been inclined to answer that question in the affirmative He did not, however, actually decide that point. . . ."

"Nor did Fawcett, J., himself decide it, as it was not necessary to do so in that case either. But in the present case the point must be decided one way or the other, and in my opinion it should be decided in the sense that limitation for a prosecution for a continuing offence runs from the time when the offence was first committed, or, where the offence consists in the failure to remove a building after conviction, from the date of the conviction. The other construction might, as I have shown, have unreasonable consequences. In this connexion I may refer again to S. 158, English Public Health Act, 1875, which was enacted in consequence of the decision in *Marshall v. Smith* (1). I have quoted the section already; it is given in *Welsh & Son v. West Ham Corporation* (2). It seems to me worth noting that, though this provision was expressly enacted in order to make the mere existence of a work or building a continuing offence, it was also enacted at the same time that a penalty should not be incurred in respect thereof after the expiration of one year from the day when the offence was committed or the bye-law was broken. I do not think it can be doubted that those words mean that time runs from the first commission of the offence, and does not begin to run from day to day as long as the work or building is in existence. As the prosecution in all these cases was not instituted until more than 18 months after the first conviction, the second convictions are illegal, including the convictions under S. 143 (2). I would, therefore, set aside the convictions in all the cases and direct that the fines, if paid be, refunded.

S.N./R.K. *Convictions set aside.*

1930 Cr. Cases 780

(Bombay)

MIRZA AND BROOMFIELD, JJ.

In re, Sama Jetha.

Criminal Revn. Appln. No. 37 of 1930, Decided on 27th March 1930, from decision of City Magistrate, First Class, Surat.

Criminal P. C., S. 488 (8)—Husband last residing with wife for two months at parents-in-law as "Gharjamai".—Sub-S. (8) includes such residence.

The words "last resided" are not restricted to permanent residence but include also a temporary residence of two months with wife at the house of parents-in-law as "gharjamai" as to confer jurisdiction on the Court of that place: 18 Cr. L. J. 706 and A.I.R. 1927 All. 291, *Foll.*, A.I.R. 1926 Oudh 268, *Dist.*: A.I.R. 1929 Bom. 410, *Coys.* [P 781 C 2]

U. L. Shah—for Petitioner.

N. K. Desai and K. M. Metha—for Opponent.

Mirza, J.—This is an application for revision of an order of the City Magistrate, First Class, Surat Sub-Division, ordering the applicant to pay to the opponent Rs. 12 per month for maintenance under the provisions of S. 488, Criminal P. C. The applicant contends that the Court at Surat had no jurisdiction to entertain the application. The applicant is a permanent resident of Bombay. He has been in the employment of the Bombay Municipality for more than twenty-five years last and is in receipt of a salary of Rs. 24 per month from that body. He has a wife by regular marriage who resides with him in Bombay. Five years ago he married the opponent at Surat as his natra wife. After the marriage the opponent resided with the applicant in Bombay as his wife along with the applicant's first wife. The opponent was ill-treated by the applicant and his first wife, and as the opponent and the applicant could not live amicably together at Bombay, the applicant called his mother-in-law from Surat and sent the opponent with her mother to go and reside at Surat. Later the applicant followed the opponent to Surat and resided with her in the house of his mother-in-law for one or two months. The parties became reconciled and the opponent accompanied the applicant back to Bombay on his promising to be of good behaviour and two persons having put themselves forward as sureties for the applicant's good behaviour towards the opponent while in Bombay. Quarrels having again ensued between the parties the applicant after some time took the opponent back to Surat and left her there with her mother. The opponent has lived with her mother since then in Surat for the last three years during which period the applicant has not been

maintaining the opponent. The letter Ex. 2 (1), from the applicant to the opponent before these proceedings shows that the applicant has ceased to entertain any affection for the opponent and no longer wants her for his wife. It is common ground that when these proceedings were taken the applicant was not residing at Surat, and the summons in consequence was served on him in Bombay.

Clause (8), S. 488 is as follows:

"Proceedings under this section may be taken against any person in any district where he resides or is, or where he last resided with his wife."

It was admitted by the applicant before the Magistrate that he last resided with the opponent as his wife at Surat when he took her there three years ago. It is contended, however, that this residence of the applicant at Surat was a temporary residence and Cl. (8), S. 488, should not be made applicable to the case of a husband who has temporarily resided with his wife at another place when he had a permanent residence elsewhere. In his deposition before the Magistrate the applicant admitted that he resided with the opponent on this occasion for two months. It is also shown that in a letter he wrote at the time the applicant stated that he was residing in the house of his mother-in-law at Surat as a "gharjamai", which expression means a son-in-law who resides permanently with his parents-in-law as a member of their family.

There is nothing in the language of S. 488 (8) which would indicate that the term "last resided" should be restricted to a permanent residence. In *In re, Khairunnissa* (1) Patkar, J., on a review of the authorities on the subject has thus summarized their effect at p. 933 of his judgment:

"It would follow from these decisions that where the husband and wife had a fixed place of abode or a permanent place of residence, a casual or temporary residence in any other place would not confer jurisdiction on the Court situate at that place."

Wild, J., in a separate but concurring judgment, expressed the following opinion (p. 935):

"The meaning of the words 'last resided' in S. 488 have apparently not been construed by this Court and I would prefer to follow the ruling in *Mrs. E. H. Jolly v. St. John William*

Jolly (2), where it was held that temporary residence was sufficient to give the Court jurisdiction under sub-S. (8), S. 488. It is difficult enough for a wife to recover maintenance from her husband who refuses to maintain her and to give a strict interpretation to the words "last resided" in S. 488 would render the difficulty even greater."

Mr. Shah has tried to distinguish the case of *Mr. E. H. Jolly v. St. John William Jolly* (2) on the ground that at the date of the application by the wife the husband was as a matter of fact in Calcutta where the application was made. That consideration does not seem to me to have been the determining factor in the decision. The case of *Mrs. E. H. Jolly v. St. John William Jolly* (2), seems to me to be a direct authority on the point that the residence of the husband though temporary would give jurisdiction to the Court.

In *Sher Singh v. Amir Kunwar* (3) Ashworth, J. held that a stay of two months in a temporary place of residence with occasional visits during that period to the permanent place of residence can be regarded as amounting to a "residence" within the meaning of S. 488, Criminal P. C. He held that the expression "resided" in Cl. (9) [now clause (8)] of this section includes a temporary residence and is not to be confined to permanent residence. This case seems to me to be another direct authority on the point and goes against the contention of Mr. Shah. The facts of the present case are stronger than were the facts in *Sher Singh v. Amir Kunwar* (3), for here the applicant resided with the opponent for an unbroken period of two months at Surat and left her only when he was being asked to sign a document in favour of the opponent. We are of opinion that the meaning of S. 488, sub-S. (8), should not be confined to a permanent residence but should also include a temporary residence of the nature established by the evidence in this case.

In the course of the trial the applicant made an offer that he would maintain the opponent if she went and lived with him in Bombay and would allow her Rs. 20 per month for the joint maintenance of herself and the applicant, giving the remaining Rs. 4 of his salary to his first wife for her separate maintenance.

(2) [1917] 18 Cr. L. J. 706=40 I. C. 706.

(3) A. I. R. 1927 All. 901=101 I. C. 670=29 Cr. L. J. 494=49 All. 479.

This offer was declined by the opponent. The Magistrate was satisfied from the evidence before him that the applicant's offer was not a bona fide one. We see no sufficient reason to take a different view on this point.

It has been urged by Mr. Shah that Rs. 12 per month for maintenance is an excessive amount having regard to the salary of the applicant which is only Rs. 24. As the opponent according to the findings has been ill-treated in the past by the applicant, and has had no maintenance allowance from him during the last three years, we do not feel disposed to interfere with the discretion which the Magistrate has exercised in awarding Rs. 12 for maintenance to the opponent. The Rule is discharged.

Broomfield, J.—I agree. There is nothing in the language of S. 488, Cl. (8) which makes it necessary, and if it is not necessary it is for obvious reasons undesirable to assign a strict or technical meaning to the words "last resided" in that clause or to treat those words as denoting permanent residence only. *Mrs. E. H. Jolly v. St. John William Jolly* (2) is a good authority for the proposition that temporary residence is sufficient to give the Court jurisdiction. That case was approved of by Wild, J., in *In re, Khairunnissa* (1) and does not appear to have been dissented from by Patkar, J., in his judgment in the same case. *Sher Singh v. Amir Kunwar* (3), is a decision of a Judge of the High Court at Allahabad to the same effect. In that case *Ramdei v. Jhunni Lal* (4), which was relied upon by Mr. Shah, has been distinguished, and it is clear that the circumstances there were quite different from those in the case before us. It appeared that the husband had merely taken his wife to her relations in a place where he did not reside in order to leave her there, and stayed with her for a week only. The present applicant's stay with his wife at Surat for two months in the circumstances described by my learned brother can fairly be said to amount to residence with her at Surat. As regards the other points in the case I have nothing to add to what my learned brother has said.

R.M./R.K.

Rule discharged.

1930 Cr. Cases 782

(Bombay)

MIRZA AND BROOMFIELD, JJ.
Emperor—Referee.

v.

Nanalal Dwarakadas—Accused.

Criminal Ref. No. 19 of 1930, Decided on 8th April 1930, made by Dist. Magistrate, Broach, in Criminal Revn. No. 31 of 1930.

(a) *Bombay Prevention of Gambling Act, S. 6—Scope.*

Section 6 is wide enough to include a complaint on oath made by a police officer.

[P 783 C 1]

(b) *Bombay Prevention of Gambling Act, S. 6—Scope.*

There is nothing illegal if the warrant is issued to the police officer who has sworn on the complaint before the District Superintendent of Police.

[P 783 C 1]

(c) *Bombay Prevention of Gambling Act, S. 4—Joint owner of house present when gambling presumed to be going on—He can be convicted for having knowingly permitted it to be so used.*

Where the joint owner of a house is present when gaming is presumed to be going on in his house, he can be convicted under S. 4 for having knowingly permitted the house to be used as a gaming house.

[P 784 C 1]

W. B. Pradhan—for the Crown.

G. N. Thakor, Barot and H. D. Thakor—for Accused.

Mirza, J.—This is an application for revision of a conviction and sentence of the applicants by the First Class Sub-Divisional Magistrate, Broach, for an offence in the case of applicants 1, 2 and 3 under S. 4, Bombay Prevention of Gambling Act, and in the case of applicants 4 and 5 for an offence under S. 5 of the same Act. The District Magistrate, Broach, has made a reference to this Court recommending that the sentences of applicants 1 and 2 may be enhanced. The application and reference have been heard together. The applicants were found in a house when the complainant, the Home Inspector of Police, entered it under a warrant issued to him by the District Superintendent of Police under the provisions of S. 6, Bombay Prevention of Gambling Act. On making a search of the house the Inspector found certain papers and account books which were of the nature of instruments of gambling. The accused were arrested by the Inspector under the warrant and the instruments of gambling were attached by him.

It is contended on behalf of the applicants that the warrant under which

(*) A. I. 1926 Ogdh 268=95 I. O. 396=27
Cr. L. J. 820.

the Inspector entered the house, arrested the applicants and attached the papers and account books was not according to law, and therefore no presumption would arise under S. 7 of the Act that the place was a common gaming house. The evidence shows that the Home Inspector on receiving certain information with regard to the doings that were going on in this house, took the informer with him to the District Superintendent of Police, and himself made a complaint on oath before the District Superintendent of Police setting out that there was reason for him to suspect that the house in question was being used as a common gaming house. The District Superintendent of Police, after investigating the matter issued the warrant. It has been urged by Mr. Thakor on behalf of the applicants that S. 6, Bombay Prevention of Gambling Act, does not contemplate the issuing of a warrant upon a complaint made by police officer. The complaint on oath he contends should have been by the informer and not by the police officer. The language of S. 6, Gambling Act, in our opinion, is wide enough to include a complaint on oath made by a police officer. The complaint can be made before any Magistrate of the First Class or any District Superintendent of Police or any Assistant or Deputy Superintendent empowered by Government in that behalf and the words are "upon any complaint made before him on oath." Had it been the intention of the legislature to exclude a police officer from the class of those who are competent to make a complaint on oath in this connexion, we would expect to find words to that effect in this section. In our opinion the warrant was properly issued.

Mr. Thakor has also contended that it was illegal to have issued the warrant to the police officer who had sworn on the complaint before the District Superintendent of Police. We do not find any words in S. 6 which would restrict the issue of the warrant by the District Superintendent of Police in this manner. The warrant, in our opinion, was properly issued.

The warrant having been properly issued and instruments of gaming found in the house entered under the warrant, a presumption arises under S. 7, Bombay Prevention of Gambling Act, that the house was being used as a com-

mon gaming house and that the persons found there were there for the purpose of gaming. As applicants 4 and 5 were among those found in the house when the police officer entered it under the warrant they would be properly convicted under S. 5. The Magistrate has passed a sentence of Rs. 50 fine on each of these applicants and has imposed a sentence of two months' rigorous imprisonment on each in default of the payment of fine. The sentence of two months' rigorous imprisonment in default contravenes the provisions of S. 65, I. P. C., by which the period in default must not exceed one-fourth of the maximum substantive sentence of imprisonment that can be imposed. The maximum substantive imprisonment which can be imposed on conviction for an offence under S. 5 is one months' imprisonment only. The sentence in the case of applicants 4 and 5 should be altered by changing two months' rigorous imprisonment in default to one week's rigorous imprisonment in default.

Applicants 1, 2 and 3 have been convicted of an offence under S. 4, Bombay Prevention of Gambling Act. The relevant terms of that section are:

"Whoever—

(a) being the owner or occupier or having the use of any house, room or place, opens, keeps or uses the same for the purpose of a common gaming house,

(b) being the owner or occupier of any such house, room or place knowingly or wilfully permits the same to be opened, occupied, kept or used by any other person for the purposes aforesaid. . . ."

It is conceded by Mr. Thakor that the house in question is a family house belonging to a joint and undivided Hindu family which consists of applicant 1, the father, applicants 2 and 3 who are his sons, and some other members of the joint family. It is contended by Mr. Thakor that applicant 1 does not reside in this house but resides in a separate house with a woman, who is described by the Magistrate as his mistress. Mr. Thakor has also contended that the papers and books which were attached go to show only that a business in the name of a company or firm was being carried on, which business was in the nature of gambling, but the papers and account books do not show that the business was that of applicant 1. He contends that as defendant 1 was not residing in the house no presumption can

arise that the papers and account books which were attached from the house were in his possession. It is clear, in my opinion, that applicant 1 being the joint owner of the house which for purposes of this application must be regarded as a common gaming house was present there under circumstances which raise a legal presumption that he was gaming there. A further presumption arises against him therefore that the house was being used as a gaming house with his knowledge and permission. It is clear from the papers and books attached that the business which was being carried on in this house was one of gaming. The books also show profit or gain to the persons who were doing the business in the name of a firm called a company. It was not shown by applicant that he was separated in interest from his sons who were admittedly residing in this house. It has been found that although applicant 1 was residing in another house with his mistress, the female members of his family continued to reside in this family house. By residing with his mistress in a separate house the applicant in my opinion did not cease to be the occupier of the family house where the ladies of his family continued residing. His occupation of the house where his mistress was must be regarded as being in the nature of a temporary residence, the family house being there as his other residence. It is possible for a person to have more than one residence at a time. In any case in my opinion, as applicant 1 was present when the gaming was presumed to be going on in his house, he could be properly convicted under this section for having knowingly permitted the house to be used as a gaming house. The convictions of applicants 1, 2 and 3 for an offence under S. 4 are correct and should be confirmed.

With regard to the sentences on applicants 1 and 2 the District Magistrate states in his letter of reference that applicants 1 and 2 were out to capture the whole betting public of Broach as shown by Exs. 16 and 17 and had branches or bucket shops spread throughout the city as shown by Exs. 4, 10 and 14. The total bets for different dates appearing in these account books show that the gambling was carried on on a large scale. The sentence of Rs. 50 fine appears to us

under these circumstances to be inadequate. We enhance the sentences of applicants 1 and 2 to Rs. 200 fine each with three weeks' rigorous imprisonment in default in each case. The sentence of two months' rigorous imprisonment on default in applicant 3 will be altered to three weeks' rigorous imprisonment. Two weeks will be allowed for paying the enhanced fines.

Broomfield, J.—I agree.

S.N./R.K.

Conviction confirmed.

1930 Cr. Cases 784

(Bombay)

MIRZA AND BROOMFIELD, JJ.

Emperor

v.

Heptulla Alibhai

Criminal Appeal No. 474 of 1929, Decided on 1st April 1930, from order of the Bench of Second Class Hon'ble Magistrate, Surat.

Bombay City Municipalities Act (1925), S. 137 — Notice signed by Chief Officer — Notice referring to resolution of Standing Committee showing that Chief Officer signed it on behalf of Standing Committee — Notice held valid.

A notice under S. 137 was issued and it was signed by the Chief Officer and not by the Chairman of the Standing Committee. In the notice there was a reference to a resolution of the Standing Committee.

Held: that, although the Chief Officer cannot sign the notice under S. 137, still the notice will not be invalid if he signs it on behalf of the Standing Committee, and the reference to the resolution of the Standing Committee makes it clear that he signed it only on behalf of the Standing Committee. The omission to write such words as "by order" or "on behalf of" is a mere defect of form which can be cured by Cl. 4, S. 192. [P 786 C 2]

W. B. Pradhan—for the Crown.

M. H. Mehta and S. E. Banaji—for Accused.

Mirza, J.—This is an appeal by the Government of Bombay against an order of the Bench of Second Class Honorary Magistrates, Surat, acquitting the accused of an offence under S. 193, Bombay City Municipalities Act, 1925. The accused had constructed a drain on land which belonged to the Municipality of Surat without having first obtained permission from the municipality in that behalf. He was prosecuted for that offence and was fined Rs. 10 on 28th February 1929. On 8th April 1929, the Chief Officer of the Surat City Municipality addressed a notice to the accused calling upon him under S. 137, Bombay

City Municipalities Act, 1925, to arrange to demolish the drain in respect of the construction of which he had been previously prosecuted and fined, within four days of the receipt of the notice and intimating that if he failed to comply with the direction within that time he would be prosecuted under S. 193 of the Act. The notice refers to a resolution No. 17 of the Standing Committee dated 28th March 1929. The accused not having complied with this notice was prosecuted before the Bench of Second Class Honorary Magistrates, Surat, for an offence under S. 193 of the Act. The Bench Magistrates held that the notice was not a valid notice because it was not signed by the Chairman of the Standing Committee, but was signed by the Chief Officer of the Municipality and it was not shown that the Standing Committee had delegated its power of issuing such a notice to the Chief Officer.

Section 46, Bombay City Municipalities Act provides as follows :

"Any powers or duties or executive functions which may be exercised or performed by or on behalf of the municipality may be delegated in accordance with rules to be made by the municipality in this behalf, to the president or to the vice-president or to the Chairman of the School or other committee, or to one or more stipendiary or honorary officers, but without prejudice to any powers that may have been conferred on the Chief Officer by this Act or on any Committee by or under S. 37 or S. 38, and each person, who exercises any power or performs any duty or function so delegated may be paid all expenses necessarily incurred by him therein."

Before the Bombay City Municipalities Act, 1925 was made applicable to the Surat City Municipality that municipality was governed by the provisions the Bombay District Municipal Act, of 1901. Under that Act certain rules were sanctioned and made applicable to the municipalities governed by that Act by a Government resolution dated 11th July 1923. R. 44 made under S. 46, Bombay District municipal Act, 1901, which is the same as S. 46, Bombay City Municipalities Act, 1925, provides as follows :

"An executive committee may depute any of their members or the Chief Officer or any Municipal Officer or servant under the control of the committee to perform the executive functions resultant from any of their resolutions. In the absence of any such specific deputation in the terms of a resolution, the necessary functions shall be performed by the Chief Officer."

The latter part of this rule would seem to apply to the notice in this case. As there does not appear to be any specific deputation in the terms of the Standing Committee's resolution the necessary functions would have to be performed by the Chief Officer in issuing the notice.

It has been contended by Mr. Mehta that R. 44 is ultra vires of S. 46, Bombay City Municipalities Act, inasmuch as it confers not a specific but a general power on the Chief Officer. No doubt if the powers conferred by R. 44 detracted in any manner from the powers conferred on the Standing Committee by the Act the rule would be ultra vires of S. 46 of the Act. But it is not shown how the powers conferred on the Chief Officer in the latter part of R. 44 could be said to detract from the powers that have been conferred under the Act on the Standing Committee.

It has also been urged by Mr. Mehta that as the rules have been framed and sanctioned under the Bombay District Municipal Act, 1901 they would not apply to the Surat City Municipality in the absence of a special resolution in that behalf by the Bombay Government. S. 5 (1) (b), Bombay City Municipalities Act, 1925, seems to be a complete answer to that contention.

The notice as issued, in my opinion, is not invalid because the Chief Officer and not the Chairman of the Standing Committee has signed it. The reference in the notice to a resolution of the Standing Committee makes it clear that the Chief Officer has signed the notice on behalf of the Standing Committee. The order of acquittal should be set aside and the accused convicted of an offence under S. 193, Bombay City Municipalities Act, 1925. As this is the accused's first conviction under S. 193 a small fine, in my opinion, would meet the ends of justice. He should be sentenced to pay a fine of Rs. 20. Should the drain continue undemolished the municipality could, if so advised, bring a fresh prosecution against the accused.

Broomfield, J.—I agree with the order proposed by my learned brother and with his reasons. I need only add a few remarks with reference to one or two of the points in the argument of Mr. Mehta who appears for the opponent (accused). He has argued that the Chief

Officer cannot be held to have the power to sign a notice under S. 137 because that section empowers the Standing Committee to issue the notice, whereas when the power to issue the notice is conferred upon the Chief Officer it is so expressly stated, as for instance in Ss. 135, 138 and 139 of the Act. But there is an obvious distinction between the power to decide whether a notice shall be issued and the mere executive act of signing the notice. Ss. 135, 138 and 139 confer upon the Chief Officer powers in respect of certain matters which are similar to the powers conferred upon the Standing Committee by S. 137. But, in my opinion, there is nothing in this which is inconsistent with the view that the Chief Officer has the power delegated to him by Municipal R. 44 of signing the notice which has to be issued in consequence of the conclusion come to by the Standing Committee. Mr. Mehta was quite correct in pointing out that rules delegating powers made under S. 46 of the Act must be subject to any powers which have been conferred by the Act itself on the Chief Officer or on any committee. The rules, therefore, must be consistent with and must not in any way detract from the powers conferred upon the Standing Committee by S. 137. If it had been provided in the rules that the Chief Officer was to have the power to issue a notice under S. 137 of his own motion, such a rule would obviously have been inconsistent with the Act and *ultra vires*. But a rule which merely allows the Chief Officer to sign the notice does not in any substantial way trench upon the powers of the executive committee. Mr. Mehta has told us that the position would have been different if the Chief Officer had signed the notice "by order" or "on behalf of the Standing Committee." He seemed to be almost disposed to admit that in that case no objection could have been taken to the notice. I think it is quite clear that if there had merely been an omission to write such words as "by order" or "on behalf of the Standing Committee" that would have been a mere defect of form which would have been cured by Cl. (4), S. 192 of the Act. For the reasons which have been given I do not consider that in this case there was any defect or irregularity in the notice in

view of R. 44 made under S. 46. The Chief Officer appears to be the proper person to sign such a notice. But even if that rule had not existed I should have been inclined to hold that the defect in the notice would merely have been a defect of form. It is quite clear that in substance there has been no irregularity. The Standing Committee decided that a notice ought to be issued. The resolution of the Standing Committee is referred to in the notice itself. To all intents and purposes then the notice which the Chief Officer signed is a notice issued by the Standing Committee in accordance with the maxim *qui facit per alium facit per se*.

S.N./R.K.

Order set aside.

* 1930 Cr. Cases 786

(Bombay)

MIRZA AND BROOMFIELD, JJ.

William Cooper—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 18 of 1930, decided on 13th March 1930, from judgment of Chief Presy. Mag., Bombay.

* (a) Evidence Act, S. 30—Statement of accused taken after close of prosecution case under S. 342, Criminal P. C., implicating co-accused—It is admissible against co-accused—But no weight can be attached to it if co accused implicated by it was not given opportunity to cross-examine accused nor was he asked any questions to explain allegations made against him and statement was not made on oath.

Statement of accused person taken after the close of the prosecution case under S. 342, Criminal P. C., implicating himself and the other co-accused would be admissible against the co-accused, although they are made in the course of the trial. But the weight to be attached to such a statement would depend upon the circumstances of each case. Where the statement is taken after the statement of the other co-accused was recorded and the other co-accused is not given opportunity to cross-examine the accused making the statement nor the Magistrate put him any questions to explain the allegations made against him and further the statement was not made on oath, not even the least value can be attached to it while considering the evidence against that co-accused : 4 Cal. 483 ; A. I. R. 1928 All. 322 ; 39 Mad. 302 17 All. 524 and 23 All. 58 Cons. 6 Bom. 124, Rel on. [P 788 C 1 ; P 790 C 2]

(b) Criminal P. C., S. 342—Statement of one accused cannot be considered against another accused in same trial under S. 342.

There is no provision in S. 312 which would seem to allow the statement made by one accused person to be taken into consideration against the other accused in the same trial.

[P 787 C 2]

G. N. Thakor and B. G. Padhye—for Appellant.

P. B. Shingne—for the Crown.

Mirza, J.—The appellant, original accused 1, was tried along with two other, original accused 2 and 3, before the Chief Presidency Magistrate, Bombay, for offences under S. 468 read with S. 119, and S. 420 read with S. 120-B, I. P. C., was convicted of those offences and sentenced to eighteen months' rigorous imprisonment. In convicting the appellant the Magistrate has relied on a written statement which accused 3 put in after the close of the prosecution case in answer to the question put by the Magistrate:

"What do you wish to say with reference to the evidence given and recorded against you."

He said :

"I got these false Goa lottery tickets printed at No. 1's press. Cooper (accused 1) made all the tracings. I have stated in full in my written statement the circumstances in which I got these tickets printed."

The written statement gives a full and detailed account of how the offences charged against the accused were committed by all the accused and one Coutinho who was not before the Court. Accused 3 pleaded guilty to all the charges and has inculpated himself and the other accused in the commission of the offences by his statement before the trial Magistrate.

The question we have first to consider is whether it would be permissible under the provisions of S. 30, Evidence Act, to take accused 3's statements into consideration against accused 1 and, secondly if these statements are admissible in evidence what value we should attach to them against accused 1. S. 30, Evidence Act, provides that :

"When more persons than one are being tried jointly for the same offence and a confession made by one of such persons affecting himself and some other of such persons is proved the Court may take into consideration such confession as against such other person as against the person who makes such confession."

This provision of the Evidence Act is against the general rule of English law and also the rule which prevailed in India prior to the passing of this Act. The general rule of English law on this subject is that the confession of an accused person is evidence only against himself and cannot be used against others. On this account this section has always been strictly

construed. It is clear in this case that this was a joint trial and if the statement made by accused 3 can be said to be a confession which was "proved" at the trial it would be permissible to take it into consideration against accused 1 under the provisions of S. 30, Evidence Act. Mr. Thakor on behalf of the appellant relies upon a dictum of Garth, C. J., in *Empress v. Ashootosh Chuckerbutty* (1) for the view that a confession under S. 30 must not be one made at the trial. The learned Chief Justice has observed :

"The word 'proved' in S. 30 must refer to a confession made beforehand."

Mr. Thakor has also relied on *Emperor v. Mahadeo Prasad* (2) where Walsh, J., has held that (p. 326) :

"the expression 'proving a confession' is inapplicable to the procedure where the Judge asks questions and an accused person gives explanations under a special section provided for that purpose."

The questions which the Magistrate put to accused 3 were so put under the provisions of S. 342, Criminal P. C. There is no indication in the language of that section that the answer given by one accused could be taken into consideration against his co-accused in their joint trial for the same offence. The learned Government Pleader has argued that although the language of S. 342 speaks of an accused person in the singular it must be held to apply equally to cases where the number of the accused is more than one. Although that is so there is no provision in S. 342 which would seem to allow the statement made by one accused person to be taken into consideration against the other accused in the same trial as contended for by the Government Pleader before us. For that provision of the law we can rely only upon S. 30, Evidence Act.

In *Re Vempally Bali Reddi* (3) Ayling, J. drew a distinction between a trial before a Sessions Court where a person pleads guilty at the outset and is convicted on his plea and cannot be tried jointly with others against whom the trial proceeds and the trial before a Magistrate. In the case before him all the accused were tried jointly before a

(1) [1878] 4 Cal. 483=3 C. L. R. 270.

(2) A. I. R. 1923 All. 822=76 I. C. 1025=25 Cr. L. J. 305=45 All. 823.

(3) [1918] 38 Mad. 802=15 Cr. L. J. 13=22 I. C. 157.

Magistrate and some had confessed the crime and implicated their co-accused in statements made under S. 342, Criminal P. C., and after their statements had been recorded and the evidence for the prosecution closed had pleaded guilty under S. 255 (1), Criminal P. C. The Court held that these statements could be taken into consideration against the other accused under the provisions of S. 30. In *Emress v. Lachman Bala* (4) the judgment of this Court implied that if the statement of the accused implicating their 'co-accused had been made' by them at the trial in the presence of the co-accused whom those statements implicated in the offence they could have been taken into consideration under the provisions of S. 30, Evidence Act. The language of S. 30 does not seem to me to justify a distinction between a confession made by an accused person before the trial and in the course of the trial. In my judgment the statements made by accused 3 would be admissible under S. 30 although they were made in the course of the trial.

The next question is what weight should be attached to these statements of accused 3 against accused 1. The statements of accused 3 were made after accused 1 had made his statement. It does not appear from the record that the learned Magistrate put any further questions to accused 1 with a view to enabling him to explain the allegations which were made against him in the statement of accused 3. Accused 3 on his own showing is guilty of the offences charged against him. He pleads guilty and prays for mercy. No doubt he has been convicted by the Magistrate and sentenced to twelve months' rigorous imprisonment in the same trial. But the circumstance under which accused 3's statements were made seem to detract considerably from the weight which the Court might otherwise have attached to them. The statements are not on oath. Accused 1 has had no opportunity of subjecting accused 3 to cross-examination on those statements. The statements admittedly are those of an accomplice made after the close of the case for the prosecution and after the statement of accused 1. In my opinion it would not be safe to attach any

weight to these statements of accused 3 in so far as they inculpate accused 1.

Eliminating the statements of accused 3 from our consideration as being of no value we have next to consider whether the evidence in the case apart from these statements would justify the conviction of accused 1. The learned Magistrate has relied upon the evidence of the two witnesses for the prosecution, Motiram Chandu and Ramchandra Ranji. He has also relied upon certain circumstances in the case which seem to raise an inference of guilt against accused 1. (Here the judgment discussed the evidence of the two witnesses and proceeded). There is nothing in the evidence of these witnesses which beyond raising a suspicion against accused 1 would go to prove that he had participated in the offence with which he is charged.

With regard to the unsatisfactory nature of accused 1's statement it is for the prosecution to make out a prima facie case against the accused in the first instance. If no such case is made out the accused is not bound to give any explanation. The explanation given by accused 1 in his statement if true would appear to show that he is a gullible person who implicitly believed all the representations that were made to him by a comparative stranger like accused 3. This explanation does not appear to be inconsistent with the probabilities of the case. Accused 3 must be credited with possessing a sharp intellect and pushful manners to have committed an offence of this nature as admitted by him. It is by no means an impossible supposition that a man of this nature might by his plausible manners succeed in imposing on another who possesses a less acute intellect than he.

The circumstance that accused 2 was present in the press that evening has not been satisfactorily explained by accused 1 in his statement. That again seems to create only a suspicion against accused 1 but is not sufficient by itself to raise a conclusive presumption of guilt against him. In my opinion on the evidence as it stands, if no value is to be attached to the statement of accused 3 in so far as it inculpates accused 1, the conviction of accused 1 should not be sustained. The convic-

(4) [1882] 6 Bom. 121.

tion and sentence of accused 1 should be reversed and he should be acquitted and discharged.

Broomfield, J.—The prosecution in this case arose from certain information given by accused 3 to the police. Accused 3 was inculpated by the accused in another case in connexion with the issue of forged lottery tickets which was decided in August 1929. On 9th September, he went to Inspector Dyer and on that date and subsequently he made certain statements which were reduced to writing. It would have been possible presumably to produce accused 3 before a Magistrate, in which case these statements of his might have been formally put in evidence. This, however, was not done. What happened was that after the evidence for the prosecution had been recorded at the trial, accused 3 was asked by the Magistrate what he wished to say with reference to the evidence recorded against him. He then said:

"I have stated in full in my written statement the circumstances in which I got these tickets printed"

and thereupon a long written statement was placed upon the record purporting to give a detailed account of the whole affair and making various allegations against accused 1 in the case. A preliminary question which we have to consider is whether this written statement of accused 3 so put in is a confession which can be taken into consideration under S. 30, Evidence Act. In the commentary on S. 30 in Woodroffe and Ameer Ali's Law of Evidence the opinion is given that

"a confession duly made at any time by one of several accused persons who are under trial jointly for the same offence can be taken into consideration under S. 30 as against the other accused persons."

The authority for this proposition, however, is a case in some unauthorized report which is unfortunately not available to us. The name of the Court is not given and it is impossible for us to say what weight should be attached to it. My learned brother has already referred to the dictum of Garth, C. J. in *Empress v. Ashootosh Chukerbutty* (1). That was an obiter dictum. The question whether a confession made at the trial was within the scope of S. 30 was not actually before the Court. On the other hand in several reported cases it

appears to have been assumed that S. 30 would apply to such a confession. In *Empress v. Lakshman Bala* (4) and in *In the matter of the Petition of Chandra Nath Sirkar* (5) statements made at the trial by one accused were held inadmissible against another on the ground that they were not made in the presence of that other. The view of the Court in both cases appears to have been that apart from that irregularity the confessions would have been sufficiently "proved" within the meaning of S. 30, although the point is not expressly decided. In *Queen Empress v. Pirbhu* (6) and *Queen Empress v. Paltia* (7) confessions at the trial by one accused incriminating another were held inadmissible on the ground that the accused making the confession had pleaded guilty. It was held, therefore, that the confessing accused was not being jointly tried within the meaning of S. 30. Apart from that circumstance, however, the view of the Court would apparently have been that the confessions would have been within the terms of the section. In *Re, Bali Reddi* (3) which has been referred to by my learned brother, we have a definite authority for the view that S. 30 does cover confessions made at the trial. I think there can be no doubt that the general practice has been to regard such confessions as admissible under S. 30, although I should say that statements made from the dock by one accused against another have not usually been treated with much attention, and a case like the present, in which a long written statement is put in from the dock, must be quite exceptional. Since the commentary in Woodroffe and Ameer Ali was written, there has been a decision of a Judge of the Allahabad High Court in *Emperor v. Mahadeo Prasad* (2) to the effect that (p. 326):

"the expression 'proving a confession' is . . . inapplicable to the procedure where the Judge asks questions and an accused person gives explanations under a special section provided for that purpose."

In the course of his judgment in that case Walsh, J., after referring to the fundamental principles of English criminal law that an accused is entitled to know what the evidence against him is before he is called upon for his defence

(5) [1881] 7 Cal. 65.

(6) [1895] 17 All. 524=(1895) A. W. N. 111.

(7) [1900] 23 All. 53=(1900) A. W. N. 197.

and that when the prosecution case is closed it cannot be reopened or added to, observed as follows (p. 325):

"Every Judge in such a case in England, where statements are made from the dock after the case for the prosecution is closed, warns the jury that they must not take into account anything which one accused in the dock may say about the other. To use, therefore, a statement made in the dock by one accused against the other in a joint trial, offends against at least two of the fundamental principles of the criminal law. The legislature in India saw fit to create an exception which is contained in S. 30, Evidence Act. In my opinion that must be construed with reference to the fundamental principles to which it creates an exception. If the section is carefully read, I think nobody, bearing in mind the fundamental principles which I have just mentioned, ought to have any difficulty in coming to the conclusion that what is contemplated is formal proof by the prosecution of a confession previously made."

I think it must be admitted that the reasoning in this case is very cogent. S. 30, Evidence Act, must certainly have contemplated a confession "proved" as part of the prosecution case, to which the accused has an opportunity of replying, and not a statement made by a co-accused from the dock in reply to questions by the Court or a written statement handed in at that stage. The language of S. 30, when a confession is proved" is clearly not very appropriate to statements made or put in from the dock. If statements made by an accused in reply to questions under S. 342, Criminal P. C., were intended to be admissible as evidence or to be taken into consideration against other accused one would have expected that the section would provide for it. But it does not do so. On the other hand, there is no reason for regarding the language of S. 30, when it speaks of a confession and of proving a confession, as being in any way technical. The statement of accused 3 in this case is undoubtedly a confession. It was produced by accused 3 himself and it appears to have been read out in Court, that is to say, it would seem to have been "proved" in the sense which was regarded as sufficient in *Empress v. Lakshman Bala* (4) and in other cases to which I have referred. I should not be prepared to go so far as to say that the language of S. 30 is not wide enough technically to cover a confessional statement so put in.

At the same time I have no hesitation in holding that under the circumstances

of this case the statement of accused 3 is quite worthless and ought not to be relied upon in the least. If the statement had been proved as part of the prosecution case, if there had been an opportunity of comparing it with previous statements made by accused 3 to Inspector Dyer, it might then have been said to have some value. Even in that case it would have been obviously inferior to the evidence of an accomplice as not being given on oath and not subjected to cross-examination. Even in that case we should have to consider that the statement is not corroborated by any other evidence as to some of the most material particulars, for instance, as to the alleged preliminary conspiracy, and that on the other hand it is contradicted, for instance, as to the time taken over the printing of the tickets, by the evidence of the prosecution witnesses. But as it is the statement having been simply put in after the prosecution case was completed, and accused 1 not having even been questioned about it it has in my opinion no value at all. (Here the judgment discussed evidence and concluded.) The evidence being what it is I think it may be said that there is a reasonable doubt in the case, of which the accused must have the benefit, I, therefore, agree with my learned brother that the conviction should be set aside.

Per Curiam.—The conviction and sentence are set aside. The accused is discharged and acquitted and ordered to be set at liberty.

S.N./R.K. *Conviction set aside.*

1930 Cr. Cases 790 (Bombay)

MIRZA AND BROOMFIELD, JJ.
Gafur Karimbak—Accused.

v.

Emperor—Opposite Party.

Criminal Ref. No. 17 of 1930, Decided on 2nd April 1930.

(a) Criminal P. C., S. 179 — "Consequence" is not restricted in its meaning to consequence which is necessary ingredient of offence.

The word "consequence" in S. 179 bears its ordinary grammatical meaning and is not to be restricted in its meaning to a consequence which is a necessary ingredient of the offence: *A. I. R.* 1922 Bom. 89, *Foll.*; 38 *Mad.* 689, *not Foll.* [P 791 C 2]

(b) Criminal P. C., S. 179—V. P. parcels, posted by accused, received by addressee and value paid to post office—Accused charged of cheating—Posting of parcels was

essential part of offence and so Court where they were posted has jurisdiction to try case both under S. 179 and also under Criminal P. C., S. 182 (2).

Where the accused styling himself as "The Director of Mesmerism" posted three V. P. parcels containing a piece of paper purporting to convey the first lesson in mesmerism, the parcels were received by the addressees and value paid to the post office, the act of deceiving and the act of inducing delivery of property were composite acts which began with the delivery of the parcels to the post office for posting. The posting was an essential part of the offence and so both under S. 179 and S. 182 (2) the Court in whose local area the posting was made had jurisdiction to try the case: *A. I. R. 1923 Mad. 686, Appr.*; 83 *Mad* 639, *not Appr.*; 1927 *Mad* 544, *Diss. from*. [P 792 C 1]

W. B. Pradhan—for the Crown.

Broomfield, J.—The District Magistrate, Kolaba, has forwarded to this Court the papers in three cases pending in the Court of the First Class Magistrate, Panvel, and asks for directions under S. 185, Criminal P. C., as to the place in which and the Court by which the said cases ought to be tried. The accused in these three cases is one Y. A. Gafur Karimbax Pathan. He is said to belong to Srinagar but has been living at Panvel, where he has been leading the life of a fakir and calling himself a "Director of Mesmerism." On 6th July 1923, the accused sent a parcel by value payable post for Rs. 2-8-0 to one Vithal Shankar Gulve of Poona. On 16th July 1923 he sent a similar parcel by value payable post for the same amount to the Deputy Commissioner, Sialkot, and on the same day he sent a third parcel by value payable post for the same amount to the Deputy Commissioner, Hissar. The parcels contained nothing but a paper on which was written what purported to be the first lesson in a correspondence course in mesmerism. The addressee in each case paid the amount to the post office and in two cases the amounts were in due course paid by the post office to the accused at Panvel. The amount of the V. P. parcel addressed to the Deputy Commissioner, Hissar, has been detained in the post office. In consequence of these transactions the accused was charged with three offences of cheating under S. 420, I. P. C., and the cases were being tried jointly. During the course of the trial the attention of the Magistrate was drawn to a decision of a single Judge of the Madras High Court in the case of *Kaleek*,

In re (1). On the strength of this ruling the Magistrate came to the conclusion that he had no jurisdiction to try the cases and that they ought to be tried at Poona, Sialkot and Hissar respectively. He accordingly submitted the papers to the District Magistrate for disposal and the District Magistrate, as already stated, has referred the matter to this Court under S. 185, Criminal P. C.

In our opinion the Magistrate is mistaken in holding that he has no jurisdiction to try these cases. The case of *Kaleek*, *In re* (1) is no doubt a case upon similar facts. The accused in that case, who had received an order for four boxes of tea from the complainant, a resident of Hyderabad, despatched from Madras by value payable post four boxes containing not tea but sawdust. The point before the Court was whether the Madras Court had jurisdiction to try the accused on a charge of cheating. It was held that it had no jurisdiction, the reasons given being that so far as the complainant was concerned the deceit and the delivery in consequence of the deceit were complete when the money was handed over to the post office at Hyderabad, and the subsequent delivery by the post office to the accused was not a necessary ingredient of the offence. The Madras High Court has held in several cases that the word "consequence" which occurs in S. 179, Criminal P. C., must be taken to mean something which is a necessary ingredient of the offence. That has been laid down, for instance, in the case of *Re, Ram-bilas* (2). But that case was not approved of in *Emperor v. Ramratan Chuni-lal* (3), where it was held by Macleod, C.J., that the word "consequence" in S. 179, Criminal P. C., bears its ordinary grammatical meaning and is not to be restricted in its meaning to a consequence which is a necessary ingredient of the offence. The payment of the money to the accused in Panvel may not be technically a necessary ingredient of the offence of cheating as defined in S. 415, I. P. C., but quite obviously it is a consequence of the accused's act in posting these parcels. It was precisely the con-

(1) *A. I. R. 1927 Mad. 544=101 I. C. 484=23 Cr. L. J. 452.*

(2) [1914] 83 *Mad. 639=15 Cr. L. J. 688=26 I. C. 186.*

(3) *A. I. R. 1922 Bom. 89=18 Cr. L. J. 173=65 I. C. 637=18 Bom. 641.*

sequence which he must have intended. If, therefore, we take the word "consequence" in its ordinary grammatical sense it is clear that S. 179 gives the Panvel Court jurisdiction to try all the three cases. This is one way in which the case of *Kaleek, In re* (1), may be distinguished so far as the Courts in this Presidency are concerned, viz., that it is based on a restricted interpretation of the word "consequence" which has not been approved of by our High Court.

But, with all deference to the learned Judge who decided that case, it appears to us that S. 179 and also S. 182, Criminal P. C. should be considered to give the Panvel Court jurisdiction quite apart from any question of the interpretation of the word "consequence" in the former section. The language of S. 179 is as follows :

"When a person is accused of the commission of any offence by reason of anything which has been done, and of any consequence which has ensued, such offence may be inquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done, or any such consequence has ensued."

The offence of cheating, as defined in S. 415, I. P. C., consists in deceiving a person and dishonestly inducing the person deceived to deliver property. In a case such as the present it appears to us to be reasonable to hold that the act of deceiving and the act of inducing delivery of property are composite acts which begin with the delivery of the parcels to the post office for posting. It may, therefore, be properly said that the accused in this case is accused of the commission of the offence of cheating by reason of the delivery of these parcels to the post office in Panvel. That posting is in fact an essential part of the offence. Even if the parcels had not reached the addressees, or if the addressees had declined to pay, the posting of the parcels with the dishonest intention of getting payment on them would seem to amount to an attempt to commit the offence. In our opinion, therefore, S. 179 clearly applies. For the same reason it would appear that S. 182, Criminal P. C., would give jurisdiction to the Magistrate at Panvel. That section provides in Cl. 2 thereof that where an offence is committed partly in one local area and partly in another and in Cl. 4 thereof, that where

an offence consists of several acts done in different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas. The offence in this case, in our opinion, was committed partly in Panvel, by the posting of the parcels there, and partly in Poona and Hissar where the money was paid over by the addressees to the post office. The offence also consists of several acts done as regards the posting of the parcels in Panvel, as regards the inducing payment of money in the other places aforesaid. For both these reasons, therefore, S. 182 enables the cases to be tried in the Panvel Court.

The learned Government Pleader referred to another case of the Madras High Court, *Krishnamurthy Aiyar v. Parasurama* (4). It was there held that where a letter containing defamatory matter was posted at one place in order that it might be read at another, the offence of defamation is triable, under Ss. 179 and 182, Criminal P. C., either at the place where the letter was posted or at the place where it was intended to be read. The reason given for the decision was that the accused had done all in his power towards publication and had lost control of the letter when he had committed it to the post. We find some difficulty in reconciling the decision in this case with the decision in *Kaleek, In re* (1), referred to above, and we consider that it supports the view we have taken of the application of Ss. 179 and 182.

The District Magistrate appears to have accepted the First Class Magistrate's view of the law as to jurisdiction. He has asked this Court to make a direction as to the trial of these cases under S. 185, Criminal P. C. That could only be done as regards one of the cases, namely, that in which the parcel was despatched to Poona, but for the reasons given above there is no need to make any order under S. 185. The First Class Magistrate, Panvel, has jurisdiction to try all three of the cases. We, therefore, direct that the papers should be returned to him and that he should proceed to dispose of the cases according to law.

Mirza, J.—I agree.

S. N./R.K. Order accordingly.

(4) A. I. R. 1923 Mad. 663=72 I. C. 69=24 Cr. L. J. 809.

1930 Cr. Cases 793

(Calcutta)

PEARSON AND PATTERSON, JJ.

Hachani Khan—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 546 of 1929, Decided on 21st January 1930.

(a) Criminal P. C., S. 297—Judge should group witnesses in such way as to direct attention of jury to evidence regarding each of particular facts sought to be proved on each side.

The Judge in his charge to the jury, should group the witnesses in such a way as to direct the attention of the jury to the evidence regarding each of the particular facts sought to be proved on each side. He should not merely place the depositions before the jury in the order in which they were examined as it may lead to confuse the minds of the jury in some respects.

[P 794 C 1, 2]

(b) Criminal P. C., S. 297—Material witness not examined by prosecution—Judge should direct jury to presume that his evidence would not have supported prosecution.

Where a material witness for the prosecution is not called the Judge in his charge to the jury, should direct them that it should be presumed from the fact of his non-examination, that if he had been examined his evidence would not have supported the case for prosecution.

[P 796 C 2]

(c) Criminal P. C., S. 297—Evidence of approver—Judge should tell jury that corroboration required is one tending to connect each accused with offence.

In dealing with the evidence of an approver the Judge should tell the jury that the sort of corroboration that is required is corroboration in material particulars tending to connect each of the accused with the offence.

Where the jury are well aware of the kind of corroboration required, the omission to state the law in more precise terms does not amount to misdirection.

But the omission of the Judge to draw the special attention of the jury to the fact that though there is some corroborative evidence as regards the movements of two of the accused in a case of dacoity immediately before and immediately after the occurrence, there is no such corroboration in respect of the third accused, amounts to misdirection.

[P 797 C 2]

Nurul Huq—for Appellants.*Rhondkar and Nirmal Chandra Das Gupta*—for the Crown.

Judgment.—This case arises out of a dacoity that was committed on the night of 2nd November 1928, in the boat of one Kali Kumar Banikya, an itinerant vendor of metal utensils. The other occupants of the boat were Kali Kumar's nephew, Lebu, and two Manjhis named Rajendra and Bir Charan. They were

all strangers to the locality and so were unable to recognize any of the dacoits as men who had been known to them from before. Kali Kumar lodged a first information at the thana on 3rd November, in which he stated that none of the occupants of the boat had been able to recognize anyone, but that he thought that he might be able to recognize two or three of the dacoits, if he saw them again. He also gave descriptions of three of the dacoits, one of whom, he said, had threatened him with a knife, while the other two had caught him by the throat. On coming to the spot, the Sub-Inspector arrested one Samiruddin, and in consequence of information given by Samiruddin, a box of utensils that had been stolen by the dacoits was recovered from the bed of the river. Various other articles were also seized, and a number of persons were arrested and sent up for trial. When produced before the Magistrate, Samiruddin made a confession and was subsequently made an approver. Seven persons, including the three appellants, were committed for trial before the Third Additional Sessions Judge of Mymensingh, and of these, three were acquitted, while the three appellants and one other person, who has not joined in the present appeal, were convicted on a unanimous verdict of guilty.

The evidence consists mainly of that of the approver Samiruddin who gives a detailed account of the whole affair from start to finish, and the evidence of Kali Kumar, Lebu and Rajendra to the effect that the three appellants were among the dacoits, and also the evidence of some of the local men regarding the movements of the approver and of his associates immediately before and immediately after the occurrence, as well as evidence regarding the recovery of the box of utensils and the proceedings of the police in the course of the investigation.

The statements of the appellants at the trial were to the effect that they were innocent and knew nothing about the occurrence, while the defence sought to be set up on their behalf in cross-examination and in argument appears to have been that they had been falsely implicated by the approver, partly in order to exculpate his real associates in the crime and partly out of enmity. It

was not denied by the defence at the time of the trial that the dacoity had actually taken place as alleged and that the approver had been one of the dacoits, nor has any such contention been urged on appeal.

In his charge to the jury the learned Additional Sessions Judge has dealt with the matter in the following way. After explaining the charges he places the approver's evidence before the jury at great length, at the same time stating that though it is not illegal to convict an accused person on the uncorroborated testimony of an accomplice, it is considered as a rule of practice unsafe to do so, unless the testimony of the approver is corroborated by independent and reliable evidence in material particulars fixing the guilt on that person. He next places before the jury the evidence of Kali Kumar, Rajendra and Lebu with special reference to the question of identification, at the same time drawing the attention of the jury to the discrepancies in the evidence of these witnesses and of the approver as regards the specific acts attributed by them to the various accused persons. He also draws the attention of the jury to the fact that Rajendra and Lebu had not been able to identify any of the accused before the police, and asks them to consider whether in these circumstances the evidence of these witnesses is not altogether worthless, and whether it can at all be relied on as corroboration of the evidence of the approver Samiruddin. As regards Kali Kumar, the Judge points out that Kali Kumar has stated in his evidence that he hopes to get back his money in case of conviction, and he asks the jury to consider whether this hope may have induced Kali Kumar falsely to identify some of the accused as having been among the dacoits. After discussing the evidence of the approver and of the occupants of the boat in the above manner, the Judge proceeds to place the evidence of the remaining witnesses before the jury. This he does at great length, indeed at too great length, for the important facts elicited from these witnesses are to some extent buried under a mass of unnecessary and unimportant details. This is especially unfortunate in view of the fact that the Judge, instead of grouping the witnesses in such a way as to direct

the attention of the jury to the evidence regarding each of the particular facts sought to be proved on either side, has merely placed their depositions before the jury in the order in which they were examined. This method of dealing with the evidence may have tended to confuse the minds of the jury in some respects, but this defect has in our opinion been remedied (except to some extent, as regards the existence or the absence of corroboration of the approver's evidence, a point which will be referred to again presently), by the summing up of the evidence against each individual accused in the concluding portion of the charge.

After placing the evidence before the jury in the manner indicated above, the Judge briefly discusses the evidence to show that the dacoity actually took place, and that the approver was one of the dacoits. He then goes on to say that the most important question is whether any of the accused persons standing in the dock and if so, which of them, were concerned in the dacoity; and again warns the jury that it would be extremely unsafe to rely solely upon the uncorroborated testimony of the approver. He also reminds them that they will have to consider whether the statements of the approver regarding the complicity of any of the accused have been corroborated by independent, untainted and reliable evidence, and points out that "it is one thing that a dacoity was committed, but it is quite another thing that any of the accused was concerned in the crime."

In this connexion he invites the attention of the jury to the evidence suggesting the existence of enmity between Samir and some of the accused and to the defence contention that Samir may have implicated them falsely out of enmity and in order to shield his real associates. He then again refers to the evidence of identification, pointing out that there was moonlight at the time of the occurrence, and that Kali Kumar had no grudge against any of the accused; and after referring again to the discrepancies regarding the part played in the dacoity by the persons whom Kali Kumar had identified, he asks the jury to consider whether, independently of the evidence of the approver, they can rely upon the identifications made by Kali Kumar at the trial.

In his summing up of the evidence against each individual accused, the Judge draws the attention of the jury, so far as the accused persons other than the present appellants are concerned, to the existence, or the absence, of independent evidence corroborating the approver. In dealing with the case of Hachani Khan one of the present appellants, the Judge refers to his identification by Kali Kumar, to the discrepancies regarding the part played by him as pointed out in the earlier part of the charge, and to the evidence suggesting the possible existence of enmity between him and the approver Samiruddin. He omits, however, to refer to the evidence of (P. W. 11), Safiruddin, who speaks of the assemblage of a number of people (including Meghu, one of the appellants), in Hachani's house on the night of the occurrence. This is a piece of evidence which if believed, tends to corroborate the evidence of the approver, both in respect of Hachani and in respect of Meghu. The Judge has dealt with Meghu's case in a manner similar to that in which he has dealt with Hachani's case referring again to the evidence of identification by Kali Kumar and to the discrepancies between the evidence of Kali Kumar and Samiruddin regarding the particular part played by the accused. He has also referred to Safiruddin's evidence regarding Meghu's presence in Hachani's house on the night of the occurrence and to the evidence of (P. W. 19), who says that he saw Samiruddin (the approver) and Meghu sleeping together in a hut in Meghu's bari shortly before sunrise on the morning after the occurrence. This is a piece of evidence which, if believed, tends to corroborate the approver's evidence as against Meghu. The Judge has not in so many words drawn attention of the jury to the fact that the evidence of Safiruddin and of Samiruddin Taluqdar (P. W. 19), tends, if believed, to corroborate the approver's evidence as regards Meghu's participation in dacoity, but he has, after referring to their evidence, again reminded the jury of the evidence of enmity between Meghu and the approver.

As regards the appellant Shah Newaj alias Fuler Bap, the Judge asks the

jury to consider whether they can rely on the identification by Kali Kumar and the approver. He has not, however, specifically drawn their attention to the fact that, apart from the identification of Shah Newaj by Kali Kumar, there is no other evidence of the approver so far as the participation of Shah Newaj in the dacoity is concerned. It may here be remarked that there is some evidence on the record to the effect that some of the accused persons, including the three appellants, had been at the *hat* on the day immediately preceding the occurrence, but the Judge has quite rightly not treated this as corroboration of the approver's evidence to the same effect, and has in fact not referred to it in his charge, except quite casually while placing the evidence of the witnesses before the jury. It would perhaps have been better, if the Judge had told the jury in so many words that the evidence on this point ought not to be regarded as corroborating that of the approver inasmuch as it in no way tended to connect any of the accused with the actual occurrence.

It is true that the evidence on this point tends to corroborate Kali Kumar's evidence to the effect that he had seen these persons at the *hat* on the day in question. The first information, however, contains no mention of Kali Kumar having recognised any of the dacoits as men whom he had seen in the *hat* on the previous day, (as he now says), and it would have been better if the Judge had drawn the attention of the jury to this fact. It is very doubtful whether there is any truth in the allegation but the Judge, though he did mention it in stating the case for the prosecution, does not appear to have laid any stress on it and there is no reason to suppose that the jury attached any importance to it or that they might have taken a different view of Kali Kumar's evidence if their attention had been specifically drawn to the fact that the first information contains no mention thereof. As a matter of fact, the first information was read over to the jury in the course of the charge: so they were in a position to notice the omission for themselves and to draw such inference therefrom as they might think fit.

It has been urged on behalf of the appellants that there are certain defects in the charge which amount to misdirections and that the result has been a failure of justice. It is contended in the first place that there was an omission amounting to a misdirection in not drawing the special attention of the jury to the fact that the first information contains no mention of Kali Kumar having, as he stated in his evidence seen some of the dacoits including the present appellants, at the *hat* on the day immediately preceding the occurrence. This point has already been referred to above and for the reasons given we are of opinion that the accused have not been prejudiced by the omission in question, and that there is, therefore, no substance in this contention.

Another point that has been taken is that the Judge did not draw the attention of the jury to the fact that there was no evidence to show that Kali Kumar identified any of the present appellants before the investigating police officer. It is a fact that there is no such evidence on the record, and the reason is obvious, namely that, having regard to the provisions of S. 162, Criminal P. C., it was not open to the prosecution to question Kali Kumar on this point. It was, however, open to the defence to cross-examine him on the point (if he had, in fact, not identified the appellants before the Sub-Inspector) and this the defence did not do. The approver was arrested on 7th November and the appellants, Shah Newaj and Meghu were arrested on the following day. There is evidence that Shah Newaj and some others (but not Meghu) were taken to the complainant's boat after arrest and that Rajendra and Lebu failed to identify any of them as having been among the dacoits. There is, however, no evidence as to whether Kali Kumar did or did not identify any of these persons before the Sub-Inspector as having been among the dacoits. Now would such evidence have been admissible unless the defence had chosen to cross-examine Kali Kumar on the point. As regards Meghu, there is no evidence to show that he was at any time taken to the complainant's boat for the purpose of identification or that Kali Kumar and his companions

were ever asked during the course of the police investigation whether they could identify him or not. As regards Hachani he was arrested later and was shown to Kali Kumar at the thana, but there was no cross-examination as to whether Kali Kumar did or did not identify him at that time.

In these circumstances the Judge was quite right in only drawing the attention of the jury to the fact that Rajendra and Lebu had not been able to identify Shah Newaj before the police, and in making no comments as regards the evidence or lack of evidence of identification before the police in respect of the other two appellants, Hachani and Meghu.

Then again, it is pointed out that Bir Charan, one of the occupants of the boat, was not examined as a witness and it is urged that the Judge was guilty of a misdirection in not telling to the jury that it might and indeed should be presumed from the fact of his non-examination that if he had been examined his evidence would not have supported the case for the prosecution. This contention is perfectly correct so far as it goes. The Judge should in our opinion have given the jury a direction on these lines. There is, however, evidence that Bir Charan is a very old man and there is nothing to show that he ever came out of the covered portion of the boat or that he saw anything of the dacoity. This being so we have no doubt that the jury, though not given any special direction on the point drew the correct inference for themselves, namely that Bir Charan if he had been examined as a witness would not have been able to throw any light on the question of the identity of the dacoits. In this view of the matter, the omission to give the jury the direction that is usually given in such circumstances, is a matter of little importance and cannot possibly have had any effect on the verdict.

Lastly, and this is a point of some importance, it is contended that the charge is defective inasmuch as the Judge did not properly direct the jury regarding the kind of corroboration that is required before placing reliance on the evidence of such an approver as the approver in the present case. It is conceded that the Judge repeatedly told

the jury that it would be unsafe to base a conviction on the evidence of the approver, unless, such evidence was corroborated by independent and reliable evidence in material particulars, but it is contended that the Judge should have gone further than that, and should have explained to the jury that by the expression "material particulars," as used in this connexion, is meant such particulars as tend to connect each of the accused with the offence charged. In this connexion reference has been made to the case *Rebati Mohan Chakravarti v. Emperor* (1) in which it was held that it is for the Judge to determine whether there is any evidence that does corroborate the story of the approver so far as the complicity of the accused is concerned, and that it is the duty of the Judge to direct the attention of the jury to those portions of the evidence confirming or corroborating the accomplice's story, which do or do not fulfil the requirements referred to above, namely the evidence corroborating the accomplice's story in material particulars implicating the accused. In that case the Judge had, in his charge to the jury, treated as corroborative evidence, evidence which in no way tended to connect the accused with the offence, and in this he was held to have been wrong, but the conviction was nevertheless upheld, as it was found that there was in fact sufficient corroborative evidence in law against the two appellants, that is to say, evidence corroborating the accomplice in some material particulars implicating the accused. In the present case the Judge has not indeed told the jury, in so many words, which portions of the evidence should be regarded as corroborative in the above sense, and which portions should not be so regarded, but there are several passages in his charge which must in our opinion have had the same effect on the minds of the jury as a specific direction on the lines indicated above would have had, as for example, the passage that has already been quoted, namely:

"it is considered as a rule of practice unsafe to convict an accused upon the testimony of an approver, unless corroborated by independent and reliable evidence in material particulars fixing the guilt on that accused."

Then again, after placing the whole of the evidence before the jury, the Judge says:

"The most important question is whether any of the accused persons standing in the dock, and if so which of them, were concerned in the dacoity. On this point the jury, unless they are inclined to rely solely upon the uncorroborated testimony of the approver which would be extremely unsafe, will have to consider whether the statements of the approver regarding the complicity of any of the accused have been corroborated by independent, untainted and reliable evidence. It is one thing that a dacoity was committed, but it is quite another thing that any of the accused was concerned in the crime."

Lastly, in the concluding paragraph of the charge, the Judge again reminds the jury that

"though it is not illegal to convict any of the accused on the uncorroborated testimony of the approver, it would be extremely dangerous to do so without corroboration of Samir's statements regarding the complicity of the accused or any of them by independent reliable evidence."

In view of these remarks it may, we think, be assumed that the jury were well aware that the sort of corroboration that was required, was corroboration in material particulars tending to connect each of the accused with the offence, and this being so, it cannot, in our opinion, be held that the omission to state the law on the point in more precise language amounted to a misdirection.

Turning now to the cases of the individual appellants, it is in our opinion to be regretted that the learned Sessions Judge, in summing up the evidence against each, did not indicate more clearly in what respects the approver's evidence had been corroborated as against each, and in what respects it had not been so corroborated. This is not a matter of much importance so far as the appellants Hachani and Meghu are concerned, for there is, in our opinion, as in *Rebati Mohan v. Emperor* (1), sufficient corroborative evidence in law against those two appellants on the record, and that evidence has been very fairly and fully placed before the jury in other portions of the charge.

As regards Shah Newaj, however, the Judge ought, in our opinion, to have drawn the special attention of the jury to the fact that though there was some corroborative evidence as regards the movements of the appellants, Hachani and Meghu, immediately before and immediately after the occurrence, there

(1) A. I. R. 1923 Cal. 57=115 I. C. 258=30 Cr. L. J. 435=36 Cal 150.

was no such corroboration in respect of this appellant, Shah Newaj. The omission to do so amounts in our opinion, to a misdirection, and having regard to the weakness of the evidence of identification of Shah Newaj and the evidence regarding the existence of enmity between this appellant and the approver, it must, we think, be held that the evidence against him, is insufficient to justify a conviction, and that the misdirection referred to above has in fact occasioned a failure of justice, so far as this appellant, Shah Newaj, is concerned.

In these circumstances, the conviction and sentence in respect of the appellant Shah Newaj should, in our opinion, be set aside, and he should be acquitted and released from custody. As regards the other two appellants, Hachani and Meghu, the convictions and sentences should be upheld, and their appeals dismissed.

R.M./R.K. *Order accordingly.*

1930 Cr. Cases 798

(Calcutta)

PEARSON AND MALLIK, JJ.

Matabbar Molla—Petitioner.

v.

Golam Panjaton—Opposite Party.

Criminal Revn. No. 372 of 1929, Decided on 12th April 1929.

(a) Criminal P. C., S. 137 — Accused alleged to have obstructed public pathway—On receipt of notice of proceedings under S. 133 he appearing in Court — Magistrate instead of enquiring whether he denied public right in pathway enquiring whether there was obstruction — Procedure held to be wrong.

Where the accused is alleged to have obstructed a public pathway, and on receipt of notice of the proceedings under S. 133, he appears in Court, the first duty of the Magistrate is to question him whether he denied the existence of public right in the pathway. If instead of doing so the Magistrate proceeds to enquire into the matter whether there was any obstruction, the procedure is wrong in law.

[P 798 C 2]

(b) Criminal P. C., S. 139-A.— Accused alleged to have obstructed public pathway — Evidence on record indicating that path was private—Magistrate should stay trial until question is decided by civil Court.

Where accused is alleged to have obstructed a public pathway, and there is some evidence on record indicating that the path was private, it is incumbent on a Magistrate under S. 139-A to stay his hands immediately, until the matter of the existence of the public right was decided by a competent civil Court. [P 798 C 2]

Panchanan Chaudhuri—for Petitioner.

Manindrakumar—for Opposite Party.

Judgment. — This rule is directed against an order whereby a conditional order under S. 133, Criminal P. C., was made absolute. The rule was issued on ground 2 alone of the petition and that ground was that the procedure as laid down under Ss. 139-A and 137, Criminal P. C., had not been followed. It appears that a notice was at first served on the petitioner to show cause why he should not be prosecuted under S. 283, I. P. C., and the petitioner, on the notice being served on him, appeared and showed cause. Thereupon, proceedings were drawn up against him under S. 133 of the Code and, when the petitioner appeared and showed cause by saying that his objection was the same as contained in his first petition, the learned Magistrate proceeded to enquire into the matter whether there had been any obstruction and, having come to the finding that there had been an obstruction, made the conditional order absolute. The procedure followed by the learned Magistrate was, in our opinion clearly wrong in law. When the petitioner, on receipt of the notice of the proceedings under S. 133, appeared in Court, the first duty of the Magistrate was to question him whether the petitioner denied the existence of public right in respect of the pathway alleged to have been obstructed. This the Magistrate did not do and he proceeded, as stated before, to enquire into the matter whether there had been any obstruction. The order of the learned Magistrate shows that there was some evidence before him, evidence which he nowhere said was unreliable, to indicate that the path was a private path. If the Magistrate had before him any evidence of this nature, it was, under the provisions of S. 139-A, Criminal P. C., incumbent on him to stay his hands immediately, until the matter of the existence of public right was decided by a competent civil Court. This again the learned Magistrate did not do in the present case.

We are, therefore, of opinion that the order of the learned Magistrate cannot be sustained. The rule is, accordingly, made absolute. The order passed by the Magistrate, making the conditional order under S. 133, Criminal P. C., absolute, is set aside and it is directed that he do proceed with the proceedings

which he started under S. 133 in accordance with law, after complying with the mandatory provisions of S. 139-A of the Code. •

S.N./R.K.

Rule made absolute.

1930 Cr. Cases 799

(Calcutta)

C. C. GHOSE AND PANTON, JJ.

Corporation of Calcutta—Petitioner.

v.

T. H. E. Edwards—Opposite Party.

Criminal Revn. No. 236 of 1929, Decided on 2nd May 1929, against order of Presidency and Municipal Magistrate, Calcutta, D/- 21st December 1928.

Calcutta Municipal Act, S. 535—Order passed under S. 535 (2) (a)—Person in whose favour order was passed claiming costs by subsequent application—Magistrate can consider that question.

There is nothing in the terms of S. 535 or in any other section, which prevents the Magistrate from taking into his consideration on a date subsequent to the date of order under S. 535 (2) (a) the question of costs raised by an application by the person in whose favour that order was passed.

[P 799 C 2]

H. D. Bose with *Debendranath Bagchi* and *Gopendrakrishna Banerji*—for Corporation.

Mrityunjay Chattopadhyaya and *Jnanchandra Ray*—for Opposite Party.

Judgment.—The short facts necessary for the purposes of this judgment are as follows: Edwards is a rate-payer of the Corporation of Calcutta and he has his house in Burdwan Road at Alipur. Immediately to the south of his house, there is another house belonging to a gentleman, Amulyadhan Addy, and tenanted by D. M. Ray. In the compound of this last-mentioned house, were erected certain huts with cutcha floorings, in which were kept a number of cows, goats and horses. The result was that the whole place was turned insanitary and Edwards complained to the Corporation of Calcutta for the purpose of inducing the latter to take action to prevent or abate the nuisance. Nothing was apparently done and, in the last resort, Edwards complained before the Municipal Magistrate under S. 535, Calcutta Municipal Act.

The Magistrate came to the conclusion that there was no nuisance and refused to pass any order. The matter

then came to this Court and, after an examination of the record, this Court passed an order under S. 535 (2) (a), by which it directed the Magistrate to pass a written order directing the Corporation to prevent or abate the nuisance. Thereafter, the Corporation, it would appear, took steps to abate and remove the nuisance in question. The date on which the Magistrate, in pursuance of this Court's order, made the written order referred to above is 10th August 1928. Thereafter, Edwards made an application for the award of costs to him against Messrs. Addy and Ray. That application was considered to be misconceived and it was allowed to be withdrawn. Subsequently, Mr. Edwards made an application against the Corporation of Calcutta under the provision of S. 535 (2) (c) of the award of costs and compensation against them. The Magistrate has gone into the matter and has awarded a sum of Rs. 501 against the Corporation of Calcutta and in favour of Edwards. It is against this last-mentioned order that a rule was obtained and Mr. Bose has appeared in support of the rule. His principal argument is that either the order is one which should have been made at the time when the Magistrate made the written order under S. 535 (2) (a) or the order should not have been made at all.

There is nothing, in our opinion, in the terms of S. 535, Calcutta Municipal Act, or in any other section, which prevented the Magistrate from taking into his consideration, on a date subsequent to the date of the order, under S. 535 (2) (a), the question of costs raised by Edwards. In that view of the matter, Mr. Bose's contention must be negatived. We have examined the terms of the judgment of the Magistrate assessing the amount of costs and it seems to us, on an examination of the circumstances present on the record and taking into account the submissions made by Mr. Bose, that the award of costs must be substantially varied, and we think that the ends of justice will be sufficiently met if we reduce the amount of costs and compensation from Rs. 501 to Rs. 100. With this variation, the rule is discharged. Nothing that we have said will prevent the Corporation of Calcutta, if so advised, from making

any application against anybody whom they might choose to proceed against in respect of costs incurred for abatement of the nuisance.

S.N./R.K. • Rule discharged.

1930 Cr. Cases 800

(Patna)

ROWLAND, J.

Ramji Ahir—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 214 of 1930, Decided on 7th May 1930, from order of Sess. Judge, Arrah, D/- 28th February 1930.

(a) Criminal P. C., S. 88—Doors of house embedded in walls are immovable and digging them out amounts to serious irregularity in search.

The doors of a house have never been considered anything else but part of the furniture of the house and moveable property, but the frames, if embedded in the walls or floor, are to be considered immovable and accordingly the action of the police officers in digging the walls or floors to remove them does not seem to be technically correct and amounts to serious irregularity in connexion with a house search: 37 All. 358, Ref. [P 800 C 2]

(b) Penal Code, S. 323—Serious irregularity in connexion with house search—Constable beaten—Offence under S. 323 and not under Penal Code, S. 332.

Where there are serious irregularities in connexion with house search and the person whose house is searched assaults and beats a constable, the offence falls under S. 323 and not under S. 332. [P 800 C 2]

S. C. Mazumdar—for Petitioner.

B. P. Jamuar—for the Crown.

Order.—The petitioner has been convicted under S. 332 and sentenced to rigorous imprisonment for three months by a First Class Magistrate and his appeal to the Sessions Judge has been dismissed. The facts found are that Writer Head Constable Sher Khan with other constables went to the family residence of the petitioner to execute a warrant of attachment under S. 88, Criminal P. C., which had been issued by the Court of a Magistrate to enforce the attendance of the father of the petitioner. The Head Constable affixed the proclamation under S. 87, and after giving the ladies of the household an opportunity to retire took possession of the house. He and his men were going to remove the doors and door frames of the house when the petitioner with his brother Lachman came and abused the police party and resisted them, with the result that blows were

exchanged, the petitioner as well as the Writer Head Constable receiving injuries.

It is contended that the police officers were not acting lawfully in removing or attempting to remove the doors and door frames. It is said that the property attached being a house was immovable property and the doors and door frames were similarly immovable. Now the doors of a house so far as I know have never been considered anything else but part of the furniture of the house and moveable property, but the frames, if embedded in the walls or floor, are, I should think, to be considered immovable and accordingly the action of the police officers in digging the walls or floors to remove them does not seem to be technically correct. I am of opinion therefore that the action of the petitioner did not amount to an offence under S. 332, I. P. C. No case exactly on all fours has been cited, but I may refer to *Emperor v. Mukhtar Ahmad* (1). In this case there were serious irregularities in connexion with a house search and the accused assaulted and beat a constable. The lower Court convicted the accused under S. 332, I. P. C., but it was held in revision that conviction should only be recorded under S. 323.

For the petitioner in the present case it has been argued that he had a right of private defence, but under S. 99, I. P. C., there is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt if done or attempted to be done by a public servant acting in good faith under colour of his office though that act may not be strictly justifiable by law. The result is that the conviction under S. 332 is altered to a conviction under S. 323.

Finally it is contended that the sentence of three months' rigorous imprisonment is excessive. In the circumstances of this case, the petitioner will pay a fine of Rs. 60 in default one month's rigorous imprisonment: That I consider a sufficient punishment.

V.B./R.K.

Order accordingly.

1930 Cr. Case: 801

(Lahore)

SHADI LAL, C. J., AND ABDUL QADIR, J.

In the matter of compensation for the life of Karim Dad, Planer, Loco-Shops, Moghalpura.

Civil Ref. No. 33 of 1929, Decided on 14th April 1930, by Senior Sub-Judge, Lahore,

(a) Workmen's Compensation Act (8 of 1923), S. 2 (1) (d) — Son maintained by deceased father on account of some infirmity is not dependant unless "minor".

Where a son cannot be said to be "minor", the mere fact that on account of some infirmity he was maintained by his deceased father does not give him the right to be regarded as dependant within the meaning of the statute.

[P 801 C 2]

(b) Workmen's Compensation Act (8 of 1923), S. 19—Commissioner cannot set aside previous order of compensation made under mistake.

Commissioner has no power to set aside a previous order for compensation made by him under a mistake.

[P 802 C 1]

(c) Workmen's Compensation Act (8 of 1923), S. 23—Commissioner exercises power of Court only under certain sections of Civil P. C., and does not possess inherent power under S. 151, Civil P. C.

Under Workmen's Compensation Act the Commissioner exercises power of a Court only under certain provisions of the Code and S. 151 Civil P. C., not being one of them, Commissioner does not possess any inherent power contemplated by the aforesaid section.

[P 802 C 1]

Abdul Rashid—for Petitioner.

M. C. Mahajan—for Respondent.

Shadi Lal, C. J.—The circumstances, which have given rise to this reference under S. 27, Workmen's Compensation Act (8 of 1923), do not admit of any dispute. On 17th September 1928 the Agent of the North Western Railway deposited with the Senior Subordinate Judge, Lahore, who had been appointed a Commissioner under the Act, a sum of Rs. 1,930 on account of compensation payable by the employer in respect of the death of a workman, named Karim Dad. On 21st January 1929, the whole of the compensation was paid by the commissioner to the deceased's son Fazl Karim. It was subsequently discovered that Fazl Karim was not a dependant entitled to the compensation, and the employer accordingly moved the Commissioner to call upon Fazl Karim to refund the money.

The first question upon which we are invited to express our opinion is whether Fazl Karim was a dependant within the

meaning of S. 2, sub-S. (1), Cl. (d) of the Act. Now, the material portion of the clause is as follows:

"Dependant means any of the following relatives of a deceased workman, namely, minor son".

And a "minor" means a person who is under the age of 15 years. It is beyond dispute that Fazl Karim was about 23 years old and could not, therefore, be held to be the 'minor' son of the deceased. It is clear that he was not entitled to the compensation, and the mere fact that on account of some infirmity he was maintained by his deceased father does not give him the right to be regarded as a dependant within the meaning of the statute.

The second question is whether the Commissioner can modify his previous order granting compensation to Fazl Karim. In this connexion our attention has been invited to sub-S. 6, S. 8, which provides that where the Commissioner is satisfied that, on account of neglect of children on the part of a parent or on account of the variation of the circumstances of any dependant or for any other sufficient cause, an order of the Commissioner as to the distribution of any sum paid as compensation or as to the manner in which any sum payable to any such dependant is to be invested, applied or otherwise dealt with, ought to be varied, the Commissioner may make such orders for the variation of the former order as he thinks just in the circumstances of the case. It will be observed that this subsection provides for two cases: (1) the variation of an order as to the distribution of any sum paid as compensation; and (2) the variation of an order as to the manner in which any sum payable to a dependant is to be invested, applied or otherwise dealt with. Now, the order, with which we are concerned in the present case, did not make any distribution of the compensation among the dependants, but directed the payment of the whole of the money to one person, who was wrongly supposed to be, but was not, a dependant. Nor is this a case of the variation of a previous order. The Commissioner is asked to quash an order which was wrongly made by him and to direct the refund of the money for payment to the employer. The language of the subsection does not confer any such power

upon him. My answer to the second question submitted by the Commissioner is that he has no power to set aside the previous order made by him under a mistake.

The third question is whether the Commissioner has inherent powers such as are conferred upon a civil Court by S. 151, Civil P. C. A perusal of the various sections of the Workmen's Compensation Act shows that the Commissioner can exercise the powers of a Court only under certain provisions of the Code, but S. 151 is not one of them. The Commissioner does not, therefore, possess any such inherent powers as are contemplated by the aforesaid section.

Abdul Qadir, J.—I concur.

V.B./R.K.

Reference answered.

1930 Cr. Cases 802

(Lahore)

TEK CHAND, J.

Wazir Chand and another — Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1872 of 1929, Decided on 2nd May 1930, reported by Sess. Judge, Multan, D/- 27-1-1930.

(a) **Factories Act, S. 41-J**—Liability of manager and occupier is joint and several and primarily it is manager who is to be supposed to have contravened provision.

Section 41-J of the Act provides that both the occupier and manager shall be jointly and severally liable to fine for any of the offence committed under the Act. This joint and several fine imposed on both the occupier and manager is irrespective of the fact as to which of the two had committed the offence. The duty to inform the authority under the Factories Act under S. 84 is laid on the manager. It is therefore primarily the manager who is to be supposed to have contravened this provision of the Act, but both the occupier and manager are made responsible jointly and severally for this contravention under S. 41 J.

[P 803 C 1]

(b) **Factories Act, S. 34** — "Person" includes plural.

The word "person" includes the plural and consequently where as a result of a single accident more persons than one are injured the accident cannot be split up into as many persons injured and notice contemplated is single notice of the accident which the manager is required to submit to the authorities and therefore contravention of this rule is one offence which cannot in its turn be split up into as many offences as the number of casualties.

[P 803 C 2]

Mukand Lal Puri—for Petitioners.

Facts.—Two petitions for revision have been put up, Nos. 17 and 18,

against the orders passed by Sardar Balwant singh Additional District Magistrate, Multan, under S. 41-J, Factories Act. The facts are not much in dispute and they are as follows.

The petitioner Wazir Chand is the declared occupier and the petitioner Gokal Chand is the declared manager of the factory which had some ginning machines working in it. As a side business it appears that an ice factory was also established, worked by the same steam engine which worked the ginning factory. An accident occurred at this factory, when an oil tank in the lathe room caught fire and two men, who were working there got injuries, one of whom succumbed to those injuries. No intimation, as is required by S. 34 of the Act, was given by the manager of this factory to the authority under the Factories Act. It is for contravention of this duty that the petitioners have been convicted under S. 41-J, Factories Act, and the learned Magistrate says, that as two men were injured, the offence must be considered under two separate accidents and not one.

Grounds.—I do not think that there is any justification for this conclusion. S. 34 of the Act lays down that

"when any accident occurs in a factory causing death or bodily injury whereby the person injured is prevented from returning to his work in this factory during 48 hours after the occurrence of the accident, the manager shall send notice of the accident to such authority in such form within such time as may be prescribed."

The learned Public Prosecutor has had to admit that the accident which occurred in this factory, and upon the basis of which the petitioners are convicted, was the burning of the oil tank in the lathe room and this accident cannot be split up into two merely because two persons and not one were injured when it occurred. The word "person" as used in this section, is no doubt in the singular but under the General Clauses Act, it must include the plural. It was a single notice of the accident which the manager was required to submit to the authorities under the Factories Act and therefore the contravention of this rule is one offence which cannot be split up into two.

The learned Magistrate has imposed separate fines on the occupier Wazir

Chand and the manager Gokal Chand for each of the so-called offences. S. 41-J of the Act provides that both the occupier and manager shall be jointly and severally liable to fine for any of the offences committed under the Act. This joint and several fine imposed on both the occupier and manager is irrespective of the fact as to which of the two had committed the offence. The duty to inform the authority under the Factories Act under S. 34 is laid on the manager. It is, therefore, the manager who has contravened this provision of the Act, but both the occupier and manager are made responsible jointly and severally for this contravention under S. 41-J of the Act.

For reasons stated above, I submit both the petitions to the High Court with a recommendation that instead of two separate convictions against both Wazir Chand and Gokal Chand, a single conviction against both of them jointly may be ordered and a single sentence of fine of Rs. 50, be imposed against them jointly and severally.

Order.—For reasons recorded by the learned Sessions Judge I accept these petitions and order that instead of two separate convictions against Wazir Chand and Gokal Chand under S. 41-J, Factories Act, a single conviction against both of them jointly be recorded, and a single sentence of fine of Rs. 50, be imposed upon them jointly and severally.

v.B./R.K.

Petition accepted.

1930 Cr. Cases 803 (1)

(Lahore)

SHADI LAL, C. J.

Roora—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1215 of 1929, Decided on 15th November 1929, case reported by Sess. Judge, Ludhiana,

Criminal P. C., Ss. 421 and 423—Appeal cannot be dismissed for non-appearance of appellant.

The Code does not permit the dismissal of an appeal on the ground that the appellant does not appear to support it. [P 803 C 2]

Order.—The learned District Magistrate was entirely wrong in dismissing the appeal preferred by the convict simply because the latter did not appear on the date of the hearing. The Code

of Criminal Procedure does not permit the dismissal of an appeal on the ground that the appellant does not appear to support it. S. 421 read with S. 423 of the Code makes it incumbent on an appellate Court to hear the appeal on the merits; and there is no warrant for the dismissal of the appeal by reason of the non-appearance of the appellant. I must, therefore, quash the order of the District Magistrate dismissing the appeal for default. The learned Magistrate, instead of disposing of the appeal on the merits promptly, has allowed it to drag on and postponed it from time to time without any adequate reason. The appeal is accordingly transferred to the Court of the Sessions Judge, who is directed to decide it without any further delay.

P.N./R.K.

Revision allowed.

1930 Cr. Cases 803 (2)

(Lahore)

TEK CHAND AND TAPP, JJ.

Feroze—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 366 of 1930, Decided on 14th May 1930, against order of Sess. Judge, Rawalpindi, D/- 31st March 1930.

Criminal Trial—Presumptive evidence.—To justify inference of guilt inculcating facts must be incompatible with innocence of accused and incapable of explanation.

In the case of presumptive evidence in order to justify the inference of guilt, the inculcating facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. [P 806 C 2]

L. Saunders and Muhammad Rafi—for Appellant.

Des Raj Sawhne—for the Crown.

Tapp, J.—The appellant Feroze (25) an Awan of Adlakha in Attock District, has been found guilty of the murder of his younger brother, Dhaman, aged about 18 or 19 on 5th or 6th July 1929, at Mandra in the Rawalpindi district, and the Sessions Judge, Rawalpindi, in agreement with three out of the four assessors has convicted him of an offence under S. 302, I. P. C., and sentenced him to death. Feroze has appealed and the case is also before us under S. 374, Criminal P. C., for confirmation of the sentence.

On the evening of 6th July 1929, Ram Rakha Mal, Head Constable, Rail-

way Police, Mandra, and Nand Lal, Assistant Station Master, while out for a walk along the Grand Trunk Road, found a corpse lying in an open field some 200 yards from the road, and about 500 yards from the Railway Station. A blood-stained axe was found lying some 10 or 15 yards from the body. A report was promptly made at the Mandra police station by Ram Rakha Mal, and Head Constable Sher Muhammad (P. W. 3) at once went to the spot, examined the body, on which there were several injuries, showing that death was due to violence, drew up the prescribed statement of injuries and inquest report, and dispatched the body to Gujjar Khan for an autopsy. A memorandum marked as Ex. P/A was found in the folds of the loin cloth on the body and this purported to show that the deceased was Dhaman, son of Shadi of Adlakha in the Tallagang tahsil of the Attock district. The contents of this document indicated that Dhaman, son of Shadi, had two enemies: Dhaman, son of Ahmad (who will be referred to hereafter as Dhaman witness) and the latter's maternal uncle Bahadur Khan, and that if anything happened to Dhaman, son of Shadi, one or other or both of these two persons would be responsible.

A photograph of the corpse was taken and this and the clothes found on the body were subsequently identified as those of Dhaman, son of Shadi, brother of the appellant.

The post-mortem examination disclosed five incised wounds of varying degrees and sizes on the neck and two contusions on the right lower jaw and forehead. Death was due to the cutting of the trachea, oesophagus and vessels of the neck with haemorrhage therefrom.

Suspicion appears to have fallen on the appellant who was not found in his village. He was apprehended by Pir Ahmed Shah, Sarbrah Zaildar (P. W. 25) who knew that appellant was "wanted by the police" at Malakwal Railway Station on 13th July and taken to the Malakwal Police post, where he was placed under arrest and sent to Mandra Police Station. On the search of his person a third class railway ticket dated 11th July, from Harnai in Baluchistan was recovered.

The prosecution led evidence to show that, on 5th July 1928, the deceased by a deed registered at Campbellpore on the 10th idem effected an exchange of his 1/4th share in the land jointly held by him, his brother the appellant and their grandmother, Mt. Agran, and his réversionary interest in the latter's half share, amounting in all to 94 kanals, 6 marlas, with Dhaman witness (P. W. 48) for an area of 101 kanals 3 marlas belonging to the latter. This transaction led to various applications being made to the revenue authorities in connexion with the mutation of names and a report to the police. These in chronological order are:

(1) Exhibit P. N., application dated 21st July 1928, by the appellant to the Deputy Commissioner, Attock, praying for the rejection of the mutation.

(2) Exhibit P. O., application dated 25th July 1928, by Mt. Agran, the grandmother, to the same effect.

(3) Exhibit P. V., an application dated 25th August 1928, by the deceased to the same effect, and alleging that he had also been deceived into selling his half share in the house to one Khan Zaman shown to be a relative of Dhaman, witness.

(4) Exhibit P. C. C., an application dated 21st September 1928, by the deceased making certain allegations against his brother, the appellant and one Fateh Khan of assault and wrongful confinement and praying for the mutation to be effected.

(5) Exhibit P. W., a report made by the deceased on 24th September 1928, at thana Tallagang, alleging that on account of the exchange of land effected by him, his brother and one Fateh Khan might possibly do him some injury.

(6) Exhibit P. D. D., a joint application dated 25th October 1928, by both the deceased and Dhaman witness praying for the attestation of the mutation.

(7) Exhibit P. Y., an application dated 21st November 1928, by the appellant and Mt. Agran for the rejection of the mutation.

(8) Exhibit P. P., an application dated 19th March 1929, by the deceased and Mt. Agran for the rejection of the mutation.

The applications and counter-applications set out above seem to have had their effect on the revenue authorities

who could not make up their minds whether to allow or refuse the mutation. Eventually this was attested by the Naib Tahsildar, P. W. 10, on 28th March 1929, for the reason, as given by him, that the parties had taken possession of the lands exchanged.

The evidence referred to above and certain other evidence in the case undoubtedly show that appellant was displeased at the transaction effected by the deceased and tried all he could to undo it. It also affords some foundation for the contention of the prosecution that in this transaction and the appellant's failure to have it undone lay the motive for the act ascribed to him. There can also be no doubt that the deceased alternately came under the influence of Dhaman witness and his own family, and judging from Ex. P. P. and the memo Ex. P. A. found on the body, the family influence prevailed in the end to the extent of antagonizing deceased and Dhaman witness, though it did not succeed in undoing the exchange.

Nothing of any significance appears to have happened after the attestation of the mutation till the end of June 1929, when, according to the prosecution, the appellant sold 6 kanals 16 marlas of land to Fateh Khan receiving Rs. 237 in cash as part of the consideration. The mutation of this sale was attested on 26th June 1929, vide evidence of the Naib Tahsildar, P. W. 10. The two brothers are then alleged to have left their village for Rawalpindi stopping on the way at the house of Mt. Nur Bhari, P. W. 26, at Kot Malyar. Here they were seen by Khan, P. W. 27. Muzaffar, P. W. 28, who knew both the brothers also met them on the Khaur road about a mile from Kot Malyar and learnt that they were going to Rawalpindi. They were then seen together at the shop of a baker named Wazir (not produced, at Fateh Jang by Ahmed Khan, constable (P. W. 29).

Now, the evidence of these four witnesses, apart from it being of very unsatisfactory and unconvincing nature, is of very little, if any, value, and may well be disregarded in view of the later evidence, and as it only shows that the two brothers were seen together between their village and Rawalpindi, while the murder was obviously committed at Mandra, 25 miles by rail from Rawal-

pindi some few days later. There is also evidence to the effect that on 4th July, the appellant and the deceased went to Jodh Singh petition-writer, P. W. 32, at Rawalpindi, and deceased had the petition P. E. E. written. This is addressed to the Superintendent of Police, and after referring to the exchange of land and other matters, sets forth that the deceased's life is in danger at the hands of Dhaman witness and Bahadur, his maternal uncle, and prays that these two persons be placed on security. It was posted to, and received by, the Superintendent of Police, who forwarded it on to the Ilaka Magistrate for action. Then there is the evidence of Karm Illahi, P. W. 47, a cousin of the deceased, which shows that the deceased stayed with him for the night of 4/5th July, and that the witness wrote the memo P. A. found on the body at the request of the deceased. According to the witness appellant was not with the deceased.

Two witnesses Jamal Din, P. W. 35, and Nur Muhammad, P. W. 31, deposed respectively to having sold an axe-head and a handle to the appellant at Rawalpindi, and to the police having come to the shops with appellant some 15 to 17 days later. Evidence of this type requires no consideration, being of absolutely no value. Finally, we have the evidence of (i) Allah Ditta, P. W. 35, as to his having proceeded from Rawalpindi to Chakwal in search of employment and having travelled in the same compartment of the train from Rawalpindi to Mandra (the junction of Chakwal) with the appellant and his brother, both of whom he knew. The three of them alighted at Mandra and had some food at a shop outside the station, and then witness went on to Chakwal leaving the two brothers at Mandra. According to the witness appellant had an axe with him.

(2) Sawar, P. W. 36, the owner of the food-shop outside the station, deposed to the appellant and two others having had food at his shop on the evening before the discovery of the corpse. This witness identified Allah Ditta, P. W. 35, as one of the companions of appellant, but was apparently unable to recognise the photo of the deceased.

(3) Baz Khan, P. W. 43, the most important witness in the case employed as a

Judicial Moharrir at Tallagang. He deposed to knowing the two brothers and Dhaman witness having seen them on two, three or four occasions at the tahsil with Pir Habib Shah, P. W. 7, the scribe of the deed of exchange, Ex. P.A.A. On 5th July Baz Khan left Chakwal by train at 4 p.m., on a journey to Chichawathi and arrived at Mandra at about 6.30 p.m. At the food-shop referred to above he saw the two brothers, who after having their food left in the direction of the road to Jatli. Appellant had an axe with him.

(4) Bakht, P. W. 44, deposed to having journeyed by train from Rawalpindi to Jhelum, where he intended to purchase some timber, and to the appellant, whom he knew, having got into his compartment at Mandra. Appellant told witness he was on his way to Loralai.

Now it will be obvious that the crucial evidence in the case connecting appellant with the murder is that of these four witnesses, and if their testimony is to be believed and is sufficient to satisfy us, there can be hardly any doubt as to the guilt of appellant. We have carefully examined and weighed this evidence, and are far from satisfied as to the veracity of Allah Ditta and Bakht. These two men are what is commonly styled 'wajtakkar' or adventitious witnesses, whose meeting with the two brothers at the time is *prima facie* open to considerable doubt. Evidence of such witnesses has to be received with considerable caution. Allah Ditta furthermore was at one time in the service of Bahadur, the maternal uncle of Dhaman witness who appears to have been under strong suspicion in the present case. Bakht travelled all the way to Jhelum to buy timber and did not do so. In short, their evidence quite fails to impress us. As regards Sawar, it is impossible to believe that out of all the several customers at his shop that evening it would be possible for him to remember the appellant from among them.

The evidence of Baz Khan cannot be rejected on similar grounds, but in our opinion it is insufficient owing to lack of corroboration and the possibility of his having made a mistake.

A very serious defect in this case has been the omission of the prosecution to show how the investigation proceeded

step by step and bring out in evidence the manner in which the various witnesses were traced. For instance, both Allah Ditta and Lakht stated that a *zaildar* named Aurangzeb discovered them, but this individual, who seems to have taken part in the investigation and whose testimony might have been of some value, was not produced as a witness. On the other hand the appellant names Aurangzeb as one of those responsible for his implication.

The story of the appellant briefly is that he left his village on 28th June 1929 for Loralai in search of employment, leaving his brother, the deceased with their aunt. Failing to obtain work he was returning home when he was apprehended at Malakwal Railway Station by Ahmad Shah, *Zaildar*. He attributed his implication to Dhaman witness, Habib Shah and Aurangzeb. This is not a satisfactory account and may indeed be false as urged by Mr. Sawhney, but appellant's guilt cannot be determined by such considerations.

We have given the case our most anxious consideration, and while there may be grounds for strong suspicion, we are not satisfied that the guilt of the appellant, depending as it does entirely on circumstantial evidence has been established beyond all doubt. It is an axiom that in the case of presumptive evidence in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

Such an inference would be wholly unjustified in the present case and we, therefore, accept the appeal, set aside the conviction and sentence, acquit the appellant, and direct he be set at liberty forthwith.

R.M./R.K.

Appeal allowed.

1930 Cr. Cases 806 (Lahore)

BROADWAY, J.
Achhru and others—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1241 of 1929, Decided on 22nd November 1929, case reported by Sess. Judge, Jullundur, D/- 2nd August 1929.

Criminal P. C., S. 137—Magistrate making absolute conditional order passed under S. 133 without taking prosecution evidence in accused's presence—Trial is vitiated by material irregularity.

The provisions of S. 137 are imperative. The complainant has to start proceedings by adducing evidence and then the party showing cause may produce his own evidence, if so advised. Hence where a Magistrate makes his conditional order under S. 133 final without recording statement of the complainant or taking prosecution evidence in the presence of the accused, the whole trial will be vitiated by material irregularity. [P 807 C 2, P 808 C 1]

Ram Rup—for Petitioners.

Facts.—Certain Chamars of village Paddi Matwali were served with a notice under S. 133, Criminal P. C., to desist from tanning inside the village as this process emitted a very offensive smell which proved injurious to the health of the villagers. This order was made absolute on 8th May 1929, under S. 137, Criminal P. C. The Chamar petitioners have filed this revision application and their learned counsel has pointed out a material irregularity in the proceedings of the trial Court, which vitiates the trial. The learned Public Prosecutor has also conceded that point.

Grounds.—The Tahsildar had asked the Chamars, in compliance with the Deputy Commissioner's order, that they should remove their premises to a place outside the village population, otherwise action would be taken against them under S. 133, Criminal P. C. This order was communicated to the Chamars on 20th August 1928. It was apparently based on the report of the Health Officer dated 23rd July 1928, submitted by him to the Deputy Commissioner, in which he had pointed out the raw hide tannery of the Chamars was a perfect nuisance. On 14th September 1928, Ralle Khan, lambardar of the village, filed a complaint against the Chamars that their tannery emitted a very offensive smell which was injurious to the health of the general public. Notice was issued to the petitioners under S. 133, Criminal P. C., on 14th September 1928, asking them to desist from tanning inside the village, or to show cause why they should not be asked to remove their tannery to a place outside the village.

In response to that notice some of the Chamars actually attended the Magistrate's Court, but, before this was done, the Magistrate himself inspected the spot and his note, dated 2nd January

1929, shows that he wanted to provide some other place for the Chamars, where they could undertake their tanning profession. Obviously the proposal did not appear agreeable to the Chamars. They actually appeared on 12th April 1929, and filed written statements alleging that they were tanning leather in the kunni in dispute since the foundation of the village, that the villagers had not previously objected to that tannery and that the existence of the tannery inside the village was not at all injurious to health and did not amount to nuisance. They were ordered to produce evidence in support of their allegations on 24th April 1929. On that date three witnesses of the Chamars were recorded in brief and the learned Magistrate, relying on the strength of his inspection note, the report of the Tahsildar dated 20th August 1928, and the report of the District Medical Officer of Health dated 23rd July 1928, made his order dated 11th March 1929, absolute, and further ordered that the Chamars shall not carry on tanning within the village abadi and shall not continue or repeat the offence, obviously under Ss. 136 and 143, Criminal P. C.

The learned Magistrate has expressly ignored the provisions of S. 137, Criminal P. C. That section requires that if the respondent appears and shows cause against the order passed under S. 133, the Magistrate shall take evidence in the matter as in a summons case. This procedure is imperative. It was held in *Emperor v. Hingu* (1), following *Srinath Roy v. Ainaddi Halder* (2), that the complainant has to start proceedings by adducing evidence and then the party showing cause may produce his own evidence if so advised. When this has been done, and not before, the Magistrate can make the conditional order absolute if he finds sufficient reason for doing so. It was further held in *Indar v. Emperor* (3), that the opposite party is not bound to produce any evidence until the party who has set the law in motion has produced his evidence. *Emperor v. Sita Ram* (4) is another authority in point, in which it was held that the Magistrate should

(1) [1909] 31 All. 453=10 Cr. L. J. 297=3 I. O. 7482.

(2) [1897] 24 Cal. 895=1 C. W. N. 217.

(3) [1914] 15 Cr. L. J. 23=22 I. C. 167.

(4) [1917] 18 Cr. L. J. 898=41 I. O. 1000.

have proceeded as in a summons case and the order passed by him on the basis of his inspection note was held to be illegal. *Tirkha v. Nanak* (5), containing recent observations of the Lahore High Court on the subject has upheld the above view. In the present case the statement of the complainant Ralle Khan was not recorded in the presence of the accused neither was any evidence for the prosecution taken in their presence.

The Health Officer and Tahsildar's reports which were made even before the institution of the present complaint are not at all proved in this case and those reports cannot constitute any valid evidence against the present accused who were not given any chance to cross-examine the authors of those reports. The onus did lie on the prosecution to prove that the tanning on the part of the accused was injurious to the health or physical comfort of the villagers. In view of the denial of the accused that their trade was so injurious, the onus was shifted very heavily on the prosecution to prove their own assertion that it was really injurious to public health and was tantamount to a nuisance which must be removed by taking action under S. 133, Criminal P. C. The order of the learned Magistrate appears illegal, for the mandatory provisions of S. 137, Criminal P. C., were not observed.

I. therefore, submit the proceedings to the High Court, with the recommendation that this revision application should be accepted and the case remanded to the trial Court for trial in the proper way.

Order.—Acting on the recommendation in the referring order, and for the reasons therein contained, I set aside the order of the Magistrate and direct that the proceedings be carried out in accordance with the provisions of law.

S.N./R.K.

Order set aside.

1930 Cr. Cases 808

(Lahore)

JAI LAL, J.

Mani Ram—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1754 of 1929, Decided on 24th January 1930, case reported by Sess. Judge, Karnal, D/- 21st November 1929.

Criminal Trial—Criminal Court should stay trial where civil suit is pending—Practice.

Criminal Court should stay its hand when a civil suit about the same dispute is pending.

[P. 803 C 1]

Shamair Chand—for Petitioner.

Facts.—On the complaint of Daya Ram Patwari that he had been cheated by Mani Ram, petitioner, who obtained from him a ruqqa for Rs. 100 under false pretences that the money would be paid to Daya Ram, but who did not pay the money, the trial Magistrate, Sahibzada Shamshad Ali Khan, Honorary Magistrate, exercising powers of a Second Class Magistrate, framed a charge against Mani Ram under S. 418, I. P. C., to the effect that Mani Ram had obtained the ruqqa under false pretences without intending to pay to Daya Ram the money for which the ruqqa was taken from him. Mani Ram has filed a petition for revision of the above order.

Grounds.—Mani Ram's story is that the ruqqa was executed of consideration and that no cheating was practised upon Daya Ram. He has also brought a civil suit for recovery of the sum of Rs. 100 due on the basis of the ruqqa from Daya Ram. The point in issue in the civil suit and in the criminal complaint is one and the same, viz., whether or not money was paid by Mani Ram to Daya Ram who executed a valuable security in Mani Ram's favour. Petitioner's contention is that proceedings in the criminal case should have been stayed and no charge under S. 418, I. P. C., should have been framed against him when the matter in dispute was before a civil Court. It is also contended that the alleged offence would fall under S. 420, I. P. C., which could not be tried by a Second Class Magistrate. The respondent's counsel admits that the trial Magistrate, who exercises only second class powers, could not frame a charge when the alleged offence clearly falls

under S. 420, I. P. C. But on the strength of the rulings cited as *Gnana-singamana Nadar v. Vedamuthu*, A. I. R. 1927 Mad. 308 and *C. Ramiah v. N. Ramiah*, A. I. R. 1927 Mad. 778, he argues that the civil suit is no bar to the criminal proceedings. Petitioner's counsel relies on the rulings cited as *Ladha Shah v. Zaman Ali*, A. I. R. 1925 Lah. 289, *Bishambar Das v. Emperor*, A. I. R. 1927 Lah. 17, *Emperor v. Bishan Das* (1), *Pars Ram v. Jalal Din* (2) and *Nur Din v. Emperor* (3), in which cases it was held by our High Court that when the matter in issue is one which can best be decided by a civil Court, then resort to criminal proceedings should not be allowed.

It is extremely doubtful if a patwari would execute a *ruqqa* without first obtaining money for which he executes the *ruqqa*. I agree with the contentions of the petitioner's counsel that the criminal Court should have stayed its hands when a civil suit about the same dispute was pending and that the alleged offence being one under S. 420, I. P. C., could not be tried by a Second Class Magistrate who has no jurisdiction to try such an offence. In my opinion, the charge under S. 418, I. P. C., framed against the petitioner should be quashed and I refer the case under S. 438, Criminal P. C., to the High Court with a recommendation that the charge may be quashed and proceedings in the criminal case be stayed until decision of the civil suit.

Order. — For reasons given by the Sessions Judge I transfer this case to the District Magistrate of Karnal with direction to send it for trial to a Magistrate of the First Class competent to try it. The Magistrate to whom the case is sent for trial shall stay proceedings till the disposal of the civil suit by the trial Court, and if he decides to proceed with the case after the conclusion of the civil suit he will first consider the question of amending the charge.

S.N./R.K.

Charge quashed.

1930 Cr. Cases 809

(Lahore)

BHIDE, J.

Budhwa—Petitioner.

v.

Kirpi—Respondent.

Criminal Revn. No. 120 of 1930, Decided on 2nd May 1930, on reference by Sess. Judge, Ambala, D/- 17th January 1930.

Criminal P. C., S. 488 — Husband willing to take back run away wife of bad character—Court must ask if she was willing to return before proceeding further.

Where, in a proceeding against husband under S. 488, Criminal P. C., the husband expresses his willingness to take his wife back although she had left him of her own will and was of bad character, it is incumbent on the Magistrate to ask the wife whether she was willing to return to her husband before proceeding further. [P 809 C 2]

Muhammad Akbar Khan — for Petitioner.

Facts.—Mt. Kirpi, the wife of Budhwa Chamar of Jatahpur in the Ambala Tahsil, has taken proceedings against her husband under S. 488, Criminal P. C., asking for Rs. 15 a month as maintenance. The learned Magistrate has allowed her Rs. 10 a month, and Budhwa has come to me on revision urging *inter alia* that he is willing to maintain his wife who has refused to return to him. The procedure of the learned Magistrate has been as follows :

Mt. Kirpi was examined on her petition, but not in the presence of her husband. In his presence four witnesses were examined on her behalf and he was then questioned, and expressed his willingness to take Kirpi back, although she had left him of her own will and was of bad character. Instead of the Magistrate asking the wife at this stage whether she was prepared to return to her husband, he adjourned the case and called on the husband to produce evidence, which he did, about his means only.

Grounds. — Since it was incumbent on the Magistrate so soon as the husband offered to maintain his wife, to ask her whether she was willing to return to him, and since the Magistrate has failed to put this question to her, I report the proceedings under S. 438, Criminal P. C., to the High Court with the recommendation that the order of the learned Magistrate should be set aside, and that he should be directed to re-hear the petition from the point at which the husband offers to take his wife back.

(1) [1910] 12 Cr. L.J. 50=8 I.C. 1161.

(2) [1916] 17 Cr. L.J. 7=32 I.C. 185.

(3) [1916] 17 Cr. L.J. 203=84 I.C. 317.

Order.—I accept the recommendation of the learned Sessions Judge and setting aside the order of the learned Magistrate direct that the case be reheard from the stage when the petitioner offered to maintain his wife, the respondent.

V.B./R.K. *Recommendation accepted.*

1930 Cr. Cases 810

(Lahore)

BHIDE, J.

Preman and others—Accused' Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 845 of 1929, Decided on 9th August 1929, from order of District Magistrate, Sheikhpura, D/- 13th February 1929.

Penal Code, S. 441—Land in possession of alienor—Alienor trying to take possession by force without legal justification—Inference of criminal intention is justified.

Where the alienor had transferred possession for good consideration to the alienee and then tried to take it back by force without any legal justification.

Held: that the presence of criminal intention may be rightly inferred; 12 P. R. 1906 Cr. (F.B.), *Foll.*; 41 *Mad.* 156; A. I. R. 1926 *Lah.* 600 and 17 I. C. 415, *Dist.* [P 810 C 2]

Abdul Aziz—for Petitioners.

R. C. Soni—for the Crown.

Judgment.—These are three connected petitions for revision in which the petitioners have been convicted under S. 447, I. P. C., and sentenced to pay a fine varying from Rs. 15 to Rs. 25 in each case.

The material facts were briefly as follows: One Preman had purchased half a square of land from Government. He had to pay the purchase money by instalments and was to remain a tenant until the whole price was paid. Before the instalments had been fully paid up, however, he transferred portions of the land to different persons and they took possession thereof. Subsequently it was declared by the Collector that these alienations, being contrary to the conditions on which the land had been sold to Preman, were void. Mutation which had been sanctioned in respect of one of the alienations was reviewed and the original entry was restored in the revenue records. Preman thereupon proceeded to take possession of the land which he had alienated by force with the help of the other petitioners. Preman

and the other petitioners were, therefore, prosecuted under S. 447, I. P. C., and have been convicted and sentenced as stated above.

The learned District Magistrate in upholding the conviction of the petitioners has relied on the Full Bench ruling *Ram Saran v. Emperor* (1). Mr. Abdul Aziz, who appeared for the petitioner, has contended that the facts of the present case are distinguishable and that in any case the Full Bench ruling referred to above does not lay down the law correctly and needs reconsideration in view of *Suleman v. Emperor* (2), *Vullappa v. Bheema Row* (3) and *Meajan v. Sharafatullah Khan* (4).

After carefully considering the above authorities I have come to the conclusion that the present cases are covered by *Ram Saran v. Emperor* (1) and that there are no adequate grounds for making a fresh reference to a Full Bench.

The rule laid down by the majority of Judges in *Ram Saran v. Emperor* (1) is that when a person claiming a title to property, whether his title be good or bad, enters without any legal justification upon property in the established possession of another, he must be inferred to have had an intention to annoy the person in possession within the meaning of S. 441, I. P. C., even though he had no primary desire to annoy, and his only object was to obtain possession for himself.

In the present instance it is not disputed that Preman had not only alienated the land, but possession had been transferred and the land was cultivated by the alienees. In these circumstances it seems clear that Preman had no "legal justification" for taking back the land by the use of force as he did. An attempt was made to prove that the Tahsildar had authorised him to recover possession. But the Tahsildar denied having done so. All that he says is that the person in "unlawful possession" is sometimes warned to give up possession, but he did not remember if even this was done in the present case.

Whatever Preman's primary "object" may have been, he must have known

(1) [1906] 12 P. R. 1906 Cr. (F.B.).

(2) A. I. R. 1926 *Lah.* 600=96 I. C. 871=27 Cr. L. J. 1015.

(3) [1918] 41 *Mad.* 156=19 Cr. L. J. 162=43 I. C. 878 (F.B.).

(4) [1912] 18 Cr. L. J. 783=17 I. C. 415.

fully well that he had no right to take back by force the land which he himself had alienated for good consideration. In these circumstances the Courts below were, in my opinion, justified in inferring that Preman and the other petitioners had the requisite "criminal intention" for the purposes of S. 441.

The facts in the Madras Full Bench ruling *Vulappa v. Bheema Row* (3) were of a different character. A young boy having stolen some jewels was believed to have handed over the same to the Head Master of a school. All that the accused were alleged to have done was to search the house of the Head Master for these jewels in spite of his protests. In these circumstances "intention to annoy" was not inferred. The ruling, however, makes it clear that whether the requisite criminal intention for the purpose of S. 447, I. P. C., should or should not be inferred depends upon the facts of each case. In the present instance such an intention has been inferred from the facts, and I think rightly.

In *Suleman v. Emperor* (2), the facts were of a very peculiar character. The accused was alleged to have committed the trespass with the object of prosecuting his intrigue with the complainant's daughter. It appeared, however, that the accused had taken special precautions to conceal his presence from the complainant, and hence it was held that he had no intention to annoy the complainant. The facts of the present case are clearly distinguishable.

In *Meajan v. Sharafatullah Khan* (4) there was no finding that the accused had any "intention to annoy."

I reject the petitions.

P.R./R.K. *Petitions rejected.*

1930 Cr. Cases 811

(Lahore)

AGHA HAIDAR, J.

Sardara—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1168 of 1929, Decided on 4th April 1930 against order of Mag., 1st Class, Rawalpindi, D/- 14th October 1929.

(a) Evidence Act, S. 24—Co-accused's confession.

Confession of a co-accused, though subsequently retracted is admissible in evidence against his co-accused: *A. I. R. 1929 Oudh 167 Foll.* [P 811 C 1]

(b) Criminal Trial—Court should not refuse to convict person on evidence of finger-print expert.

A Court cannot refuse to convict a person on the evidence of a finger-print expert merely on the ground that it is unsafe to base a conviction upon such evidence: *A. I. R. 1922 Pat. 73* and *A. I. R. 1928 Lah. 622, not Foll.*; *A. I. R. 1928 Pat. 129* and *A. I. R. 1923 Mad. 178, Foll.*

[P 812 C 2]

(c) Penal Code, S. 457.—Policeman convicted of burglary—Five years rigorous imprisonment is not excessive sentence.

Where a policeman whose duty it was to protect the lives and property of the subjects of the Crown was convicted of a serious offence of burglary, sentence of five years rigorous imprisonment was held not excessive.

[P 812 C 1]

T.M. Mackay—for the Crown.

Judgment—Two policemen, namely, Sardara and Amar Nath, have been convicted under S. 457, I. P. C., and sentenced to a term of five years rigorous imprisonment each. Amar Nath has appealed through his counsel, M. Saunders, while Sardara has submitted his petition to this Court through the jail in which he is confined. I take up the appeal of Amar Nath first. A burglary was committed in the house of one Dr. Khan Chand in the small hours of the morning of 5th May 1929. The police were informed and investigation made. Dr. Khan Chand gave a list of the articles which were found missing from his house. The police arrived at the spot and found certain broken window panes on the roof of Dr. Khan Chand's house. It appears that there were skylights in Dr. Khan Chand's house which were broken through by the burglars who thus effected entrance into the room. The police found that these pieces of glass bore certain finger impressions. They accordingly took these pieces of glass into their possession and had them subsequently photographed by Sardar Gurdit Singh, P. W. 2. The accused was suspected and taken into custody. His finger-prints were taken in the presence of the Court (Ex. P. C.). There is a register maintained in the Police Department in which the finger-prints of policemen are preserved. Amar Nath being one of these policemen naturally his finger-prints were also taken on this register, which is Ex. P. B. Altogether the thumb prints of 483 men are to be found in Ex. P. C. in which the finger prints of the accused person were taken before the Court and the enlarged photographs of the finger-prints found on

the broken window panes and Ex. P./B. which contains the finger prints of a very large number of policemen including the accused Amar Nath, Sardar Harnam Singh, Deputy Superintendent of Police, in charge of Finger Print Bureau, Phil-laur, has given evidence to the effect that the finger Prints on the broken window panes were those of Amar Nath. He was hardly cross-examined by the accused and therefore his evidence stands practically unchallenged. Besides this evidence we find that Sardara, the co-accused, implicated Amar Nath in the offence when he made his formal confession before a Magistrate. It is true that that confession was subsequently retracted, but having regard to the authority of the Chief Court of Oudh in *Sheo Ratan v. Emperor* (1), there cannot be any doubt that this confession of Sardara, even though subsequently retracted, was admissible in evidence against Amar Nath, his co-accused. Thus we have the evidence of the expert about the finger-prints of Amar Nath on the broken window panes which received a certain amount of corroboration from the confession of Sardara. Two cases, *Bazari Hajam v. Emperor* (2) and *Jassu Ram v. Emperor* (3), were cited before me by counsel for Amar Nath, accused. *Jassu Ram v. Emperor* (3) is merely based upon *Bazari Hajam v. Emperor* (2) and the learned single Judge of this Court held that it would be unsafe to base a conviction upon the solitary testimony of the finger print expert. The learned Judge of the Patna High Court in a subsequent case reported in *Basgit Singh v. Emperor* (4) considered the case reported in *Bazari Hajam v. Emperor* (2) and accepted the view of law laid down in *Emperor v. Viramal* (5), that a Court cannot refuse to convict a person on the evidence of a finger print expert merely on the ground that it is unsafe to base a conviction upon such evidence. This I take to be the correct view of law. Thus the evidence of the finger print expert in the present case receives corroboration

if corroboration were necessary, from the confession of the co-accused Sardara. On these facts in my judgment the accused Amar Nath was properly convicted.

I have been asked to consider the question of sentence and have considered it. The accused is a policeman whose duty it is to protect the lives and property of the Crown. Instead of performing this duty he has been found guilty of having committed the serious offence of burglary. In my judgment the sentence of five years' rigorous imprisonment which has been imposed upon him by the trial Magistrate is not by any means excessive. I dismiss the appeal.

As already stated while dealing with the case of Amar Nath, that as a result of the investigation, Sardara, accused, was taken into custody and he made a confession before Sardar Dewindar Singh P. W. 12. He subsequently recovered the property in the presence of another Magistrate, Qazi Rahmatullah, P. W. 11. There cannot be any doubt as to the genuineness both of the confession as well as of the recovery; and the evidence of the two Magistrates on these points cannot be impeached. In the presence of P. W. 11, Qazi Rahmatullah, the accused took out a tin which contained the articles belonging to the complainant, Dr. Khan Chand, which had disappeared from his house on the night of the burglary. The guilt of Sardara is therefore fully established and I do not think that the fact that he retracted his confession afterwards makes any difference. He has been convicted under S. 457, I. P. C., and sentenced to five years' rigorous imprisonment. In my judgment both the conviction and the sentence are fully appropriate. I dismiss the appeal.

S.N./R.K.

Appeal dismissed.

1930 Cr. Cases 812

(Lahore)

JAI LAL, J.

(Swami) Chetanand—Accused—Petitioner.

v.

Gurbakhsh Singh—Complainant—Respondent.

Criminal Misc. Petn. No. 53 of 1930, Decided on 24th April 1930, for transfer of case from the Court of Magistrate, First Class, Kasur, to some other Court.

(1) A. I. R. 1929 Oudh 167=114. I. C. 771=30 Cr. L. J. 360.

(2) A. I. R. 1922 Pat. 78=68 I. C. 959=28 Cr. L. J. 633=1 Pat. 542.

(3) A. I. R. 1923 Lah. 622=77 I. C. 423=25 Cr. L. J. 375=4 Lah. 24F.

(4) A. I. R. 1929 Pat. 121=104 I. C. 626=28 Cr. L. J. 850=6 Pat. 305.

(5) A. I. R. 1923 Mad. 178=69 I. C. 374=23 Cr. L. J. 694=46 Mad. 715.

Criminal P. C., S. 526—Complaint under S. 107 made on Sunday—Magistrate taking complainant's statement on Sunday and issuing warrant against accused, for amount far beyond accused's means, with two sureties—When two persons offered security, enquiry held in their absence and on finding that they had not immovable property worth security amount, their security rejected—Other persons offering security and their bond attested by Honorary Magistrate—Honorary Magistrate called to appear and after his examination, that security also rejected—Magistrate's conduct was characterised by vindictiveness and desire to harass accused and so transfer of case to another Magistrate held justified.

The object of calling upon the accused to furnish security is not to penalise the accused but to ensure his presence in Court, and the amount of security must be fixed with due regard to the nature of the offence and the means of the accused. [P 816 C 1]

While a complaint against the three accused persons, members of the Congress, under Ss. 500 and S. 385, I. P. C., was pending another complaint under S. 107, Criminal P. C., was made on a Sunday, the statement of the complainant was recorded also on another holiday and order was passed directing issue of warrants bailable for Rs. 6,000 with two sureties who were to bind themselves jointly and severally in that amount. The amount of security was far in excess of the means of the accused. When bail was offered by two men, an enquiry was held in the absence of the sureties and the only question considered was whether the sureties had each immovable property worth more than Rs. 6,000, and as the answer was in the negative the security was refused. Other persons offered as sureties and their bonds were attested by an Honorary Magistrate. On enquiry, the Magistrate not being satisfied that the security was sufficient called the Honorary Magistrate to appear before him but when he appeared, the Magistrate postponed the case as the Courts were closed that day. The Honorary Magistrate appeared again, but after his examination the bonds were again rejected, although the sureties stated that they owned immovable property worth Rs. 1,00,000 and Rs. 25,000 respectively. The accused applied for transfer of the case.

Held: that the conduct of the Magistrate was characterised by vindictiveness and a desire to harass the accused and on this ground transfer of the case to another Magistrate was justified. [P 816 C 2]

Fakir Singh—for Petitioner.

R. C. Soni—for Respondent.

Judgment.—These are three applications by Swami Chetanand for the withdrawal of three criminal cases from the Court of Sardar Narindar Singh, Magistrate, First Class, Kasur, and for their transfer to a Magistrate in some district other than Lahore. It is alleged that the local officials at Kasur are prejudiced against the petitioner

and that the District Magistrate of Lahore has also conducted himself in such a manner in dealing with the petitioner's cases that the latter apprehend that he also is prejudiced against him and, therefore, he does not expect justice in the Court of any of the Magistrates in Lahore. The following are the undisputed facts on which the application is based.

In October 1929, Gurbakhsh Singh and Thakur Singh filed a complaint under S. 500 and S. 385, I. P. C., against three persons, Durga Das, Lekh Raj and Swami Chetanand, and also against another person, with whom we are not concerned on the present occasion. A month later Swami Chetanand made a report to the police against Gurbakhsh Singh and another charging the latter with an offence under S. 392, I. P. C., in consequence of which the house of Gurbakhsh Singh was searched, but the police did not proceed further with the case. The case filed against Durga Das, Lekh Raj and Swami Chetanand was pending in the Court of Lala Roshan Lal, Magistrate, at Lahore. In the meantime on 2nd February 1930, which was a Sunday and a public holiday, a complaint under S. 107, Criminal P. C., was made by Gurbakhsh Singh before the Sub-Divisional Officer of Kasur. In this complaint it was alleged that Durga Das, Lekh Raj and Swami Chetanand had committed certain acts which caused an apprehension in the mind of the complainant and that they would cause a breach of the peace and a prayer was made that they be bound over under S. 107, Criminal P. C. On the same day this complainant was transferred to the Court of Sardar Narindar Singh, who was at Pattoki. It seems that the complaint to the Sub-Divisional Officer was not presented at the headquarters but when he was in camp. On 3rd February 1930, which again was a public holiday, Sardar Narindar Singh recorded the statement of the complainant and passed an order directing issue of warrants bailable for Rs. 6,000 with two sureties, who were to bind themselves jointly and severally in that amount, for the arrest and production of Durga Das, Lekh Raj and Swami Chetanand on 5th February 1930. In the order recorded by this Magis-

trate an apprehension was expressed that the persons complained against were not likely to appear merely on summonses and for that reason warrants were issued. There is absolutely no indication on the record how the Magistrate entertained this apprehension, nor is there any suggestion in the statement of the complainant to that effect. In pursuance of the warrants issued the persons complained against were arrested on the 3rd before 10 a. m., were produced before the Sub-Divisional Officer and, under his orders, were taken to Kasur by a train which leaves Pattoki at 10.5 in the morning and were apparently kept in jail till the 5th, when they were produced before the Magistrate. They prayed to be released on bail and were informed that an order for their release on bail had already been passed on 3rd February 1930; further it would appear that they were not informed by the persons who arrested them that they could be released on bail and also that the Magistrate took cognizance of the case before 10 a. m.

On 5th February 1930, bail was offered by two men who belonged to Chunian, but the Magistrate declined to accept their security unless the Tahsildar of Chunian certified to the capacity to give security for Rs. 6,000 each. The security bond was consequently sent to Chunian and the accused were kept in custody. Chunian is 50 miles from Kasur, and it appears that the security bond did not reach the Tahsildar till 10th February 1930, for certification and the tahsildar fixed 16th February 1930, for an enquiry into the sufficiency of the security to be held at Pattoki. Consequently an enquiry was held on the 16th at Pattoki, but it seems that the sureties were not called and the enquiry was held in their absence.

The only questions asked from the persons from whom the enquiry was made by the Tahsildar were directed to ascertain whether the sureties had moveable property worth more than Rs. 6,000 each and the answers being in the negative, a report was made that the security was not sufficient, but it is to be observed that the Tahsildar stated that the sureties had not sufficient immovable property. The result

was that the security offered was not accepted by the Magistrate.

In the meantime, realizing that delay is likely to occur in the attestation of the security bond by the Tahsildar of Chunian, the accused had a security bond executed by two residents of the Lahore Cantonment, Kidar Nath and Mehtab Rai, had it attested by an Honorary Magistrate and counsel produced the security bond with the sureties before the Magistrate Sirdar Narindar Singh, on the same day. The Honorary Magistrate had stated in his attestation that he knew one of the sureties personally and was satisfied that he had considerable moveable and immovable property far exceeding in value the amount of the security demanded and with regard to the other he had satisfied himself by enquiry that he also had sufficient immovable property to entitle him to give bail in the sum of Rs. 6,000. It is alleged that the bond was presented to the Magistrate at 2 o'clock, but no attention was paid. Consequently at 3.50 an application was presented by counsel stating that he had been waiting with the security bond and the sureties for acceptance of the security by the Magistrate. On this application the Magistrate noted that it was already 4.5 p. m., and, therefore, he could not attend to the matter. He consequently fixed the case for the next day. It may be mentioned that on 6th February 1930, another security bond executed by two sureties Qazi Abdul Kadir and Gokal Chand was presented, but, for some reason or other, was not attested.

On 7th February 1930, the sureties appeared before the the Magistrate again and were subjected to a lengthy examination including searching questions as to their movable property, the number of horses, tongas, value of jewelry, etc., owned by them. Questions were also asked from them with a view to ascertain whether they were the men who had actually signed the bond and appeared before the Honorary Magistrate to attest the same and also whether they knew the accused Swami Chethanand for whom they had given security. They stated that they owned immovable property worth Rs. 1,00,000 and Rs. 25,000 respectively. The Magistrate, however, was not satis-

fied and he called the Honorary Magistrate from the Lahore Cantonment to appear before him on 8th. The Magistrate, accompanied by counsel and the two sureties, reached Kasur a little after 1 o'clock but the Magistrate declined to do anything in the matter and postponed the case to the 10th on the ground that the Courts had been closed owing to the death of a local legal practitioner. He forgot the fact that complaint had been received and the warrants for the arrest of the accused were issued on public holidays. Consequently the Honorary Magistrate again appeared on the 10th and, after he had been examined the security bond was rejected.

I have examined the record of statements of the sureties and of the Honorary Magistrate and I am satisfied that the sureties were well able to pay the amount for which they offered bail respectively, and it was quite unnecessary to call and to examine the Honorary Magistrate and I further consider that there was no justification for the view of the Magistrate that the sureties must have moveable property of more value than the amount of the bail. The questions asked from the sureties were, in my opinion, calculated to harass and to insult them.

Now all this happened on 10th February 1930, and it is a curious coincidence that on the same day another complaint was filed by Mt. Gian Devi, a relation of Gurbaksh Singh, under S. 457, I. P. C., against the same accused persons. And this complaint was also on the same day sent by the Sub-Divisional Magistrate to Sardar Narindar Singh. The suggestion of the petitioner's counsel is that this complaint was filed in order to circumvent the possible release of the petitioners on bail, in case the Magistrate felt constrained to accept the security of Kidar Nath and Mehtab Rai.

After this security bond had been rejected by the Magistrate, the accused moved this Court in order to obtain a direction to the District Magistrate of Lahore to decide the question of sufficiency or otherwise of the security tendered by the accused himself. An order was consequently passed that the District Magistrate himself should consider the question of sufficiency of security.

It is alleged that the District Magistrate took no action on it and consequently an application was presented that proceedings in contempt of Court be taken against him for not obeying the order of this Court and that on the presentation of this last mentioned application, the Additional District Magistrate accepted the same security bond which had been rejected by the Magistrate. When, however, the order was conveyed to the Magistrate he made some representation that the proceedings of the Additional District Magistrate were irregular, and on 5th March 1930 the order accepting bail was cancelled. When, however, the record went back to the Magistrate at Kasur the security of the same persons was accepted on 13th March 1930.

In the meantime, however, as I have stated above, a complaint under S. 457, I. P. C., had been made against the accused persons and in that case on 7th March 1930 an application was made to the Sessions Judge of Lahore praying that the accused be released on bail. The case was fixed for 10th March 1930 and an order was passed that the record of the case be produced before the Sessions Judge on that date. The record, however, did not reach on the 10th and the case had to be adjourned till the next day and the record was received only after the order was repeated by telegram. On the 12th the Sessions Judge directed that the accused Swami Chetanand be released on bail for Rs. 5,000 and on the 13th the security offered was accepted by the Magistrate along with the security in the former case.

The above proceedings took place with regard to the security of Swami Chetanand accused. Now on 17th March 1930 the remaining two accused applied for bail and two men i. e., Jiwan Singh of Sheikhpura and Bhag Mal of Kasur offered security on 20th March 1930. The bond of Jiwan Singh had been attested by the Naib Tahsildar of Sheikhpura, but the Magistrate directed that the Naib Tahsildar who was posted in another district should appear before him on 24th March 1930. On that date Jiwan Singh did not appear before the Magistrate and Bhag Mal expressed a desire to withdraw the

security on behalf of the accused offered by him.

In view of the treatment meted out to the other sureties and the manner in which the Magistrate conducted himself throughout these proceedings, it is not surprising that both Jiwan Singh and Bhag Singh declined to have anything to do with his Court. The case pending in the Court of Lala Raushan Lal, Magistrate, First Class, Lahore, was also transferred by the District Magistrate to that of Sardar Narindar Singh without notice to the accused and apparently without any application.

I have merely given above the history of the proceedings before the Magistrate as far as possible in its chronological order. I have not thought it necessary to set out in detail the manner in which the proceedings were conducted in his Court and which were open to serious objections.

In my opinion, the above facts are quite sufficient to indicate the attitude taken up by the Magistrate against the accused persons in this case. I have not been able to discover any other motive which led the Magistrate to adopt this extraordinary attitude and procedure in the matter except the one suggested by the petitioner's counsel. It is that his clients are active members of the Congress party, Swami Chetanand being the Secretary of that local Congress Committee. It is also alleged that as 26th January 1930, was observed by the Congress Committee as, what they called it, the Independence Day, the local authorities were annoyed with the accused persons and started proceedings to punish them for their objectionable behaviour from their point of view. I accept this explanation, as I have not been able to discover any other reason for the unusual conduct of the Magistrate.

Incidentally it may be mentioned that the Magistrate entirely ignored the principles underlying the fixing of the amount of security which an accused person can be called upon to furnish. It has more than once been laid down that the object is not to penalise the accused but to ensure his presence in Court and the amount of security must be fixed with due regard to the means of the accused and the nature of the

offence. A complaint under S. 107, Criminal P. C., on the facts alleged was not of such a serious nature as to warrant such a heavy amount of security and the amount was far beyond the means of the accused persons. Swami Chetanand apparently has no business except perhaps political agitation, the other two accused are a hawker and a servant in a press respectively drawing a salary of Rs. 20 or 30 per month. The entire conduct of the Magistrate, therefore, was characterised by vindictiveness and a desire to harass the accused and the grounds for the transfer of the case from his Court are so irresistible that the learned Assistant Legal Remembrancer, who appeared for the Crown, had nothing to say against the grant of the petition.

At the same time I do not see any reason to transfer this case from the Lahore District. The orders passed by the District Magistrate, though unexplained, are capable of being construed as having been passed on the material placed before him and I do not believe that the accused will not be impartially tried in Lahore. I, therefore, withdraw these cases from the Court of Sardar Narindar Singh, Magistrate, First Class, Kasur, and transfer them to the Court of Khan Sarbuland Khan, Magistrate First Class, Lahore. I have transferred the case to Lahore because in my opinion it is not desirable that the accused should be tried in these cases by any other Magistrate at Kasur.

S.N./R.K.

Petition granted.

1930 Cr. Cases 817

(Allahabad)

DALAL, J.

Banarsi Das—Applicant.

v.

Emperor

Criminal Revn. No. 40 of 1930, Decided on 27th March 1930, against order of Addl. Sess. Judge, Pilibhit, D/- 6th November 1929.

United Provinces Prevention of Adulteration Act (6 of 1912), S. 4—Scope.

Possession of adulterated food or drug is not made a crime under the Act. [P 817 C 2]

G. S. Pathak—for Applicant.

M. Waikullah—for the Crown.

Judgment. — This application must succeed on both the grounds raised on behalf of the applicant. The applicant has been convicted of an offence under S. 4, United Provinces Prevention of Adulteration Act 6 of 1912 (Local). There is a mandatory injunction in S. 15 (2), of the Act that every summons issued in a prosecution under S. 4 and S. 10 shall specify particulars of the offence charged and the name of the prosecutor besides other information. In the summons no particulars were given; nor was the name of the prosecutor given. The particulars were essential in this case because even now I have not understood the exact reason or rather the exact charge on which the applicant has been convicted. If the particulars had been stated in the charge a Court of revision would have had an opportunity to test the particulars and discover whether they amounted to an offence under S. 4. What the learned Judge says I am afraid I am unable to understand. What happened in this case was that, according to the Magistrate, 21 canisters of ghee were found in a store-room of the applicant who sells ghee ordinarily as his business. The trial has been so perfunctory that I cannot discover whether every one of the 21 canisters contained adulterated ghee or only one canister. An observation of the Magistrate at the end of the judgment that ghee which was not found adulterated had been detained for a long time makes me believe that the entire quantity was not adulterated. It is very unfortunate that in summary trials no proper care is taken to record evidence and facts in a way to give an accurate idea of facts to the Court of

revision. What the learned Judge says is this :

"It is clear from the evidence as found by the Magistrate that the adulterated ghee was meant for sale and anybody who sells such ghee does commit an offence under S. 4."

The section, however, makes no mention of storage of adulterated ghee. It will not be profitable to spend any time in solving the puzzle of the language of the Sessions Judge. The Magistrate makes no positive statement at all as to what was the crime that the applicant committed. He has entered into generalities as to the adulteration business going on in a very large number of cities and his belief is that the accused would not have tested the ghee before offering it for sale. He also does not trouble himself to decide whether the storing of adulterated ghee is an offence, and in what words he would have framed the charge if it had been necessary to frame a charge in this particular case. The task of a Court of revision becomes very difficult when Subordinate Courts refuse to disclose what in their opinion was the specific charge on which an applicant has been convicted. For this reason the omission to mention the charge in the summons was highly prejudicial to the applicant and the Sessions Judge could not have thought carefully of this matter when he made the observation that the applicant knew very well what the charge against him was and that the omission of particulars from the charge was merely an irregularity. When this Court after all its training fails to understand the charge the Sessions Judge's statement is incorrect that the applicant knew very well what the charge against him was. Possession of adulterated food or drugs is not made a crime under the Act. In the present case there was no sale, nor was the substance offered for sale or exposed for sale; nor is it said that the applicant manufactured the articles himself for sale. If there had been any evidence that the applicant purchased pure ghee and adulterated it himself his act would have been covered by the words

"manufactures for sale any article of food which is not of the nature, substance or quality which it purports to be."

The prosecution has been entirely misconceived. I set aside the conviction.

tion and sentence and order the fine, if any recovered from the applicant, to be refunded.

P.N./R.K. *Conviction set aside.*

* * 1930 Cr. Cases 818

(Nagpur)

Full Bench

FINDLAY, J. C., MACNAIR AND
SUBHEDAR, A. J. C's.

Gobarya and others—Applicants.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 215, 216 and 218 of 1929, Decided on 13th March 1930, from order of Sess. Judge, Hoshangabad.

* * (a) Evidence Act, S. 30 — (Per Full Bench)—If there is any other relevant matter implicating co-accused, Judge can consider confession along with that matter (Subhedar, A. J. C.)—Such confession can only be used when other proved facts fail by narrow margin to justify conviction.

The self-inculpatory confession of an accused implicating his co-accused is fact upon which alone the conviction of his co-accused cannot be legally based. Nor can such a confession even if it be corroborated by other evidence which is insufficient by itself to sustain the conviction of the non-confessing co-accused form a legal basis for his conviction.

[P 827 C 1]

Per Full Bench.—But if there is any other relevant matter implicating the co-accused the Judge is permitted by S. 30 to consider confession along with the said matter and as a result of such consideration to convict the accused. (Per Subhedar, A. J. C.) Such confession can be legitimately used to corroborate other evidence and even to supplement the same in those exceptional cases in which without such aid the other evidence falls short by very narrow margin of that standard of proof which is requisite for a conviction.

[P 827 C 1]

Where the other evidence was to the effect that the accused were seen going on the night of the murder towards the place where the deceased lived and that there was general enmity between the accused and the deceased the evidence is insufficient to justify conviction of the non-confessing co-accused: 24 W. R. 42 Cr. and 9 C. P. L. R. 35 Cr., Appr: A. I. R. 1926 All. 377, Rel. on; other case law discussed.

[P 831 C 1]

(b) Evidence Act, S. 3—Evidence.

Per Macnair, A. J. C.—The word "evidence" in the Act signifies only the instruments by means of which relevant facts are brought before the Court, viz., witnesses and documents, and by means of which the Court is convinced of these facts.

[P 827 C 1]

(c) Evidence Act, S. 30—Scope.

Per Macnair, A. J. C.—When S. 30 lays down that the Judge may consider a fact in certain circumstances it plainly declares that fact to be relevant in those circumstances.

[P 829 C 1]

(d) Evidence Act, S. 30—(Per Full Bench) Court can exclude confession by accused

altogether from consideration against co-accused (Per Macnair, A. J. C.) It cannot be said that word "may" gives Court right to exclude confession from consideration.

Per Full Bench.—Court has discretion to exclude a confession by an accused altogether from consideration against the co-accused if it is so disposed, Per Macnair, A. J. C.—The use of the word "may" does not show that every confession is of very small value against a co-accused. It cannot be said that the word "may" gives the Court right to exclude the confession from consideration if it is so disposed. The Judge is given a discretion but the discretion must be exercised in a judicial manner; if the confession would help in arriving at a decision that the accused is guilty he must do so. [P 828 C 2, P 829 C 1]

T. J. Kedar—for Applicant.

V. Bose—for Opponent.

Judgment

Jackson, A. J. C.—Five persons have been convicted of murder and four of them have been sentenced to death. Gobarya, his wife Kashi, his son-in-law Sitaram, and one Budhia are those who have been sentenced to death, and Asaram, Gobarya's son, has been sentenced to transportation for life. The person held to have been murdered is Fadal, brother of Gobarya.

On 21st August 1929, Fadal's body was recovered from a well near the ghana in which he had been living, and the medical evidence is that he died from strangulation. Sitaram, one of the accused, who admits his guilt, has described how he and the other accused came to strangle Fadal and throw the body into the well. It appears that there was ill-will between Fadal on the one side and Gobarya and his wife on the other on account of a partition which had recently taken place. As a result of that partition Gobarya had to pay some money to Fadal, and on 20th August he asked Sitaram to tell Gobarya and Kashi that he wanted the money. Kashi, who appears to have resented the fact that Fadal, who was a childless widower, shared equally at the partition with her husband, suggested that Fadal should be killed and all dispute thus ended. Sitaram was cajoled into taking a part, and all the five accused at night went to the ghana of one Sojar in whose employ Fadal was and there, while Gobarya sat on Fadal's chest and Kashi, Asaram and Budhia helped to hold him, Sitaram passed a rope twice round Fadal's neck, and Gobarya and Sitaram pulling on the ends of

the rope strangled him. His body was then carried to the well and thrown in after a blow had been struck on the head with a stone to make it appear that Fadal had been killed by accident in falling into the well. The bucket and rope of the well were thrown in after him, and two utensils were brought and left near the well to help the suggestion that Fadal had fallen in by accident while drawing water.

Sitaram made a confession to a First Class Magistrate on 2nd October 1929 to the above effect. He repeated his story to the committing Magistrate on 23rd September 1929, although on 16th September 1929 he is recorded as having declined to accept the conditions on which he could become an approver. He again repeated his story before the Sessions Judge, and in the Sessions Court he put in an application asking for a pardon, but this on the opposition of the other accused and of the prosecution was rejected. It is only in his grounds of appeal to this Court that he has put forward the plea that he was threatened by the police and tutored to tell the story implicating himself and the other accused, with a promise that, if he did so, he would be made an approver and acquitted. I am unable to accept the argument put forward on his behalf to show that his confessions were not voluntary and not true. Although his application was rejected by the Sessions Judge, he had been given an opportunity of becoming an approver in the Court of the committing Magistrate and he refused it for reasons which are not obvious. Nevertheless, the fact remains that until after his conviction he told the same story on three different occasions and when he was called upon to plead to the charge before the Sessions Judge his plea was one of guilty. It seems to me impossible to hold otherwise than that Sitaram was a party to the murder of Fadal.

As regards the other accused, it is argued that there is no evidence against them but Sitaram's confession, and that there can be no conviction on the confession of a co-accused alone. The confession of a co-accused is certainly not evidence within the meaning of the definition of that term in S. 3, Evidence Act; but it is a matter which can be taken into

consideration under S. 30, and must be included in the matters before the Court that under S. 3 are to be taken into consideration before a fact is held to be proved or not proved. It has thus the practical effect of, and can be most conveniently referred to, as evidence. The question, however, arises whether it is substantive evidence or merely evidence that can lend assurance to other evidence incriminating the co-accused. It seems to me that such a confession being admissible under S. 30 must be regarded as substantive evidence if it clearly implicates the other accused in the crime, and that it cannot be treated merely as corroborative of facts otherwise proved, which would make S. 30 a mere nullity.

That is the view taken by Hallifax, A. J. C., in *Sapku v. Emperor A. I. R. 1922 Nagpur 146*. He sums up his review of the case law on the subject in the following paragraphs:

"10. Against the proposition that the confession of a co-accused can be used as a piece of substantive evidence and that we may start with it as a basis, proceeding to enquire how far it is corroborated, we have, therefore, the dictum of Stevens, J. C., in *Empress v. Karim Buz* (1) that of Ainslie, J., in *Empress v. Ashootosh Chuckerburthy* (2) which on examination works out very nearly to laying down 'rule touching the credibility of evidence' of which Heaton, J., speaks in the passage quoted above, the judgment of the Madras High Court in *Giddigadu v. Emperor* (3) which rests entirely on authority to which I cannot refer, and the dictum of Jenkins, C. J., in *Emperor v. Noni Gopal Gupta* (4), which apparently was not followed by Fletcher, J., in *Emperor v. Babar Ali* (5).

"11. On the other hand, we have reasoned and to my mind convincing judgments by Knox, J., and Richards, J., in *Emperor v. Kehri* (6), by a Bench of this Court in *Emperor v. Malhari* (7) by Heaton, J., Macleod, O. J., concurring, and, on this point, Shah, J., not dissenting, in *Gangapa Kardapa v. Emperor* (8). To these I might add the reasoning in the judgment of the learned Sessions Judge (Mr. F. K. Body) which is published as an annexure to *Gangapa Kardapa v. Emperor* (8). There is also the judg-

(1) [1896] 9 O. P. L. R. 87 Cr.

(2) [1879] 4 Cal. 483=8 C. L. R. 270.

(3) [1910] 38 Mad. 46 = 9 Cr. L. J. 404 = 1 I. C. 867.

(4) [1911] 38 Cal. 539 = 12 Cr. L. J. 286 = 10 I. C. 582.

(5) [1915] 42 Cal. 789 = 16 Cr. L. J. 321 = 23 I. C. 657.

(6) [1907] 29 All. 484 = 5 Cr. L. J. 360 = (1907) A. W. N. 140.

(7) Criminal Appeal No. 38-B of 1911.

(8) [1914] 38 Bom. 156 = 14 Cr. L. J. 626 = 21 I. C. 673.

ment of Garth, C. J. in *Empress v. Asfotosh Chuckerbutty* (9), and indeed the unanimous decision of the Full Bench in that case that such a statement is substantive evidence. I have not mentioned the *Allahabad* case of *Queen-Empress v. Nirmal Das* (9) nor the Bombay case of *Queen-Empress v. Khandia* (10) as they may both be taken as overruled by the later decisions quoted. In any case, the reasons stated in the later rulings appear to me much more convincing. I concur entirely in the views expressed by the Allahabad High Court in *Emperor v. Kehri* (6) and by Heaton J. in *Gangaga Kardepa v. Emperor* (8), and hold that in this case the confession made by Shrawan can be treated as substantive evidence against Sapku Patil, and if it is found to be credible, because it is sufficiently corroborated by other evidence or matters proper for consideration, Sapku Patil can be convicted on it."

It is true that two other Judges of this Court disagreed with the view stated in that case, but I do not find their reasoning convincing. There was, however, agreement upon one point and that is that even if the confession of a co-accused can be treated as substantive evidence, it cannot by itself be made a basis for conviction of the other accused. In the present case there is corroboration of Sitaram's story as regards the throwing of the body into the well and the steps taken to make it appear that the death was accidental. There is also the evidence of Sarjuram (P. W. 5) who met Sitaram early in the morning after the murder returning to his own village from Dahua where the murder was committed. But such corroboration helps to implicate nobody but Sitaram. As regards Gobarya and Kashi, the corroboration of Sitaram consists of the evidence to show the ill-will that existed between Fadal and his brother and sister-in-law and of the evidence of Salak (P. W. 7) who on the night of the murder saw five persons, of whom Gobarya, Kashi, Sitaram and Buddhia were four, going towards the ghana where Fadal lived. The question is whether this corroboration is sufficient. I am satisfied that Sitaram took part in the murder; he could not have committed it alone; the motive for the murder was not his but Gobarya's and Kashi's; and, when it is proved that Gobarya and Kashi were seen on the night of the murder going with Sitaram towards the residence of the deceased, it seems to me impossible not to hold

that Gobarya and Kashi were among the persons who committed the murder. Similarly, in the case of Buddhia there is some evidence of enmity between him and Fadal which would make it probable that he would be willing to assist Gobarya and Kashi, and when he too was seen among the five persons going towards the ghana, it seems to me that his guilt also is manifest. My view is that the convictions and sentences of Sitaram, Gobarya, Kashi and Buddhia be upheld. As regard Asaram, there is no corroboration of Sitaram's confession and in my opinion he ought to be acquitted.

Mohiuddin, A. J. C.—I have read the opinion which my learned brother has recorded in this case, and I agree with him, for reasons recorded in para 3 of his opinion, that Sitaram was a party to the murder of Fadal. I would therefore confirm the conviction and sentence in Sitaram's case and dismiss his appeal. Regarding the other four co-accused Gobarya, Kashi, Buddhia and Asaram, there is no direct evidence of their complicity in the murder of Fadal except the confession of the co-accused Sitaram, and the question for consideration therefore is whether the confession is substantive evidence or merely a matter that can be taken into consideration, to lend assurance to other evidence incriminating the co-accused. S. 30, Evidence Act, is an exception to the rule of English law that a confession by an accused can be considered against others who may be tried along with him and was introduced into the Evidence Act in 1872, for the first time. Glover, J., in *Queen v. Jaffir Ali* (11), (at p. 64) made the following observation about this section:

"Section 30, Act 1 of 1872, introducing as it does an entirely new, and, I am inclined to think, rather dangerous element in the conduct of criminal trials, ought to be construed with great strictness."

and Phear, J., in *Queen v. Sadhu Mundaul* (12), characterized it as "dangerous material."

The confession of an accused is not evidence within the meaning of that word as defined in S. 3, Evidence Act, but is a matter which can be taken into consideration by the Court, that is, it is

(9) [1900] 22 All. 445—(1900) A. W. N. 169.

(10) [1891] 15 Bom. 66.

(11) 19 W. B. Cr. 57.

(12) 21 W. B. Cr. 69.

an element in the consideration of all the facts in the case. It cannot be put on the same footing as the evidence of an accomplice who has become an approver, because his statement cannot be tested, developed, and explained by cross-examination and is not given on oath. Accomplice evidence has been made admissible under S. 133, Evidence Act, and we find in *Illus. (b)*, S. 114, Evidence Act, the rule of caution and prudence where it is declared by the legislature, that an accomplice is unworthy of credit, unless he is corroborated in material particulars. But as the confession of a co-accused is not evidence but is only a matter which has been made admissible for consideration, it cannot be treated as substantive evidence and no amount of corroboration of that matter can put it on the same basis as the evidence of an accomplice. I am therefore of opinion that the confession of a co-accused, not being evidence, is only a matter which can be taken into consideration if there is other evidence in the case to lend assurance to that evidence, and cannot form the basis of a conviction, even though there may be corroboration of the statement of the co-accused.

I am fortified in this view by the only published decision of this Court, which is contained in *Empress v. Karim Bax* (1) and runs as follows:

"Section 27, Evidence Act, then, has no application to the case, but, as I have said, S. 30 does apply. At the same time the confession of a co-accused used under the provisions of the latter section stands on a perfectly different footing from the testimony of an accomplice. The latter is substantive evidence in the strict sense of the term, a conviction may legally proceed upon it without corroboration, though the general practice of the Court is to require corroboration, because a presumption naturally arises against such evidence from its tainted character. Whether corroborated or uncorroborated it may form the basis of a conviction. It is entirely otherwise with the confession of a co-accused. It is not in itself substantive evidence and we may not start with it as a basis, proceeding to enquire how far it is corroborated. It can be used only in a subsidiary manner in connexion with the substantive evidence adduced in the case."

This point was considered by a Bench of this Court, consisting of Batten and Stanyon, A. J. C's., in *Emperor v. Malhari* (7), and the relevant portion of their judgment runs as follows:

"The question then remains how far we

should act on it. We think that since we believe it to be the truth both as to what was done and as to the identity of the persons doing it, we are bound to use it as establishing the guilt of all the accused. A good deal has been written and said about the scope of S. 30, Evidence Act, 1872, and some of the earlier published decisions on the point would make the confession of an accused something less than evidence against his accomplice jointly tried with him for the same offence, so that no conviction of the latter could be sustained thereon if the other evidence would be insufficient to prove his guilt. We are unable to take this view. We do not think it was the intention of the legislature that S. 30, should provide a mere superfluity, to be used only in cases already established by other evidence. The later view that a statement admitted under S. 30, is a piece of evidence as relevant as any other kind of evidence, commends itself to us as the more correct interpretation of the law. It follows that a conviction based on the uncorroborated statement of a co-accused would not be illegal, because there is not one word in the Evidence Act which requires any specified quantity or description of relevant evidence to sustain a judicial finding. We have considered the recent case of *Emperor v. Kehri* (6), where the evidential value of a retracted confession is very fully considered. In our opinion it is a correct interpretation of the law, and we concur with every dictum laid down in it."

They observed that a statement admitted under S. 30 is a piece of evidence as relevant as any other kind of evidence, but I respectfully beg to point out, that the statement of a co-accused not being evidence at all under the Evidence Act, the view taken by the learned Additional Judicial Commissioners is not correct.

The next case in which the point was considered by a Bench of this Court, is *Sapku v. Emperor* (A. I. R. 1922 Nag. 146). In this case Hallifax, A. J. C., concurred entirely with the view expressed by the Allahabad High Court in *Emperor v. Kehri* (6), and held that the confession of a co-accused could be treated as substantive evidence, and if it was found credible, because it was sufficiently corroborated by other evidence or matters proper for consideration, other accused could be convicted on it. Pridaux, A. J. C., expressed the opinion that the confession of a co-accused could not be treated as substantive evidence. On account of this difference of opinion, the case was laid before Kotval, A. J. C. who concurred in the opinion expressed by Pridaux A. J. C.

This view was followed by Findlay, Offg. J. C., and Pridaux, A. J. C., in *Diwan Dhimar v. Emperor*, A. I. R. 1926

Nag. 229, as appears from the following passage:

"On behalf of the Crown reliance has been placed on the decision of Sanderson, C. J., and Beachcroft, J., in *Ah Foong v. Emperor* (18), as well as on the old decision of Garth, C. J., in *Empress v. Ashootosh Chuckerbutty* (2), and it has been suggested that the confessions in this case are practically equivalent to the evidence and can be accepted as affording proof within the meaning of S. 8, Evidence Act. Reliance has also been placed on the view taken by Hallifax, A. J. C., in *Sapku v. Emperor* (14), but the view of the majority of Judges in that case was that the confession therein concerned was not evidence under the Evidence Act as against a co-accused and the only fair inference was that the Court might take such a confession into consideration with, or supplementarily to, relevant facts which might form the basis of a judgment. We see no reason for differing from this view."

The published ruling of this Court contained in *Empress v. Karim Bax* (1), and the decisions of two Benches of this Court contained in *Sapku v. Emperor*, A. I. R. 1922 Nag. 146 and *Diwan Dhimar v. Emperor*, A. I. R. 1926 Nag. 229, are thus in favour of the view that the confession of a co-accused, which is made admissible in evidence, is not substantive evidence and cannot form the basis of a conviction.

Jenkins, C. J., in *Emperor v. Lalit Mohan* (4), at 588 clearly laid down that conviction on the confession of a co-accused alone would be bad in law, and that the Court can only treat a confession as lending assurance to other evidence against a co-accused. Brett and Chatterjee, JJ., were the other Judges who formed the Bench in that case and concurred in the view expressed by Jenkins, C. J. It seems that the decision reported in *Emperor v. Lalit Mohan* (4), was not brought to the notice of the Divisional Bench, which decided *Emperor v. Babar Ali* (5), because Fletcher, J., made no reference to it in his judgment. I, therefore, venture to suggest, that the view of the Calcutta High Court, is the one which is contained in the Full Bench decision of that Court contained in *Emperor v. Lalit Mohan* (4).

The Madras view is to be found in *Giddigadu v. Emperor* (3), in which Benson and Sankaran Nair, JJ., laid down that the wording of the section shows, that such a confession is merely to be an element in the consideration of all

the facts of the case, but do not do away with the necessity for other evidence. In Bombay High Court there was a difference of opinion on this point between Shah, J., on two occasions, and the cases were referred to a third Judge: see *Emperor v. Gangappa Kardeppa* (8) and *Emperor v. Sabtikhan Bahadurkhan* (15). The Allahabad view was followed in Bombay by a majority of the Judges in these two cases.

Taking it for granted, that the confession of a co-accused can be treated as substantive evidence, it seems to me that corroboration of such a confession must be better and stronger than what may be considered sufficient in the case of the evidence of an accomplice:

"The existence of general enmity and a desire, however strong or a motive however effective to procure the death of another person," as pointed out by Walsh and Dalal, JJ., in *Emperor v. Kalwa* (16):

"may be a piece of circumstantial evidence, but is not corroboration of a sworn statement of participation in a particular crime. Corroboration must point to the identification of the person charged with the particular act with which the direct evidence connects him."

Sitaram knew that there was ill-will between Fadal and Gobarya, and as he participated in the murder, he knew that the body of Fadal was thrown into the well and that steps were taken to make it appear that death was accidental. These facts cannot be considered as material particulars, which corroborate the confession of a co-accused. Sujuram (P. W. 5) met Sitaram early in the morning after the murder returning to his own village from Dahua, and Salak (P. W. 7) saw five persons, of whom Gobarya, Kashi, Sitaram and Budhia were four, going towards the ghana where Fadal lived. The corroboration raises a suspicion, but falls short of what is required to support a conviction. Similar facts were considered to be consistent with the innocence of the accused in *Emperor v. Babar Ali* (7), by Fletcher, J., as appear from the following passage in that judgment:

"The corroboration in the evidence in this case although it raises a case of suspicion, falls far short of what is required to support a conviction. It consists principally of statements of witnesses as to seeing the accused or some

(15) [1918] 48 Bom. 798=20 Or. L. J. 497=51 I. C. 65.

(16) A. I. R. 1926 All. 377=95 I. C. 74=27 Or. L. J. 746=48 All. 409.

(18) [1919] 46 Cal. 411=20 Or. L. J. 94=48 I. C. 504.

(14) A. I. R. 1922 Nag. 146.

of them together on the night of the occurrence, and as against one of the accused, as to the identification of certain ornaments found with one of the accused which had some time or other been pledged with the deceased woman. These statements, though giving rise to suspicion, are consistent with the innocence of these four accused."

I am, therefore, of opinion that there is not such corroboration of the confession of Sitaram, as to make it safe to rely on his confession so far as his co-accused are concerned. This confession has also been retracted by Sitaram in this Court. For reasons given in paras. 2 and 12 of this order, I am of opinion, that Gobarya, Kashi, Budhia and Asaram should be acquitted.

(On difference of opinion case was laid before the Judicial Commissioner for referring it to another Judge under Ss. 378 and 429 Criminal P. C.).

Reference Order

Subhedar, A. J. C. — A point of law of considerable importance in the administration of criminal justice in these provinces is involved in these connected appeals which have been referred to me, under S. 429, Criminal P. C., for opinion on a difference of opinion arising between Jackson and Mohiuddin, A. J. C's., who formed the Bench and heard the said appeals. As I shall show later on, there has been a considerable divergence of opinion among the Judges of this Court in the matter of interpretation of the provisions of S. 30, Evidence Act. Both the learned Government Advocate and the counsel for the appellants have, therefore, moved me to refer the matter to the decision of a Full Bench in order that the conflict of views existing at the present date be set at rest and the law definitely laid down for the guidance of the Judges of this Court and Subordinate Courts in future. Accepting their suggestion I order that the case be laid before the Judicial Commissioner for favour of constituting a Full Bench to hear the matter.

The facts of the case are clearly given in the first three paragraphs of the opinion of Jackson, A. J. C., and need not therefore be repeated here at any length. Five persons were concerned in the alleged murder of one Fadal of whom one Sitaram alone made a confession implicating himself and the other co-accused. Excepting the con-

fessional statement of Sitaram, there was no other evidence which by itself established the charge against the confessing accused but the Sessions Judge convicted them practically upon the confession of Sitaram.

The principal question involved in the decision of the appeals before the Bench was if the self-inculpatory statement of the appellant, Sitaram, implicating the other four appellants who were his co-accused, was a piece of substantive evidence against them, or was merely a matter that could be taken into consideration with any other piece of evidence incriminating them.

Jackson, A. J. C., following the views of Hallifax, A. J. C. in *Sapku v. Emperor* (17) and of Batten and Stanyon A. J. C's, in *Emperor v. Malhari* (7) held that the confession of the co-accused was substantive evidence against the other co-accused while Mohiuddin A. J. C., following the dicta of Stevens, J. C., in *Empress v. Karim Bax* (1), of Kotval and Prideaux, A. J. C's, in *Sapku v. Emperor* (17) and of Findlay, J. C., and Prideaux, A. J. C., in *Diwan Dhimar v. Emperor* (18) held that the confession of the co-accused not being evidence was only a matter which could be taken into consideration if there was other evidence in the case to lend assurance to that evidence and could not form the basis of conviction of the other co-accused even though there might be corroboration of the statement of the co-accused.

Reference may also be made here to three other decisions of this Court, viz., that of Kotval and Kinkhede, A. J. C's, in *Shaikh Shero v. Emperor* (19), of Wadegaonkar, A. J. C., in *Raghunath v. Emperor* (20) and of Kinkhede, A. J. C., in *Necha v. Emperor* (21) in which the learned Judges followed the law as propounded in *Empress v. Karim Bax* (1). The cases from the other High Courts in which one or the other view was taken are cited at length by Jackson, A. J. C., in para. 5 of his opinion and by Mohiuddin,

(17) A. I. R. 1924 Nag. 140.

(18) A. I. R. 1926 Nag. 229.

(19) A. I. R. 1925 Nag. 78=81 I. C. 891=25 Cr. L. J. 1067.

(20) A. I. R. 1926 Nag. 119=89 I. C. 516=26 Cr. L. J. 1880=23 N. L. R. 62.

(21) A. I. R. 1928 Nag. 218=109 I. C. 801=29 Cr. L. J. 609.

A. J. C., in paras. 10 to 12 of his opinion and are not, therefore, again cited here.

I refer the following points to the decision of a Full Bench :

(1) Whether the self-inculpatory confession of an accused implicating his co-accused is substantive evidence upon which alone the conviction of his co-accused could legally be based and if not,

(2) whether such a confession even if it be corroborated by other evidence which is insufficient by itself to sustain the conviction of the non-confessing co-accused could form a legal basis for his conviction.

Opinion

Subhedar, A. J. C.—On account of the importance of the subject and the conflict of views held thereon by many eminent Judges of this Court and other High Courts in India the following points have been referred to the decision of the Full Bench:

(1) Whether the self-inculpatory confession of an accused implicating his co-accused is substantive evidence upon which alone the conviction of his co-accused could legally be based and if not,

(2) whether such a confession even if it be corroborated by other evidence which is insufficient by itself to sustain the conviction of the non-confessing co-accused, could form a legal basis for his conviction.

The points under reference really invite the decision of the sole question whether, under the provisions of the Evidence Act, which is unquestionably a self-contained enactment, not only defining and amending but also consolidating the law of evidence in India by repealing all rules other than those saved by the last portion of its second section, a self-inculpatory confession of an accused is or is not judicial evidence against his co-accused. If the answer to this question is in the negative it logically follows that the answer to both the points referred to must also be in the negative.

The matter was indeed argued very ably and exhaustively on both sides. The learned Government Advocate tried to maintain that there was practically no difference between the confession of a co-accused and the evidence of an accomplice and that a conviction could not be illegal if based solely upon such a confession, while Mr. Kedar, for the appellant, contended that such a confession, not being judicial evidence, no conviction could legally be obtained on its basis.

Section 30, Evidence Act, is worded as follows:

"When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession."

It is to be noted that under S. 5, Evidence Act

"evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others."

What is oral and documentary evidence is defined by S. 3 of the Act and it is obvious that a self-inculpatory confession of a co-accused does not fall within the category of this class of evidence. It is equally clear that such a confession as aforesaid has not been declared "relevant" by any of the several sections of Chap. 2, Evidence Act, which defines and declares what facts are relevant nor is it declared to be so by any other sections of the Act. To take only two of the many instances, S. 28, Evidence Act, declares the confession of an accused relevant against himself provided it escapes the attraction of Ss. 24 to 26 *ibid.*; and S. 133 declares an accomplice to be a competent witness against an accused person. It follows therefore that since the self-inculpatory confession of a co-accused does neither fall within the definition of evidence nor is declared "relevant" by the Evidence Act, it is not admissible to prove the existence or non-existence of a fact in issue in a case. The matter may also be considered from another standpoint. Prov. 1, S. 165, Evidence Act, lays down in unequivocal terms

"that the judgment must be based upon facts declared by this Act to be relevant, and duly proved."

From this it is apparent that the confession of a co-accused, which is not declared either relevant or evidence by the Evidence Act, could not possibly form the basis of a legal judgment. Obviously therefore it must be rigorously excluded from consideration except to the extent permitted by S. 30 of the Act itself.

It further appears to me quite clear that the legislature has advisedly used the words "may take into consideration" in S. 30, Evidence Act, making it optional with the Court to use or not to

use the self-inculpatory statement of an accused against his co-accused. Giving the natural meaning to the terms of the said section it is apparent that the Court has got the right to exclude such a confession altogether from consideration against an accused person if it is so disposed. No such option is, however, left to the Court in respect of facts declared relevant or evidence under the Evidence Act and duly proved, and the Court is bound to consider these though it may reject them on their merits; otherwise its judgment would be vitiated.

The words "may take into consideration" in S. 30, Evidence Act, also connote the idea that there must be other material besides the confession of a co-accused to form the basis of the conclusion to be arrived at in a case. To my mind these words are deliberately inserted by the legislature so as to exclude the possibility of such a confession being used by itself against a non-confessing accused in the determination of his guilt.

In *Empress v. Govind* (22), Stevens, J. C., in setting aside the conviction which was based solely upon the confession of a co-accused made the following weighty observations :

"I think the conviction of this appellant is bad in law. The Magistrate is not correct in regarding a confession of an accused person implicating a co-accused under S. 30, Evidence Act, as the same thing as 'the testimony of an accomplice' which is referred to in S. 133 of the Act. It is plain from the words of the latter section that it contemplates that the accomplice shall be examined as a witness. This being so, the provision that 'a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice' has not application to the case of an uncorroborated confession taken into consideration as against a co-accused jointly tried with the confessing accused under S. 30."

Again, in *Empress v. Karim Bax* (1) the same eminent Judicial Commissioner expressed himself on the effect of S. 30, Evidence Act, as follows:

"It (the confession of a co-accused) is not in itself substantive evidence and we may not start with it as a basis, proceeding to inquire how far it is corroborated. It can be used only in a subsidiary manner in connexion with the substantive evidence adduced in the case. We have thus to have recourse in the first instance to the evidence of the witnesses."

The principles laid down in the above cases were followed by Pridaux and Kotval, A. J. C's., in *Saptu v. Emperor*, (22) [1896] 9 C. P. L. R. 35 Cr.

A. I. R. 1922 Nag. 146; by Findlay, J. C., and Pridaux, A. J. C., in *Diwan Dhimar v. Emperor*, *A. I. R. 1926 Nag.* 229; by Kinkhede, A. J. C., in *Necha v. Emperor*, *A. I. R. 1928 Nag.* 213, and by Mohiuddin, A. J. C., in the case out of which this Full Bench reference has arisen.

I shall now briefly refer to some of the most important cases of the other High Courts which were cited at the Bar and otherwise discovered by me and which bear upon the question under consideration. The earliest view of the Calcutta High Court was expressed by Phear, J., in *Queen v. Sadhu* (12) where the learned Judge characterized S. 30 of the Act as "dangerous material" and held that it was discretionary with the Judge to act upon it or not. Jackson, J., in construing the words "may take into consideration" appearing in the said section remarked as follows in *Queen v. Chandra Bhattachari* (23) :

"The section does not provide as has been repeatedly pointed out by this Court, that such confession is evidence; still less does it say that it may be the foundation of a case against the person implicated. The legislature very guardedly says that it may be taken into consideration, and I think, that the obvious intention of the legislature in so saying was that, when, as against any such person there is evidence tending to his conviction, the truth or completeness of this evidence being the matter in question, the circumstance of such person being implicated by the confession of one of those who are being jointly tried with him should be taken into consideration as bearing upon the truth or sufficiency of such evidence. In this case, the Judge has proceeded in the inverse way, and has taken the confession of a fellow prisoner as the basis of a case against the appellant."

This view was dissented from by that Court in the Full Bench case of *Empress v. Ashootosh* (2) wherein it was laid down that under S. 30, Evidence Act, the confession of a co-accused was evidence proper on which a conviction could legally be based. However, the earlier view of that Court, that such a confession was not evidence but was matter only to be taken into consideration to lend assurance to other evidence, was upheld in *Emperor v. Lalit Mohun* (4) where at p. 588 Jenkins, C. J., expressed himself in these words:

"The language of the section is guarded, and the history of this Act leaves me no doubt that this section was designedly framed in these terms. While 'admissions,' a word which (22) 24 W. R. 42 Cr.

embraces confessions, are by S. 21 relevant, and may be proved as against the person making them, all that S. 30 provides is, that the Court may take them into consideration, as against other persons. This distinction of language is significant, and it appears to me that its true effect is that the Court can only treat a confession as lending assurance to other evidence against a co-accused."

It is true that in *Emperor v. Babar Ali* (5), Fletcher, J., observed that the confession of an accused "can be taken into consideration" against other accused provided it is corroborated, but whether as a matter of precaution or as a rule of law is not made clear. Since no reference is made in this case to the decision in *Emperor v. Lalit Mohan* (4) it cannot be said that the law as propounded therein was overruled in this case.

Coming to the decision of the Bombay High Court it appears that serious conflict of opinion arose amongst the several Judges of that Court in the following two notable cases:

Emperor v. Gahappa Kardeppa (8) and *Emperor v. Sabitkhan Bahadurkhan* (15). In the first case Macleod and Heaton, JJ., held that the confession of a co-accused was substantial evidence, while Shah, J., held the contrary view. In the second case Scott, C. J., to whom the case was referred on a difference between Heaton and Shah, JJ., held that if the confession of a co-accused was substantially corroborated by other evidence it could form the basis of a legal conviction.

The earlier view of the Allahabad High Court as expressed in *Empress v. Nirmal Das* (9) was that such confessions could only be taken into consideration along with other evidence in the case, but in *Emperor v. Kehri* (6) this view was dissented from and it was held that they were substantive evidence in a case and a conviction based solely thereon was not illegal. Again, in *Emperor v. Kalwa* (16) the learned Judges who formed the Bench declined to apply the law as laid down by that Court in *Kehri's* case but preferred to follow the view of Garth, C. J., in *Empress v. Ashootosh* (2).

The view of the Madras High Court on this question appears to have been consistent throughout. In 7 *Mad. H. C. App. 15: Weir 740 (Anonymous)* it was held that S. 30 was an exception,

and its wording showed that the confession of an accused was merely to be an element in the consideration of the evidence and that unless there was something more, the conviction of a co-accused based upon it would still be a case of no evidence and bad in law. The latest pronouncement of that Court to the same effect is to be found in *Giddigadu v. Emperor* (3).

In *Devendra Bhattacharya v. Emperor A. J. R. 1927 Pat. 257* a Divisional Bench of the Patna High Court approved and followed the view of the Calcutta High Court on this point as propounded in *Emperor v. Lalit Mohan* (4).

It only remains to notice the two unreported cases of this Court in which the view propounded in *Emperor v. Kehri* (6) and some of the Bombay cases already noticed was followed by some of the Judges of this Court. They are the decisions of Hallifax, A. J. C., in *Sapku v. Emperor* (17), of Batten and Stanyon, A. J. C's., in *Emperor v. Malhari* (7), and of Jackson, A. J. C., in the case out of which the present reference has arisen. With due deference, I regretfully differ from the learned Judges who held the view contrary to that expressed in *Empress v. Karim Bax* (1) as I find their reasoning unconvincing.

For reasons given in paras. 4 to 8 above and relying on those decisions of the other High Courts which follow the views similar to those propounded in *Empress v. Karim Bax* (1), I am of opinion (a) that the confession of a co-accused is not substantive evidence, like the testimony of an accomplice, upon which alone the conviction of an accused could legally be based; (b) that no conviction could also be legally based upon such a confession even though it be corroborated by other evidence which by itself would not sustain the conviction; and (c) but such a confession may be taken into consideration along with other evidence in the case as bearing upon the truth or sufficiency of that evidence or as lending assurance to it.

Using the word "evidence" in the popular sense, the confession of a co-accused not having the sanctity of oath nor the test of cross examination behind it, is, from its very nature, evidence of the very weakest and subsidiary char-

acter and the Court should not, in the first instance, start with it proceeding to enquire how far it receives corroboration from other evidence on record. It may, however, be legitimately used to corroborate other evidence and even to supplement the same in those exceptional cases in which without such an aid the other evidence falls short by a very narrow margin of that standard of proof which is requisite for a conviction. It is not possible to lay down any hard and fast rule as to the extent to which the confession of a co-accused may be used to supplement the substantive evidence in a case and it must be left open to the Court, in each case, in the exercise of judicial discretion, to decide for itself under what circumstances and to what extent it should be so used. My answer to both the points referred to is, therefore, in the negative.

Macnair, A. J. C.—I have had the advantage of reading the opinion of my brother Subhedar. Although my answers to the questions do not differ widely from the answers given by him, I find it desirable to deliver a separate opinion. The first question as framed makes use of the word "evidence" in a sense in which it is not used in the Evidence Act. Evidence is defined in S. 3 of the Act. I entirely agree with the following commentary on this definition in Woodroffe and Amër Ali's Law of Evidence, 8th Edn. p. 108 :

"The word 'evidence' as generally employed is ambiguous : (a) It sometimes means the words uttered and things exhibited by witnesses before a Court of justice : (b) at other times it means the facts proved to exist by those words or things, and regarded as the groundwork of inferences as to other facts not so proved : (c) again it is sometimes used as meaning to assert that a particular fact is relevant to the matter under enquiry (Steph. Introd., 3, 4). The word in this Act is used in the sense of Cl. 1. As thus used it signifies only the instruments by means of which relevant facts are brought before the Court (viz., witnesses and documents), and by means of which the Court is convinced of these facts."

Section 30, Evidence Act, mentions the necessity for proof of a confession, and the word "evidence," as defined in the Evidence Act, means the oral or documentary evidence by means of which a confession is proved. It appears to me desirable to use words in accordance with the definitions in the Evidence Act when discussing the meaning of a section of that Act, and I am not

certain in what exact sense the word "substantive" is used. I therefore consider that the first question should be stated :

"Whether the self-inculpatory confession of an accused implicating his co-accused is a fact upon which alone the conviction of his co-accused could legally be based ?"

The proposition that S. 30, Evidence Act, allows consideration of a confession against a co-accused only when there is other matter for consideration against that co-accused has been accepted by many eminent Judges. I may refer to *Queen v. Chunder Bhutacharjee* (23) at 43 ; *Emperor v. Lalit Mohan Chuckerbitty* (4), *Giddigadu v. Emperor* (3) and *Emperor v. Gangappa Kardeppa* (8) at 66 by Shah, J. I think the main reasoning of these Judges may be stated as follows : The confession of a co-accused is a statement made by an accomplice : that accomplice has confessed that he is guilty, but a very common reason for confession is that the evidence is so strong that denial is futile and that, if no trouble is given to the prosecution and the Court, there is a possibility of a lenient sentence ; the statement, then, should be treated with caution for reasons similar to those which apply to the evidence of an accomplice ; the statement in the confession has not been tested by cross-examination ; it is natural, then, that the Evidence Act should place restrictions upon the use of this confession : S. 30 which allows the confession to be used is framed in very guarded language : it is hardly possible that this language was intended to allow a Court to make as full a use of the confession as of any evidence given by witnesses : the section read as a whole means that the confession can be considered along with other matter.

It appears to me that this reasoning has considerable force, but, in my opinion, when the language of S. 30 is closely considered, it is clear that it allows consideration only in this manner. It allows a Judge to take the confession into consideration against a co-accused, and there is no reason to imagine that the words "take into consideration" were loosely used for the word "consider." In my opinion, a Judge cannot take a fact into consideration unless he is at the time considering other facts ; it would be incorrect to say :

"I take into consideration all the proved facts"

instead of "I consider all the proved facts." The words of S. 30, then, do not allow a Judge to consider the confession of a co-accused against that co-accused unless there are other relevant facts under consideration. I therefore answer the first question in the negative: S. 30 does not allow the confession to be used in the manner suggested.

The opinions of the learned Judges who have taken the opposite view are entitled to respectful consideration. With due respect I venture to give my opinion that they have not given due weight to the argument that the framers of the Act would have simply stated that the confession was "a relevant" fact or "could be proved" against the co-accused if that was what they intended to convey; and that these Judges have not appreciated the meaning of the words "take into consideration." Heston, J., in *Emperor v. Gangappa Kardeppa* (8) at 163 states:

"These words, in my judgment, are exactly appropriate to making the confession, which is already evidence in the case, evidence against the person implicated as well as the other accused."

Macleod, J., (at p. 175) disagrees with the argument that S. 30 must be read as if it said that the confessions might only be taken into consideration along with other evidence against the accused "evidence" is used in a wide sense as meaning any matter which the Court may consider. I add that the use of the ambiguous word "evidence" has facilitated the conclusion that the confession can be used in the same way as statements made by witnesses. Had the word "fact" which has no technical meaning been used it would have been more easy to see that S. 30 allowed this fact to be used only in a particular manner.

The second question referred to the Bench must also, in my opinion, be answered in the negative. S. 30 permits the confession to be taken into consideration along with other relevant facts; it does not permit consideration of the confession in the way indicated by this question.

But I think an answer in the negative is not a full answer to the point which it was intended to refer to the

Full Bench. There should be an answer to the question:

"If there is other relevant matter implicating the co-accused, but insufficient to justify a conviction can the confession be used to supplement this matter and render a conviction proper?"

In my opinion, S. 30 which lays down that the confession can be taken into consideration against a co-accused, furnishes a clear answer in the affirmative. S. 30 is clearly intended to provide for the case where a Judge, if he were to leave the confession out of consideration and consider the other proved facts, might not convict the co-accused. I approve of the remarks of Jackson, J. in *Queen v. Chunder Bhuttacharjee* (23) and Stevens, J. C., in *Empress v. Karim Bax* (1) quoted by my learned colleague Subhedar.

My brother Subhedar holds that the confession can only be used when the other proved facts fail by a very narrow margin to justify a conviction. He has quoted with approval the opinion of Jenkins, C. J., in *Emperor v. Lalit Mohan* (4) to the effect that the confession can only be treated as lending assurance to other evidence against a co-accused. Jenkins, C. J., has laid stress on the fact that S. 30 states that a Court may take the confession into consideration. Now, the word "shall" could not have been used since there might be no consideration into which the confession could be taken. Again, it is frequently the case that the Court has already dealt with the confession as affecting the accused who confessed before dealing with the case against the co-accused. The Judge may have formed the opinion that the confession was of no value for any purpose or was entirely unreliable in so far as it implicated the co-accused. Again, the Judge might hold that the other matter for consideration was so conclusive against the co-accused that the confession need not be considered. It appears to me, then, that the use of the word "may" does not show that every confession is of very small value against a co-accused. I do not think it can be said that the word "may" gives the Court the right to exclude the confession from consideration if it is so disposed. The Judge is given a discretion but the discretion must be exercised in a judicial manner; if the con-

fession would help in arriving at a decision that the co-accused is guilty (and the Judge is allowed to consider the confession) he must do so. My brother Subhedar's opinion appears to be based partly on the view that the confession does not fall within the definition of "evidence" and is not declared relevant by the Evidence Act. I have pointed out that the relevant facts on which a judgment can be based are not evidence as defined in the Act. In my opinion when S. 30 lays down that a Judge may consider a fact in certain circumstances it plainly declares that fact to be relevant in those circumstances. In S. 27 of the Act the declaration that certain matter is relevant is made by stating that the matter may be proved. It can equally be made by stating that matter may be considered; for the idea that a fact not proved against an accused should in any way be considered against him cannot be entertained for a moment. S. 30 appears to me to lay down that, before deciding to what extent the evidence adduced is reliable and whether the facts proved by that evidence are sufficient for a conviction the Judge may take the confession into consideration. I can find no support in the words of the section for the view that this can only be done if the other evidence is very nearly sufficient for a conviction. My answer to the question is that, if there is any other relevant matter implicating the co-accused, the Judge is permitted by S. 30, Evidence Act, to consider the confession along with the matter, and as a result of such consideration to convict the co-accused.

Findlay, J. C.—I have had the advantage of perusing the opinions of my learned brothers Macnair and Subhedar, A. J. C's. I would also answer the first question referred to us in the negative, and I concur with Macnair, A. J. C., that if, in that question, the word "fact" had been used instead of "evidence," the position would have been clearer.

As regards the second question referred to the Bench, I am disposed to agree with Macnair, A. J. C., that it has been unfortunately phrased and as it stands it has to be answered in the negative. If, however, it were framed in the terms proposed by Macnair, A. J. C., viz:

"If there is other relevant matter implicating the co-accused, but insufficient to justify a conviction, can the confession be used to supplement this matter and render a conviction proper?"

I should undoubtedly answer it in the affirmative. In my opinion the use of the words "take into consideration" is most suggestive. The phraseology in question, to my mind, connotes that the framers of the Evidence Act had, in their mind, the case where the other matter, on which a conviction could be based, was, to some extent, dubious or insufficient, under which circumstances the Court is entitled to take the confession into consideration. In a particular case the confession may complete the picture and render the conviction of the accused possible and proper, or again the confession may introduce inconsistency and throw doubt on the other matter on which the conviction was attempted to be based. I find it impossible, however, to lay down any definite or precise rule as to the quantum of evidence or other matter which must in the particular case be on record against the accused before the confession can be taken into consideration for the purpose of convicting the co-accused.

With all deference, however, I am unable to agree with Macnair, A. J. C., that S. 30 is a mandatory one and that the Court is bound to take such a confession into consideration. It seems to me that the phraseology used clearly implies that the Court has a discretion in the matter and can either take the confession into consideration as against the other co-accused. If the matter be looked at from the historical point of view, it is pertinent to point out that prior to the passing of the Evidence Act material like this, what one learned Judge called "dangerous material," could not be used at all against an accused person. The Act introduces a novel provision in this connexion, but I do not think that the framers of the Act intended anything more than to bestow a discretion upon the Court to take such confession into consideration if it so sees fit. Apart from this, however, I am in agreement with Macnair, A. J. C., that:

"If there is other relevant matter implicating the co-accused, the Judge is permitted by S. 30, Evidence Act, to consider the confession along with the said matter and, as a result of such consideration, to convict the co-accused."

To the questions, however, in the forms in which they have been referred to this Bench, my answers are, as already stated, in the negative.

Order

Subhedar, A. J. C.—The following five accused were convicted by the Sessions Judge, Hoshangabad, of murdering one Fadal and the first four were sentenced to death while the fifth received the sentence of transportation for life:

(1) Gobarya, the separated brother of the deceased Fadal.

(2) Mt. Kashi, wife of accused, 1.

(3) Sitaram, son-in-law of the first two accused,

(4) Budhia, not related to any of the accused.

(5) Asaram, the son of the first two accused.

Besides the confession of Sitaram fully implicating himself and the other accused, there is the following evidence on the record:

(1) The evidence of Salok (P. W. 7) that on the night following the bhujaria (Wednesday) about two months prior to his examination at the Sessions trial he had seen the first four accused on the Chindwara road near a banian tree going in the direction of the river. The time was when people generally go to bed.

(2) The evidence of Bhabutram (P. W. 2) and Sojar (P. W. 10) that there was ill-feeling existing between the first two accused and the deceased since the partition between them was effected last year and the evidence of Sojar (P. W. 10) and Madho (P. W. 4) that Budhia had some quarrel with Sojar since about 20 years.

All the five accused persons preferred appeals to this Court which were heard by Jackson and Mohiuddin, A. J. C's., with the result that the conviction of Sitaram was maintained and that of Asaram set aside. The learned Judges having, however, differed in their conclusions on the appeals of the remaining three appellants their cases have been referred to me, under S. 429, Criminal P. C., for opinion. Jackson, A. J. C., starting with the confession of Sitaram and holding that it was sufficiently corroborated by the aforesaid evidence was of opinion that the conviction of the first three appellants should be upheld. Mohiuddin, A. J. C., on the other hand,

holding that the confession of a co-accused was not substantive evidence though corroborated in some particulars was of opinion that the convictions of these appellants should not be upheld. In the alternative he also held that the two facts mentioned above did not amount to any corroboration of the confession of Sitaram.

As there was serious conflict of views with regard to the true scope of the provisions embodied in S. 30, Evidence Act, I had referred the following two questions for the decision of the Full Bench:

1. "Whether the self-inculpatory confession of an accused implicating his co-accused is substantive evidence upon which alone the conviction of his co-accused could legally be based, and if not.

2. Whether such a confession even if it be corroborated by other evidence which is insufficient by itself to sustain the conviction of the non-confessing co-accused, could form a legal basis for his conviction."

Both these questions have been answered in the negative by the Full Bench which consisted of the Judicial Commissioner, Macnair, A. J. C., and myself. I, therefore, proceed to examine how far the evidence referred to in para 2 above, connects the appellants whose appeals are before me with the crime of which they stand convicted. The evidence of Salok (P. W. 7) is on the face of it very vague and stands alone. The place where the witness met the first four accused is described in the map (Ex. P-5) as No. 3 and is roughly, half a mile from No. 1, the ghana where Fadal is alleged to have been murdered. This evidence is in serious conflict with the confessional statement of Sitaram on the very important points of time and the number of persons. Whereas Sitaram stated that the whole party of murderers started from the house of accused 1 for going to Sojas's ghana where Fadal lived at about 12 midnight" Salok (P. W. 7) stated that he had met them at a time when all people generally go to bed" which expression does ordinarily mean 10 p. m., at the latest. Further, whereas Sitaram stated that all the five accused had gone together, Salok makes mention only of the first four accused. It is also worthy of note that Sitaram makes no mention of the fact that the party of five murderers had met Salok at any place en route to the ghana of Sojar.

Even if the evidence of Salok (P. W. 7) be believed in its entirety it fails, in my opinion, to establish any connexion of the present appellants with the murder of Fadal.

As to the next piece of evidence of a general enmity between the deceased, Fadal, and the first two accused, it is enough to say that by itself or even in conjunction with the first piece of evidence it is wholly insufficient to uphold the conviction. In *Emperor v. Kalwa* (16) it is observed that the existence of general enmity and a desire however strong or a motive however effective to procure the death of another person may be a piece of circumstantial evidence, but is not corroboration of a sworn statement of participation in a particular crime.

In view of the principles now laid down by the Full Bench I must hold that for want of evidence in the present case the conviction of the three appellants, Gobarya, Mt. Kashi and Budhia, should not be upheld. I therefore agree with the opinion of Mohiuddin, A. J. C., that they should be acquitted. The records will now be returned to the Bench before whom the appeals are pending.

Order.—In accordance with the opinion of Subhedar, A. J. C. to whom the case was referred under S. 429, Criminal P. C., we direct that Gobarya, Kashi and Budhia be acquitted and set at liberty. The conviction of Sitaram is upheld and the sentence of death confirmed. Asaram's case has been disposed of separately.

P.N./B.K.

Order accordingly.

1930 Cr. Cases 831

(Nagpur.)

SUBHEDAR, A. J. C.

Girdhari—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 12-B of 1930, Decided on 14th March 1930, against decision of Sub-Div. Magistrate, Basim, D/- 9th January 1930, in Criminal Appeal No. 108 of 1929.

(a) Criminal P. C., S. 256—Mere recording of reasons, if no good reasons are forthcoming, would not save trial from incurable irregularity if it results in prejudice to accused—Fact that Magistrate or prosecution witnesses had to leave place of trial immediately

are not good reasons to take up case on Sunday—Criminal P. C., S. 537.

It is not so much the recording of the reasons as the adequacy thereof which should count in the determination of the question if the provisions of S. 256 have been complied with. If no good reasons are forthcoming, merely recording them in writing by the Magistrate would not save the trial from the taint of an incurable irregularity if it results in prejudice to the accused. The reasons that the Magistrate had to go out for urgent work or that the prosecution witnesses had to leave the place of trial immediately are not good reasons for taking up a case on Sunday and rushing through the trial without giving the accused proper opportunity to defend himself.

[P 833 C 2]

(b) Criminal P. C. (1923), S. 256—Omission to follow new procedure inserted in S. 256 by amending Act of 1923 of requiring accused to state "at the commencement of next hearing" whether he wishes to cross-examine prosecution witnesses is irregularity vitiating trial—Criminal P. C., S. 537.

The provision that the accused should be asked whether he wishes to cross-examine the prosecution witnesses on a date subsequent to that upon which he is called upon to plead to the charge, inserted in S. 256 by the amending Act of 1923 by words "at the commencement of the next hearing," is obviously intended to give the accused an interval of time to think out the lines of his defence before he is called upon to inform the Court how he intends to proceed and an omission of this new procedure is an irregularity which vitiates the whole trial: 7 L.L.J. 114, *Foll.* [P 833 C 2, P 834 C 1]

(c) Criminal P. C., S. 537—Magistrate taking up case on Sunday—Accused not given opportunity to appoint pleader and to defend himself properly—Trial is void.

There is very serious prejudice caused to the accused amounting to a failure of justice by the trying Magistrate rushing through and completing the trial of the accused on a Sunday without his consent and without affording him an opportunity of properly defending himself by appointing a pleader and so the whole trial is void: (1864) W. R. Cr. 2 and 17 Bom. L. R. 918, *Foll.* [P 834 C 2]

(d) Criminal Trial—Complainant's story so grotesque as to be on the face of it improbable—Accused convicted—Trial vitiated by irregularity prejudicing accused's case—Accused having served out more than half sentence retrial should not be ordered.

Where a conviction is set aside on the ground of material irregularity of procedure, a retrial should ordinarily be ordered. But where the complainant's story is so grotesque that it is on the face of it improbable, and the accused has already served out more than half the sentence, retrial should not be ordered if the trial is vitiated by material irregularity prejudicing his case: 3 Pat. L. W. 224, *Rel. on.* [P 835 C 1]

Abdul Razak—for Applicant.

Order.—The applicant, Girdhari Sonaji, aged 32, metal moulder by profession and resident of Khamgaon, Dis-

trict, Buldana, has filed this application for revision of an order passed by Mr. Utgikar, Tahsildar and Magistrate Second Class, Basim, convicting him of an offence under S. 354, I. P. C., and sentencing him to six months' rigorous imprisonment and a fine of Rs. 25. This conviction was upheld in appeal by Mr. Sanyal, Sub-Divisional Magistrate, Basim. As the case involves a decision of substantial questions of procedure, it is necessary to state the facts at some length. There was a fair at Mouza Loni in the Basim taluq of the Akola district, where Mr. Utgikar and the Sub-Inspector, Police Station House, Risod, were on duty. On Sunday 1st December last at 12-30 p. m. Tulsi made a complaint to the police which was taken down by the Sub-Inspector (Ex P-1), the official translation of which is as under :

"I had gone to the fair with my brother Kisan. I and the men and women, who accompanied us, were going in a line. And the man brought before me was going by the cross-road, who caught hold of my left breast amidst the crowd. I then began to cry, and when asked by Anjoni, I pointed out the man, who caught hold of my breast. Bhunga, Gangu have seen him in the act of catching my breast. I wish to file complaint."

Soon after this a challan was presented before Mr. Utgikar, who rushed through the trial and after examining only the complainant, her brother and one Mt. Gangu passed the judgment convicting the applicant as stated above. The order-sheet of the Magistrate runs as under :

"1st December 1929—Loni—Challan under S. 354, I. P. C.
Register.

Present—Accused in custody and all P. W's.
Evidence for prosecution recorded.

Accused examined. Charge framed. For reasons noted inside he is asked forthwith.

He pleaded not guilty but has no defence to make.

Judgment given. P. W's. allowed to go."

Being undefended by a pleader the applicant did not at all cross-examine the other two prosecution witnesses and put only a single question to the complainant which elicited the reply : "I pointed out the accused correctly to my brother and made no mistake." In the form which is prescribed for recording the plea of defence of the accused the trying Magistrate noted as under :

"(Complainant and witnesses are from Hyderabad State and are leaving the fair to-night. I am leaving this tomorrow. So accused is asked forthwith.)

He does not wish to ask anything to any of the P. W's. any more."

The plea of the accused was recorded in the following words :

"I am innocent. I have no defence to make."

On 6th December 1929, Mr. Asgherali, pleader, presented an appeal on behalf of the applicant in the Court of the District and Sessions Judge, Akola, but the memorandum was returned to him on the same day for presentation to the proper Court. It was accordingly presented in the Court of Mr. Sanyal, Sub-Divisional Magistrate, Basim, on 9th December, 1929, who immediately passed an order under S. 426, Criminal P. C., releasing the appellant on bail, till the decision of the appeal. The applicant, who had in the meantime reached the Akola jail, did not probably know that his relations had engaged a pleader and got the appeal presented and therefore on 10th December 1929 he filled up the prescribed form of appeal which was forwarded by the Superintendent of the jail to the Deputy Commissioner, Akola, who in his turn sent it on to the Sub-Divisional Magistrate, Basim, on 13th December 1929. On a slip attached to this memorandum of appeal there is an endorsement of Mr. Sanyal bearing date 20th December 1929 to the effect that "this has already been registered" implying obviously that he had taken cognisance of the appeal presented by Mr. Asgherali already.

Among other grounds two important questions relating to the procedure adopted by the trying Magistrate were raised in appeal before the Sub-Divisional Magistrate and it was contended that the trial was prejudicial to the accused and otherwise invalid. The first was that the case was taken up by the Magistrate on a Sunday evidently without the consent of the applicant, and the second was that no opportunity was allowed to the accused to engage a pleader to properly conduct the defence and cross-examine the prosecution witnesses.

Both these contentions were overruled by Mr. Sanyal and they are again pressed before me by the learned pleader for the applicant. While admitting that

"the Magistrate ought not to have taken up the case on a Sunday."

Mr. Sanyal held that it did not cause any prejudice to the accused because, even if the case were taken up on the following day, the accused could not possibly have engaged a pleader. He further observed that "the appellant had sent his appeal from the jail; therein he notes that he does not desire to be represented" by a pleader on the 10th December 1929."

Mr. Sanyal has evidently a short memory and is certainly wrong in stating that in the memorandum of appeal sent from jail there is a note by the appellant to the effect that he did not wish to be represented at the hearing of the appeal. Having perused this memorandum of appeal I do not find any such note in it. As a matter of fact a proper appeal was already filed by Mr. Asgheralli, pleader, before Mr. Sanyal on 9th December 1929 on which date he himself passed an order for bail, and it appears from his order-sheet of 7th January 1930 that the appeal was argued on merits by the pleader on that date. Therefore the suggestion made by Mr. Sanyal, with reference to the memorandum of appeal from jail, that applicant was not in a position to engage a pleader, even if the case was not taken up on Sunday, is obviously incorrect and very misleading.

In para. 4 of the Judicial Commissioner's Criminal Circular IV-4 it is laid down that "the Courts are entirely closed on every Sunday." As far back as 1864 a Bench of the Calcutta High Court, in setting aside an order passed on a Sunday, made the following pertinent observations in *Grijamonee v. Ishur Chander* (1):

"But, as a rule, the Magistrate should not sit as a Judicial Officer, and dispose of cases in the ordinary course of business on a Sunday, because, to put it upon no higher ground, Sunday is a recognized holiday throughout the country; and on that day judicial business is suspended in all the Courts, and parties might be put to great inconvenience if their cases were liable to be called up for hearing on that day at the caprice of a Magistrate, and much injustice might be done."

Again, this very point arose in *Baban Daud v. Emperor* (2) where the trial of an accused was commenced and practically finished on a Sunday, the accused being unable to engage a pleader, and the judgment convicting

him was pronounced on the following day. The conviction of the accused was set aside by a Bench of the Bombay High Court on the ground (1) that there was an irregularity in procedure which had prejudiced the accused who could not be said to have had a fair opportunity to defend himself; and (2) that the fact that the accused did not ask the Court to adjourn the case did not make any difference. These conclusions have my entire concurrence.

On the second question Mr. Sanyal held that the reasons assigned by the trying Magistrate for rushing through the trial were cogent and did not prejudice the accused and that, since they were recorded in writing there was sufficient compliance with the provisions of S. 256, Criminal P. C. I shall show later on that the reasons assigned by the Magistrate were absolutely inadequate and the trial most certainly prejudiced the applicant. It is enough for the present to say that it is not so much the recording of the reasons as the adequacy thereof which should count in the determination of the question if the provisions of S. 256, Criminal P. C., have been complied with. If no good reasons are forthcoming, merely recording them in writing by the Magistrate would not, in my opinion, save the trial from the taint of an incurable irregularity if it results in prejudice to the accused.

Section 256, Criminal P. C., enacts that the accused shall be required to state *at the commencement of the next hearing of the case* whether he wishes to cross-examine any, and, if so, which of the witnesses for the prosecution whose evidence has been taken. The words underlined (here italicized) were inserted in the section by the Amending Act of 1923 and they clearly indicate the intention of the legislature that sufficient time should be given to the accused to consider whether he wishes to cross-examine any of the prosecution witnesses after the framing of the charge, and it is only in special cases that the Magistrate can require him to state forthwith if he so wishes *Ramchandra v. Emperor* (3). The provision that the accused should be asked whether he wishes to cross-examine the prosecution witnesses on a date subsequent to that

(1) [1864] W. R. Or. 2.

(2) [1915] 17 Bom. L. R. 918=81 I. C. 452=16 Cr. L. J. 752.

(3) A. I. R. 1928 Pat. 216=5 Pat. 110,

upon which he is called upon to plead to the charge, is obviously intended to give the accused an interval of time to think out the lines of his defence before he is called upon to inform the Court how he intends to proceed and an omission of this new procedure is an irregularity which vitiates the whole trial: *Phuman v. Emperor* (4).

The complainant's story was indeed so grotesque that it was on the face of it improbable and it was therefore the more necessary that every opportunity should have been afforded to the accused to engage a pleader to conduct the defence properly. The indecent assault at midday in a public fair upon a girl who was in the company of her brother and another woman, by a man, who evidently had a shop of his own in the fair as appears from the second sentence of the memorandum of appeal from the jail where he states that "he was at his shop" seems very improbable. Having regard to the fact that at public fairs crowds of people rush about from one place to another, it is not inconceivable that the hand of the accused may in passing have come in such close contact with the left breast of the complainant that she and her companions may have fancied an indecent assault, or it may be a case of mistaken identity. No map of the scene of occurrence is on record nor any attempt has been made by the trying Magistrate to clear up several other points which, under the circumstances of the case, required elucidation and which could only be done by close cross-examination of the three prosecution witnesses and visiting the scene of the alleged occurrence before it could be said that the charge against the accused was fully established. It is indeed a matter of very great regret that a senior officer of Mr. Utgikar's standing had not even the ordinary fairness to question the accused, situated as he was in a foreign place and suddenly confronted with the serious charge, if he wished to engage a pleader to defend him, in spite of the fact that the unfortunate man protested that he was wholly innocent of the charge.

In answer to the rule issued by this Court the District Magistrate has forwarded without any comment the try-

ing Magistrate's explanation the material portion of which runs as under:

"1. Discretion allowed by S. 356 (1), Criminal P. C. was exercised for reasons recorded in the plea and defence sheet. I must have returned to Basim by next evening (36 miles), viz. 2nd December 1929, to meet the Commissioner, Berar, on 3rd December 1929. The witnesses also were to leave the fair the same night.

8. As stated above (para 1) the case had to be taken up even on a Sunday and as I was there to do fair duty in all its aspects, immediate disposal of criminal cases was very necessary."

The above explanation cannot bear any serious examination. In taking up the case on a Sunday and hurrying through the trial Mr. Utgikar appears to have been moved more by a sense of looking to the convenience of the prosecution witnesses and himself than to the convenience of the unfortunate man who had the misfortune of being an accused before him to stand a trial for a serious offence. I fail to see how under the circumstances stated by the learned Magistrate "immediate disposal of criminal cases was very necessary." The reasons assigned appear to me to be wholly inadequate and were all avoidable. The prosecution witnesses were already in attendance and the provisions of the Criminal Procedure Code gave ample powers to the Magistrate to bind the witnesses down for future attendance and even if they failed to attend they could have been easily summoned or brought under arrest from the Nizam's Dominions as provided by the Judicial Commissioner's Criminal Circular IV-8 (1). The offence under S. 354, I. P. C., was a bailable one and even if the challan was presented by the Sub-Inspector on Sunday, Mr. Utgikar could have easily bailed out the accused and bound down the prosecution witnesses. At all events after the charge was framed he could have easily adjourned the case to a date suitable to himself and the prosecution witnesses if he had to leave the fair the next day in order to keep his appointment with the Commissioner on 3rd December 1929.

For reasons given above I hold that there was very serious prejudice caused to the accused amounting to a failure of justice by the trying Magistrate rushing through and completing the trial of the applicant on a Sunday without his consent and without affording him an

opportunity of properly defending himself. I therefore hold that the whole trial was void. I accordingly set aside the conviction of the applicant and order him to be set at liberty without further delay. The fine if paid will be refunded.

As a necessary consequence of my setting aside the conviction on the ground that it was void there should be a retrial, but in the special circumstances of the present case, when the applicant has served out more than half the sentence, I should be doing him more injustice by ordering his retrial than if I were to uphold the conviction and reduce the sentence to that already undergone which I consider would have been the proper measure of sentence to pass even on a valid conviction. I, therefore, accept the prayer of the applicant's pleader that there should be no retrial of the applicant: cf. *Bhase Singh v. Emperor* (5).

The present case furnishes a striking illustration of the way in which administration of justice suffers at the hands of overworked executive officers. It is, therefore, desirable that the superior executive officers should distribute the work of the two branches of administration among their subordinate officers in a manner that the latter may have no excuse whatsoever for rushing through their judicial work on account of the pressure of other work.

S.N./R.K. *Order set aside.*

(3) [1917] 3 Pat. L. W. 224=43 I. C. 109=
(1917) P. H. C. G. 87.

* 1930 Cr. Cases 835

(Nagpur)

FINDLAY, J.C., AND SUBHEDAR, A. J. C.
Sheikh Shafi—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 6-B of 1930, Decided on 18th March 1930, against decision of Addl. Sess. Judge, Amraoti, D/-11th January 1930.

(a) Evidence Act, S. 24—Approver in murder case making several statements implicating himself—At Sessions trial retracting confessions stating that he made them being tutored by police—His pardon withdrawn and he put on trial—No evidence to corroborate his retracted confessions—Confessional statements themselves wanting in natural details and contradicting each other on important points—There was no sufficient evidence to justify his conviction.

The weight to be given to a retracted confession must depend upon the circumstances

under which the confession was originally made and the circumstances under which it was retracted, including the reasons given by the prisoner for its retraction. Unless the confession is corroborated in material particulars by credible independent evidence, or unless the character of the confession and the circumstances under which it was taken indicate its truth it would be unsafe to rely on it.

The accused was appointed approver in a case of murder. He made several confessional statements implicating himself and the other accused in the murder. But at the Sessions trial he unreservedly retracted his previous statements as approver and that he knew nothing of the murder and that he was tutored by the police into making those statements which were false. The conditional pardon granted to him was withdrawn and he was put on his trial on the previous charge of murder. There was no evidence to corroborate his confession and further the various confessional statements made by him were wanting in those natural details which one would ordinarily expect in a free and voluntary confession. The statements also contradicted one another on several important points.

Held: that there was not sufficient evidence to justify his conviction: 31 *Mad.* 83; 13 *C. P. L. R.* 107; 20 *All.* 193: 15 *Bom.* 452; 22 *Cal.* 50; *A. I. R.* 1925 *Cal.* 587 and 53 *I. C.* 929, *Rel. on.*
[P 826 C 2, P 840 C 1]

* (b) Evidence Act, S. 32 (3)—Scope.

Where a person sentenced to death for murder makes a statement to a Magistrate about the time of his being hanged that the approver appointed to give evidence in the case, who had previously retracted his confessions, was not involved in the crime the statement may be admissible under S. 32 (3): *A. I. R.* 1925 *P. C.* 52, *Rel. on.* [P 840 C 2]

N. G. Bose—for Appellant.

Vivian Bose—for the Crown.

Judgment.—This is an appeal by Sheikh Shafi, a young mill labourer aged 20, who has been convicted by Mr. K. B. Sheorey, Additional Sessions Judge, Amraoti, of murdering one Hanmanta and sentenced to death. The appeal was received from jail but the appellant was represented at the hearing by Rai Bahadur N. G. Bose. Hanmanta was in the employ of the Badnera Mill and had disappeared from his quarters in September 1928. On 23rd March, at the instance of the Mill authorities, Mahomad Akbar (P. W. 4), who was then Sub-Inspector in charge of the Badnera Police Station House, broke open the quarters which had been kept locked by the missing man and recovered from his room a lot of property valued at about Rs. 400 as described in Ex. P-1.

On the same day Mahomad Akbar proceeded on leave and was succeeded by Kevel Krishna (P. W. 2) and the latter suspecting that Hanmanta had been

murdered began an investigation which resulted in the arrest and prosecution of the appellant and two other mill employees Pirusha and Sheikh Maheeb as being concerned in the murder of the missing Hanmanta. On 14th April 1929 the appellant made a formal confession before a Magistrate (Ex. P-9) implicating himself and the other accused. On 3rd May 1929 he received a conditional pardon and was made an approver (Ex. P-15). On the following day he was examined in the committing Magistrate's Court as the second witness for the prosecution and adhered to his confession. On 23rd July 1929, however, when he was examined as the ninth witnesses for the prosecution in the Sessions Trial No. 18 of 1929, he unreservedly retracted his confession and previous statement as an approver and stated that he knew nothing of the murder and that he was tutored by the police into making his previous statements which were false (Ex. P-18). The trial of the other two accused ended in their convictions which were maintained by this Court in appeal and both of them were hanged on 18th December 1929.

On the termination of the aforesaid Sessions trial on 30th July 1929, the Public Prosecutor having issued a certificate under S. 339, Criminal P. C. (Ex. P-17) that the appellant had forfeited his pardon, he was proceeded against and was committed to take his trial before the Court of Sessions on the original charge of murdering Hanmanta. This trial, as already stated above, has ended in the conviction of the appellant which is, however, solely based upon his own retracted confession.

Rai Bahadur Bose for the appellant did not controvert the finding of the Additional Sessions Judge that Hanmanta was murdered but he strongly contended that, in the absence of any other evidence, the conviction of the appellant, based as it admittedly was on his own retracted confession, was unsound, the more so as the circumstances on record throw a cloud of suspicion on the question of the said confession being true and a voluntary one. Although the Additional Sessions Judge has not, in his judgment, even referred to any evidence in corroboration of the confession of the appellant, the learned Government Advocate endeavoured to urge be-

fore us that there were certain facts which afforded corroboration in some measure though very slight and he therefore, submitted that the conviction should not be disturbed. It was also argued for the Crown that the confession having been duly recorded and adhered to by the appellant in the committal proceedings in the previous case, there could be no doubt that it was a true and voluntary confession.

Before dealing with the question of corroboration it is necessary, in the first instance, to determine how far the contention of the pleader for the appellant that the confession was not true and voluntary is sustainable. It is now well settled that the weight to be given to a retracted confession must depend upon the circumstances under which the confession was originally made and the circumstances under which it was retracted, including the reasons given by the prisoner for its retraction: *Queen-Empress v. Raman* (1) at p. 88.

While it is equally true that the use to be made of such a confession is a matter of prudence rather than of law, it has been held in a series of cases that it is unsafe for a Court to rely and act on a confession which has been retracted, unless after consideration of the whole evidence in the case, the Court is in a position to come to the unhesitating conclusion that the confession is true. This implied that, usually, unless the confession is corroborated in material particulars by credible independent evidence, or unless the character of the confession and the circumstances under which it was taken indicate its truth: *Empress v. Chutia* (2); *Queen-Empress v. Maikulal* (3); *Queen-Empress v. Dada Ana* (4) at p. 461 and *Queen-Empress v. Jagat Chandra Mali* (5) at p. 77; it would be unsafe to rely on it.

It is a matter of regret that the learned Additional Sessions Judge did not properly appreciate the principles enunciated in the several rulings cited by him in para. 7 of his judgment and, therefore, failed to apply them to the facts of the present case. It is not correct to say that *Empress v. Chutia* (2) stood overruled by the later decision in

(1) [1898] 21 Mad. 83.

(2) [1900] 18 C. P. L. R. 107.

(3) [1897] 20 All. 132—(1897) A. W. N. 224.

(4) [1891] 15 Bom. 452.

(5) [1895] 22 Cal. 50.

Bhaddu v. Emperor (6). In both the cases there was in fact other evidence which was considered to be sufficiently corroborative of the retracted confession. The fact that Ex. P-9, the confession in the present case, was recorded by Mr. Aminulla (P. W. 3) after taking the usual precautions did not, in our opinion, relieve the learned Judge of the necessity of probing into the circumstances both antecedent and subsequent to it in order to find out if it was really a free, voluntary and true confession and could be relied on in spite of its retraction and of the fact that there was little or no other evidence to corroborate it: *Jagran v. Emperor* (7). On a careful scrutiny of the materials on record it is abundantly clear to us that the confession of the appellant (Ex. P-9) as well as his statement made before the committing Magistrate (Ex. P-16) were inspired and made by him evidently under the influence of the police as stated by him in his evidence at the Sessions trial No. 18 of 1929 (Ex. P-18).

It is surprising that the attention of the learned Additional Sessions Judge was not drawn to Ex. P-6 which is on record and which goes to the very root of the whole matter. It is admitted by Kevel Krishna (P. W. 2) that, long before he inscribed his first information report (Ex. P-7) on 11th April 1929, he had, at the instance of Sheikh Mahebub, already arrested the appellant on 8th April 1929 at 5-30 p. m., and had questioned him and that two hours later while the appellant was still in his custody, he got the appellant's statement (Ex. P-6) recorded by Mr. Aminulla (P. W. 3) on oath in the Police Station House at Badnera. Neither the Sub-Inspector nor Mr. Aminulla have in their depositions given any reasons why it was thought necessary to take down the confessional statement of the appellant and that too on oath (Ex. P-6) in such a hurry and without, as admitted by the Magistrate himself, going through the prescribed formalities which he undoubtedly observed before he recorded Ex. P-9. Mr. Aminulla stated that he did not know if the appellant and Sheikh Mahebub were "formally then arrested or not." But surely it was as much his duty as a

responsible Magistrate to have enquired about this, as it was the plain duty of a responsible police officer in the position of Kevel Krishna (P. W. 2) to have informed the Magistrate that the appellant was already under arrest before he apparently prevailed upon the Magistrate to record the confessional statement of the appellant on oath.

It is conceded by the learned Government Advocate that Ex. P-6 could not, in the circumstances, be admissible in evidence but it can obviously be taken by us into consideration to find out if the subsequent formal confessional statement of the appellant (Ex. P-9) was or was not a free and voluntary statement as it purports to be. It is clear to us that after Ex. P-6 was taken it was not at all difficult to get Ex. P-9 recorded. In spite of his being sent to jail custody on 13th April 1929, the appellant could not have for gotten during the space of one day when he was not in police custody, that he had already made a statement on oath a week before and that it was not therefore possible or desirable for him to resile from it on the 15th idem when his confessional statement (Ex. P-9) was recorded.

The Sub-Inspector (P. W. 2) in his evidence states that on 30th April 1929, he made a recommendation to his District Superintendent of Police that the appellant should be made an approver by the grant of a conditional pardon. It is not stated by him why out of the two confessing accused, viz., the appellant and Sheikh Mahebub, the former alone should have been selected for being made an approver in the case. This course appears very likely to have been adopted with two objects. The challan was presented on 23rd April 1929, and the investigation had only disclosed that there was bare circumstantial evidence against Prusha and Sheikh Mahebub, while there was none whatsoever against the appellant. In order therefore to make the case against the other two accused complete by the introduction of direct evidence and at the same time to fulfil a possible promise made to the appellant to save him, the appellant was presumably selected for being made an approver. On account of his being only a raw youth of 20 he was possibly amenable to manipulation as would seem to have been the case, a matter

(6) [1918] 19 Or. L. J. 861=46 I. C. 1005.

(7) [1909] 13 C. W. N. 861=2 I. C. 681=9 C. L. J. 668.

which will be clear when we examine his several statements.

The several confessional statements of the appellant, Exs. P-6, P-9 and P-16, are wanting in those natural details which one would ordinarily expect in a free and voluntary confession. To begin with, there is nothing to show if the appellant and Sheikh Mahehub and Pirusha were on terms of such intimacy either by reason of age, 'friendship or relationship, that the latter would take him into their confidence to commit such a diabolical crime. The murder was committed evidently for loot and some of the property of the deceased was traced to the two persons who have already paid the extreme penalty for the crime. In his confession, however, the appellant does not say that he was even told of this object by the principal actors or that they induced him to join them for mercenary motives. He merely states that some five or six days after the murder he was only paid Rs. 10 by Pirusha. In the next place a careful comparison of the aforesaid three statements reveals that each subsequent one is a distinct improvement over its predecessor in very material particulars, regardless of its being contradictory to the previous one. This clearly indicates that there was another brain working behind that of the appellant; each statement subsequent to Ex. P-6 seems to fit in with the case for the prosecution as it developed from time to time during the investigation by the police.

In Ex. P-6 the appellant had stated that, about the middle of the previous rainy season, one day, when the factory was closed, he, Sheikh Mahehub, Piry and with "one black man in a dhoti" and one Hanmanta Mahar had gone to the house of Piry. From there at 1.30 a.m. they started to go to Masan; that Piry had a hatchet, a spade and Hanmanta Mahar had taken a lathi in his hand; that Piry dealt the deceased a blow with the hatchet from behind; that Mahehub gave two blows with the head of the pick-axe on the back of the deceased; that he himself gave one blow with the head of the spade; that Hanmanta Mahar dealt two blows with his lathi; that Piry and the black man had taken off their clothes; that after Hanmanta was dead, Mahehub took off silver Kada from his hand and he the muckis;

that Piry took away all the ornaments; that the deceased was wearing a patka, a shirt and had chappals on his feet and a dhoti on; that Piry paid him Rs. 10 five or six days after the incident, and that Piry had told him not to reveal the secret by brandishing his big knife.

On 15th April, 1929 the appellant made the following confession :

"Peeru, Mahehub and I conspired four days before Pola at Peeru's house. Peeru said, 'We will kill Hanmanta'. On Tuesday Mahehub, Peeru and I went to bring Hanmanta. We brought him and went so far as the nala. We went to Peeru's house. From there we went along the nala. Peeru killed Hanmanta with an axe. He fell down. Then Mahehub and I struck him with sticks. He died within 25 minutes. The deceased had 2 mohurs, 2 Muckis and 2 kadas which Peeru kept with himself promising to pay me Rs. 10 and Rs. 4 to Mahehub. We put the corpse in a pit and covered it under earth. The pit was ankle deep, containing water. We three put the corpse into the pit and then covered it with earth. Having put the corpse along with its clothes into the pit, we started from there and returned (to our houses). Peeru gave me Rs. 10 on Sunday. He paid Mahehub also Rs. 4 on Sunday. I have nothing more to say. I showed the place where the corpse was buried to the police and recovered clothes from there, but I do not know what became of the corpse."

It is to be noted that in this confession the appellant is very definite in his date, introduces conspiracy without giving any details, drops the story of the black man and Hanmanta Mahar, is silent on the description of the clothes which Hanmanta was wearing and the threat given to him by Pirusha to keep the secret, introduces two gold mohurs and the payment of Rs. 4 to Mahehub and contradicts the previous story of the assault made by himself and Mahehub by substituting sticks for pickaxe and spade. Lastly he asserts that he showed the place to the police where the corpse was buried and the clothes were recovered. This assertion is proved to be false by the evidence of Kevel Krishna (P. W. 2), who clearly deposed that the appellant was unable to point out the place and that it was Mahehub who did so and that Mahehub pointed out the clothes.

In the last statement of the appellant as an approver (Ex. P-16) final touches are clearly noticeable obviously intended to make it conform fully with all the details of the prosecution story which, as a result of complete investigation, was ultimately presented to the Court.

This will be clear from the following extracts from Ex. P-16 :

"The deceased Hanmanta Lothi used to live in the chawl of the mill about two or three rooms apart from the room of Sheikh Mahebur. He was neuter . . . Hanmanta used to put on two silver kadas one on each hand, 2 gold mohurs on the neck, 4 gold mudkis, 2 on each ear. . . . On Tuesday about seven months back, at about 7 or 8 p. m. Pirush took me and Mahebur to the house of the deceased. . . . At about 8.30 p. m. myself, Piru, Hanmanta and Mahebur went to the house of Piru. . . . Hanmanta asked Piru to give some medicine which would cure him of impotency and promised to give him Rs. 20 if he gave proper medicine. Piru promised to give him that medicine. At about 11 p. m., we left for the burial ground as Piru had promised to cure Hanmanta there. . . . Onry gave me the stick, article 3, and he himself carried the axe and kudali articles C and D. Mahebur carried the stick, article F. . . . We all went to the masan. It was pitch dark then. . . . Hanmanta carried a hurricane lantern with him. . . . On the way the light got extinguished. When we reached the masan, Piru dealt a blow with the axe, article D on the neck of Hanmanta and he fell down. Piru then said "What are you seeing. Beat this fellow." I gave Hanmanta two lathi blows on the head. . . . Piru had a knife, article G tied to his loin cloth. He cut out the two gold mohurs from the neck of the deceased. He also took out the two mudkis from the ear. He asked us to take out the silver kada and I and Mahebur took out one kada each. I took out the kada of the left hand. Piru took the kadas from us saying that we had no pockets. He kept two silver kadas, 2 gold mohurs, and 4 gold mudkis in his pocket. . . . The deceased was putting on a red bordered dhoti, a white bandi, a black coat, a Marwadi shoe, and a red cap. Article H is the same dhoti, I the bandi, J the black coat, K the shoe and L the cap. . . . We returned to the house of Piru. It was about 1 or 1.30 a. m. then. Piru gave 1 gold mohur, a pair of mudkis and 1 kada to Mahebur. He himself retained 1 mohur, 1 kada and 1 pair of earrings. Piru promised to give me 10 rupees on Sunday when he came to Amraoti. He accordingly gave me Rs 10 on Sunday. . . . I can identify the ornaments. The mohur is article M, two earrings are article N and the silver kadas article O. Hanmanta had been putting these on when he was murdered. These articles had been given to Mahebur by Piru. Piru threw away the stick article F, after taking the same from the hand of Mahebur. It was thrown on a cactus hedge. Its end was splintered on account of beating and it had two splinters attached to it. My stick was taken away to his house by Piru."

It is very significant to note that while it was pitch dark and the lantern, which the party had taken with them, had been extinguished, and when the appellant himself had apparently no opportunity to handle the most ordinary and common articles which were on the person of the deceased or the axe and

knife which Piru had with him, yet as an approver he was able to identify all these in the committing Magistrate's Court with absolute certainty. Kevel Krishna (P. W. 2) has not stated that the appellant was also able to pick out all these several articles from others of similar kinds as he is supposed to have done in the case of the bamboo stick article F. The end of this stick

"was splintered on account of beating and it had two splinters attached to it."

It must have been noticed that in his previous two statements the appellant did not make any mention of this stick which is supposed to have played such an important part in the murder.

It indeed requires a great deal of courage to put such an intrinsically improbable story as is contained in Ex. P-16 before a Court of justice, but it demands a greater degree of credulity on the part of a Judge to accept it as true. The statement in Ex. P-16 is undoubtedly fuller than the previous statement, but in very essential details it obviously contradicts the earlier ones. If it was a true statement, it cannot be explained why a different one on most of the essential points was made by the appellant on 8th April when his confessional statement was recorded by Mr. Aminulla (P. W. 3) in the Police Station House at Badnera. The only legitimate conclusion then to be drawn from all the circumstances is that the appellant gave out the truth when two-and-half months later, in his deposition at the Sessions trial he stated that his previous statements were false: see Ex. P-18.

As observed in *Emperor v. Panchkari Dutt* (8) S. 24, Evidence Act, does not require positive proof of improper inducement to justify the rejection of a confession, the word "appears" indicating a lesser degree of probability than would be necessary if "proof" had been required, that anything ranging between the barest suspicion on the one hand and absolute certainty on the other may be sufficient to satisfy the requirements of the section for the rejection of a confession, and that if a prima facie confession is false, inconsistent, or absurd that might suggest that it is not voluntary. In another *Calcutta* case where a retracted confession

was rejected because the surrounding circumstances disclosed that it was obtained under police pressure, it was observed that it is always difficult for an accused person to prove ill-treatment or inducement by the police even when it is true: *Mobarak Ali v. Emperor* (9).

Having given our best consideration to all the facts and circumstances of the present case, we are far from convinced that the confession (Ex. P-9) of the appellant is true and was voluntarily made and, as the same is retracted, we deem it very unsafe to uphold the appellant's conviction only on its basis. It is rightly conceded by the learned Government Advocate that the first confessional statement (Ex. P-6) is totally inadmissible in evidence against the appellant. There then remains the appellant's statement as an approver. Since that deposition is also unworthy of credence for reasons already given and is also retracted, it cannot afford any corroboration of the retracted confession: *Empress v. Chutia* (2).

The learned Government Advocate had argued that the confession of the appellant was corroborated by the following facts:

(1) That the appellant pointed out the places where Hanmanta was buried and the articles H, B, F and J;

(2) that the lathi (article G) was picked up by the appellant from among the other lathis and the appellant testified that it was the lathi which Pirusha had given to Mahebut;

(3) that two women had seen a body being eaten by vultures in the neighbourhood where some bones and hairs were recovered.

As to the first fact both the Sub-Inspector Kevel Krishna (P. W. 2) and Govindrao, patwari (P. W. 5), have clearly stated that Mahebut and Shafi had gone together in the company of the police to show the place of the burial of the dead body of the deceased Hanmanta, but that the appellant was unable to locate the place saying that he had forgotten it "as it was dark." Both of them stated that it was Mahebut who pointed out the place as also the articles H, B, F and J. As to the second fact there is nothing on the record of this case to show when or wherefrom or by whom article G was picked up. Nor

is there any evidence to corroborate the statement of the appellant in Ex. P-16 that this lathi was given by Pirusha to Mahebut and subsequently thrown away. As to the third fact it is sufficient to state that, since the appellant was unable to locate the spot where the body of the deceased Hanmanta was thrown away, the evidence of these women affords no corroboration whatsoever to the confession of the appellant.

The above discussion is sufficient to dispose of the appeal, but we cannot refrain from remarking on one very significant fact which was that Mahebut, just before he was about to be hanged stated to Mr. Vaidya (D. W. 1), Magistrate, First Class, who had gone to witness the execution, that the appellant was not concerned in the murder and that he and Pirusha alone had committed the crime. Mr. Vaidya took care at once to write to Mr. Digby, the Sessions Judge, informing him of this incident: Ex. D-1. The learned Additional Sessions Judge refused to receive this statement on the ground that it did not come within the purview of S. 32 (1), Evidence Act. We are, however, of opinion, though not without some degree of doubt, that the statement in question could be admissible under S. 32 (3), Evidence Act. In *Umra v. Emperor* (10), where an accomplice incriminating himself and the appellant by a statement to the police about the crime, had subsequently died, his statement was admitted in evidence by the High Court under S. 32 (3), Evidence Act, and special leave for appeal to the Privy Council was rejected as the question was one of interpretation of certain sections of a statute. For the foregoing reasons we accept this appeal, set aside the conviction and order that the appellant, Sheikh Shafi, be set at liberty.

S.N./R.K.

Conviction set aside.

(10) A. I. R. 1925 P. C. 52=6 Lrh. 45=52 I. A. 121 (P.C.).

1930 Cr. Cases 841

(Oudh)

BAZA AND NANAVUTTY, JJ.

Hazari and others—Prisoners—Appellants.

v.

Emperor.

• Criminal Appeal No. 116 of 1930, Decided on 22nd March 1930, against order of Sess. Judge, Sitapur, D/- 15th February 1930.

(a) Criminal P. C., S. 237—Charge under Penal Code S. 397—Conviction under S. 412 is not improper.

If a person is charged under S. 397 on the fact that he was found in possession of the stolen property, which possession he has failed to account for, it is not improper to convict the person under S. 412, if the charge under S. 397 fails for want of identification or any reliable evidence for the presence of the person at the dacoity: *A. I. R. 1925 P. C. 130, Ref.*

[P 844 C 1]

(b) Evidence Act, S. 24—Confession after being warned—Accused is bound down by language of confession.

When a man of sound mind and full age makes a confessional statement in ordinary simple language after he has been warned, he must be bound by the language of the statement and by its ordinary plain meaning: *A. I. R. 1927 Oudh 17, Foll.*

[P 843 C 1]

(c) Evidence Act, S. 114—Person found in possession of stolen articles soon after theft—Presumption.

When a person is found in possession of stolen articles soon after the theft, the law presumes that such person must either be the thief or the receiver of the stolen goods. The identity of the stolen articles being established, the identity of the thief or the receiver of the stolen goods is presumed to be established.

[P 844 C 1]

(d) Evidence Act, S. 114 (b) and S. 133—Conviction on uncorroborated evidence is rarely justifiable and evidence in corroboration must be independent testimony.

Although it is not illegal to convict on the uncorroborated evidence of an accomplice, a conviction on the uncorroborated evidence of an accomplice is rarely justifiable. The evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime, but the corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connexion with the crime.

[P 844 C 2]

(e) Evidence Act, S. 30—Retracted confession of accused when material for conviction of co-accused.

The retracted confession alone of an accused is not sufficient to justify the conviction of a co-accused, but where such confession stands un rebutted, and there is nothing to show that the accused had any reason for naming other men falsely, and his story fits in exactly with the facts known or proved and is corroborated sufficiently by material evidence against the co-accused, the confession is admissible, and

may be a strong plea of evidence against the co-accused. [P 844 C 2]

M. H. Qidwai and S. N. Misra—for Appellants.

H. K. Ghosh—for the Crown.

Judgment.—These appeals (Nos. 116 and 131 to 137) arise out of a dacoity case tried by the learned Sessions Judge of Sitapur.

The evidence on record shows that a serious dacoity was committed in the house of Beni Madho, at Basantapur Thana Tambaur, district Sitapur, on 7th June 1929 at about 9 p. m. It appears that Beni Madho was the head of a well-to-do Brahman family residing in Basantapur. Some thirty dacoits raided the house, belaboured the inmates, robbed the females of their ornaments, broke open boxes etc., and carried away property worth Rs. 5,000 nearly. The following were the inmates of the house at the time of the occurrence;

1. Beni Madho.
2. Beni Madho's wife
3. Sheo Nandan (P. W. 1) son of Beni Madho.
4. Shiam Kali (P. W. 10), wife of Sheo Nandan.
5. Mt. Sunder (P. W. 7), widowed daughter-in-law of Sheo Nandan.
6. Ajodhya (P. W. 11), brother of Sheo Nandan.
7. Mt. Bitan or Bittan (P. W. 8), wife of Ajodhya.
8. Mt. Churai (P. W. 9), widowed daughter-in-law of Beni Madho.
9. Deota Din (P. W. 4), brother of Beni Madho. Their servants, Nageshar P. W. 6 and Jehangir, P. W. 3 were also present there at that time. All these persons, except Beni Madho (deceased), and his wife, have been examined as witnesses in this case. Shiam Lal, P. W. 2 and Chandrabhal, P. W. 5, the neighbours of Beni Madho, also give evidence about the dacoity. It is in evidence that one of the dacoits was armed with a gun. He took his post under the roof from where he fired several shots. Sheo Nandan, who was in the courtyard shouting to the women to escape, was fired at by the man on the roof. He was struck in the head by several pellets. He received injuries and one of the pellets caused a small depressed fracture of the skull. Grievous hurt was caused to Beni Madho.

also, but we do not know who caused the injury. He was found lying unconscious in the Barotha after the dacoits left the house. He eventually died some 13 or 14 days after the occurrence, but no post-mortem examination was or could be held, as the body was cremated before any action could be taken by the police. Sheo Nandan made a report at the Police Station, Tambaur on 8th June at about 9 a. m. Tambaur is some 12 miles away from Basantapur. The police investigation started without any unnecessary delay and the result was that 19 men, including Sone, were sent up for trial. Sone was granted pardon and was then examined as a witness in the case. Thus 18 men were committed to the Sessions for trial. Of these seven persons, namely Din Band Badlu, Tore, Khunnu, Bhauwa, Jothe and Zamin Ali were acquitted. The remaining 11 were convicted and punished. Salaru was sentenced to transportation for life under S. 397, I. P. C. Mahadeo was sentenced to eight years rigorous imprisonment and Nabi Baksh to six years rigorous imprisonment under S. 412, I. P. C. The remaining eight persons, namely (1) Hazari, (2) Sunder Lal, (3) Mansa Din, (4) Amjad, (5) Ram Autar, (6) Ram Dayal, (7) Bans Gopal and (8) Hira Lal were sentenced to ten years rigorous imprisonment each.

All these persons have appealed. Hazari, Sunder Lal, Mansa Din, Mahadeo and Ram Dayal submitted their appeals from jail and filed their appeals through counsel also. The remaining six persons, namely Nabi, Amjad, Ram Autar, Salaru, Bans Gopal and Hira Lal submitted their appeals from jail only. Nabi Baksh, however, was represented by a counsel at the hearing of these appeals.

It is amply proved that a serious and daring dacoity was committed in Beni Madho's house. The factum of dacoity is not disputed in these appeals before us. It may be taken as satisfactorily established that a dacoity did take place at the house of Beni Madho and what we have to consider is whether the evidence on record is sufficient to justify the conclusion that the appellants were concerned in the crime. We should like to note that Sone, Sunder Lal, Amjad and Ram Autar had made con-

fessions. Sone was granted pardon and was then examined as a witness for the prosecution. Sunder Lal, Amjad and Ram Autar retracted their confessions in the Court of the committing Magistrate. Now we take up the appeals of the appellants named above individually.

1. *Hazari*.—This man is a cousin of Sone, approver. The direct evidence against him consists of the statements of Sone and also of the three confessing accused. It should be noted that Sone, Amjad and Sunder Lal had named this man in their confessions long before he was arrested. This man was identified in jail by only one person, namely Mt. Churai, but her evidence of identification is quite worthless and must be rejected. It is in evidence that Nageshar had struck one of the dacoits with a spear at the beginning of the dacoity. The approver Sone and the three confessing accused all stated in their confessions that it was Hazari who was struck with a spear at the time of the occurrence. When Hazari was arrested on 15th August 1929 it was found that he had a large triangular scar on his forearm. The injury was examined by the learned Sessions Judge and the assessors, and they found that it was the mark of a serious wound. The Civil Surgeon also had examined the injury on 26th August 1929. He could not give the cause of the injury definitely, but he stated that it was consistent with a wound from a spear. Hazari tried to explain away this injury by stating that he had a fall from a bullock cart and the injury was caused by an arhar stem. The defence, while it has the merit of ingenuity, is quite unsatisfactory and unconvincing. It is noticeable that the Civil Surgeon was not asked in cross-examination whether the injury in question could have been caused by an arhar stem, but was asked whether it could have been caused by the horn of a bull. We think the defence which was put up by Hazari to explain away the injury was false and an after-thought. We are of opinion that the learned Sessions Judge and the assessors were perfectly right in coming to the conclusion that Hazari had really received the injury at the time of the occurrence and that his defence was quite untrue. Nageshar, P. W. 6, states

clearly that he had struck a dacoit with his spear and the dacoit had then retired outside the door. It is true that this witness did not show his spear to the Sub-Inspector, but he told the Sub-Inspector that he had injured a dacoit with his spear. The mere fact that he did not show his spear to the Sub-Inspector does not show that the story is untrue. In our opinion there is an important piece of circumstantial evidence in support of the direct evidence of the approver and the statement of the confessing co-accused against this man. The evidence which was produced against this man was believed by the learned Sessions Judge and the assessors. We see no sufficient reason to reject the evidence which shows that this man was concerned in the crime. He was rightly convicted and punished. His appeal fails and must be dismissed.

2. *Sunder Lal*—The evidence against this man consists of (1) his own confession, (2) the evidence of Sone, (3) the statement of one of the confessing accused, (4) the recovery from his house of two dopattas, two dhotis and a silver hamel and a gold "nathni" which have been proved to be stolen property and (5) the identification made by some seven witnesses. The evidence of identification may not be safely relied upon, but the remaining evidence is quite sufficient to justify the conclusion that this man was concerned in the crime. His own confession is a very strong piece of evidence against him under the circumstances of the case. He had made the confession after he was duly warned by the Magistrate. His confession (Ex. 30) is very circumstantial and full of detail. When a man of sound mind and full age makes a confessional statement in ordinary simple language after he has been warned, he must be bound by the language of the statement and by its ordinary plain meaning: see *Raja Bahadur Singh v. Emperor* (1). It is true that the confession has been retracted, but that is of no importance. Admissions of guilt made by an accused in full possession of his faculties in his confession to a Magistrate do not, where the accused is utterly unable to show how he made the admissions if they

were not true, become ineffective, because they are subsequently retracted: see *Emperor v. Raj Kali* (2).

The property which has been recovered from his house has been satisfactorily identified. It is amply proved that articles forming part of the proceeds of the dacoity were found in his possession. He was also identified in jail by seven witnesses. Their evidence of identification may not be relied upon but the remaining evidence shows clearly that he was concerned in the crime. We are of opinion that he has been rightly convicted and punished. His appeal therefore fails and must be dismissed. (His Lordship then considered evidence against Mansadin, accused 3, whose appeal was allowed, and proceeded.)

(4) *Mahadeo*—This man is the uncle of Sunder Lal, accused. The only evidence against him, besides the statement of Sone, approver, is that the Sub-Inspector recovered from his possession four silver ornaments and a skirt which have been identified as having been stolen in the dacoity. It should be noted that Sone simply identifies Mahadeo, but does not name him and he is not named by any of the three confessing accused also. There is no reliable evidence to show that this man was present at the dacoity. However, it is satisfactorily proved that the articles forming part of the proceeds of the dacoity were found in his possession. He has therefore been convicted by the learned Sessions Judge under S. 412; I. P. C. The learned counsel who appeared for this man has put up as good arguments on his behalf as could be put up, but we are not at all impressed with his criticism of the prosecution evidence. Our attention has been drawn to the list of the stolen property, given by Sheo Nandan to the police on 9th June 1929. The list is in Urdu and bears the signature of Sheo Nandan in Hindi. The learned counsel has attempted to show that the articles in question do not tally with the list. It is true there is some difference in some particulars (weights, etc.), but the fact remains that the articles are there, and it is too much to expect that the list should have contained an exact description of all the articles which had been carried away by the dacoits. It

was almost impossible for Sheo Nandan to give the exact weight and the exact price of the articles which had been stolen away. Most of the articles are of a distinctive nature and have been satisfactorily identified. We are not prepared to disagree with the finding of the learned Sessions Judge on this point. When a person is found in possession of stolen articles soon after the theft, the law presumes that such person must either be the thief or the receiver of the stolen goods. The identity of the stolen articles being established, the identity of the thief or the receiver of the stolen goods is presumed to be established. Mahadeo has attempted to prove that the articles in question belonged to his family. The evidence given by the defence witnesses on this point appears to have been manufactured and has been properly rejected by the learned Sessions Judge. Mahadeo has failed to account for his possession of the articles in question and he has been rightly convicted by the learned Sessions Judge under S. 412, I. P. C. He was not of course charged under S. 412, I. P. C. but he could rightly be convicted under that section on the facts found by the learned Judge: see S. 237, Criminal P. C., illustration, and also the principle of decision in *Begu v. Emperor* (3). His appeal fails and must be dismissed. (His Lordship here discussed evidence against accused 5 to 10).

11. *Hira Lal*—This man was successfully picked out by almost all the eyewitnesses to the dacoity. The learned Judge did not think it safe to base his finding on the evidence of identification as this man suffers from a species of leucoderma in his hands and feet. However, the remaining evidence on record is sufficient to justify the conclusion that this man was also concerned in the crime. He has been named by Sone and all the three confessing accused as having taken part in the dacoity. It appears that this man had absconded after the occurrence. He was arrested in Bombay and he has not explained satisfactorily why he was there. It is also in evidence that soon after the dacoity he paid Rs. 25, as rent in pice and small change. As observed by the learned Judge a man normally does not carry this amount of

small change. The explanation for that is that among the loot shared by the dacoits there was a certain sum of money in small change which had been collected from the ghat. The family of Beni Madho and Sheo Nandan held a theka of ghat and had got Rs. 1,500 in small change as the toll. This amount also was carried away by the dacoits. This circumstance is quite sufficient to corroborate the statement of the four accomplices that Hira Lal also had taken part in the dacoity. As pointed out in the case of *Ram Prasad v. Emperor* (4), although it is not illegal to convict on the uncorroborated evidence of an accomplice, there is a consensus of opinion that a conviction on the uncorroborated evidence of an accomplice is rarely justifiable. The evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime; but the corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connexion with the crime. The retracted confession alone of an accused is not sufficient to justify the conviction of a co-accused, but where such confession stands unrebutted, and there is nothing to show that the accused had any reason for naming other men falsely, and his story fits in exactly with the facts shown or proved and is corroborated sufficiently by material evidence against the co-accused, the confession is admissible, and may be a strong piece of evidence against the co-accused: see *Sheo Ratan v. Emperor* (5). We think the learned Sessions Judge and the assessors were justified in coming to the conclusion that this man was also concerned in the crime. His appeal also fails and must be dismissed.

The result is that we dismiss all the appeals except that of Mansa Din. We allow the appeal of Mansa Din, set aside his conviction and sentence and direct that he be acquitted and released, unless his presence is required in any other case.

R.M./R.K.

Appeal dismissed.

(3) A.I.R. 1925 P.C. 120—8 Lah. 226—52 I.A. 191 (P.C.).

(4) A.I.R. 1927 Oudh 269—2 Luck. 681.

(5) A.I.R. 1929 Oudh 167.

1930 Cr. Cases 845

(Oudh)

WAZIR HASAN, C. J., AND PULLAN, J.

Jai Singh and others—Accused—Applicants.

Emperor — Complainant — Opposite Party.

Criminal Revn. No. 21 of 1930, Decided on 24th March 1930, against order of Sess. Judge, Hardoi, D/- 18th November 1929.

(a) Criminal P. C., S. 110—In proceedings under S. 110 instances of specific crimes are admissible, although they are not supported by evidence of such amount or value as would secure a conviction for substantive offence.

In a case under S. 110 the Court is not considering whether the accused person has or has not committed a specific offence but whether his general reputation is such that security should be taken for his good behaviour. When evidence is taken as to reputation of bad behaviour the Court cannot and should not exclude the reasons which induced the members of the community to form a bad opinion of the accused person, and if their opinion is based wholly or partly on the belief that the accused person committed a crime which has not been brought home to him the Court cannot rule out as inadmissible all evidence on which the belief of the witnesses is based. Hence instances of specific crimes are admissible in evidence in these proceedings although they are not supported by evidence of such amount and value as would secure a conviction for the substantive offence: *A. I. R. 1922 Oudh 26, Appr. A. I. R. 1925 All. 691. Rel. on.* [P 846 C 1, 2]

(b) Criminal P. C., S. 110—Scope.

An isolated instance of violence of a young zamindar on which no report was made would not be a sufficient cause for taking action against him under S. 110. [P 847 C 1]

(c) Criminal P. C., S. 110—Belief of prosecution witnesses of accused being man of desperate and dangerous character based upon suspicion that accused committed crime and certain acts of oppression—But Court holding suspicion not proved and acts of violence only youthful frolics—Many other persons including accused's tenants deposing to his being peaceful citizen and good landlord—Court should not demand security.

General reputation means the opinion of those members of the public who are in a position to know the man's character. Where a large number of persons come forward and swear that they believe a man to be of a desperate and dangerous character and there is little or no counter evidence of good character such evidence will possibly justify a Court in taking action even if the grounds of belief are indefinite. But when an equal or greater number of persons in the same class or classes depose that the same man is of good character the Court must sift closely the grounds on which the prosecution witnesses have based their belief. If it is found that their belief is based on

their suspicion that the accused has committed a crime and certain acts of oppression and the Court holds that the suspicion is unjustified and the so called acts of oppression are merely "youthful frolics" the Court will be reluctant to demand security, and the position of the accused if he is a landlord is much strengthened when a large body of public opinion, including many of his tenants finds him to be a good landlord and a peaceful citizen. [P 848 C 1]

J. Jackson, Ali Mohammad and Avadh Behari Varma—for Applicants.

H. K. Ghose—for the Crown.

Judgment.—This is an application in revision of an order of the learned Sessions Judge of Hardoi requiring the applicants to give security for their good behaviour or in default to undergo rigorous imprisonment for a period of three years under S. 123 read with S. 110, Criminal P. C. The applicants are Jai Singh, a zamindar, and his three servants Mata Din, Anandi Din and Murli. The charge against them is that they are dangerous characters and that their being at large without security is hazardous to the community. It is not alleged that Jai Singh gave any signs that he was a dangerous character before the year 1926 and it is admitted by the Sub-Inspector who took proceedings against him that the proceedings were only taken because the Sub-Inspector could not find enough evidence to bring a charge of murder against Jai Singh and his servants. The murder in question was committed on 21st May 1928. The victims were Mt. Deo Kuari, her daughter, two maid servants and their two children. These three women and three children were cut to pieces with a sword and their dead bodies partially burnt in their house in the middle of a large village of Raigaon in the middle of the night. At that time of the year the whole village community must have been asleep outside their houses in or in the neighbourhood of the village and we cannot believe that the murder and the fire which consumed two whole kothris were unnoticed by the villagers. Yet not a shred of evidence was obtained by the police to lead directly to the perpetrator or perpetrators of the crime. The fact that such an atrocity could be committed under such circumstances and that no evidence should be forthcoming which could lead to the conviction of any of the persons who took part therein is a black spot on the administration of criminal justice in

Hardoi District. We have, however, only to consider whether the proceedings instituted against Jai Singh and his servants under S. 110, Criminal P. C., are justified or whether the order passed by the Sessions Judge is a proper order. The learned Judge has stated the law dealing with the admissibility of evidence as to particular crimes in cases of bad livelihood. In our opinion the law was correctly stated by the Judicial Commissioner of Oudh in *Bhagwat Prasad v. Emperor* (1) in the following passage :

" This Court, and indeed every High Court, always looks with grave suspicion on cases in which proceedings are started against an accused because the police have failed to procure evidence against him on a charge of substantive offence. The badmashi sections were not intended for furnishing the police with the means of detaining persons against whom a definite charge has been made but has broken down."

But we also accept what is stated by a Bench of the Allahabad High Court in *Emperor v. Budhan* (2) :

" that it is impossible to accept the proposition that the evidence going to show that a substantive offence had been committed or which might form the basis of a charge of a substantive offence is necessarily to be excluded in proceedings under S. 110 and cannot form the basis of an order under S. 112, Criminal P. C."

Under certain circumstances even an order of acquittal must not be held to be conclusive and the reason for this view is that in a case under S. 110 the Court is not considering whether the accused person has or has not committed a specific offence but whether his general reputation is such that security should be taken for his good behaviour. When evidence is taken as to reputation of bad behaviour, the Court cannot and should not exclude the reasons which induced the members of the community to form a bad opinion of the accused person, and if their opinion is based wholly or partly on the belief that the accused person committed a crime which has not been brought home to him the Court cannot rule out as inadmissible all evidence on which the belief of the witnesses is based. We are not therefore prepared to dissent from the view which he expresses :

" that instances of specific crimes are admissible in evidence in these proceedings although they are not supported by evidence of such amount and value as would secure a conviction for the substantive offence."

This is not a case in which Jai Singh and his supporters had been put on their trial and either acquitted or discharged. There was not sufficient evidence to put them on their trial, but evidence has now been given to the effect that Jai Singh was in the village on the night of the crime, that the lady Mt. Deo Kuari was his widowed sister-in-law, that she was in receipt of an allowance paid by him, and that he was under an obligation to carry out the marriage of her daughter. On these facts the theory is built up that he had a motive for the murder and therefore may have been concerned in it, and the Judge not altogether properly in our opinion, drew deductions from the conduct of Jai Singh in the morning after the murder pointing out that he left undone certain things which he might have been expected to do had he been innocent. In our opinion it is unwise to draw conclusions from the conduct of a person in face of a terrible calamity such as this. Whether innocent or guilty he might very well fail to act with that prudence which might commend itself to an educated person considering the circumstances afterwards at leisure. It is true that the suggested motive is a possible motive and had there been evidence sufficient to put Jai Singh on his trial for murder it might have been fairly alleged that he was actuated by that motive, but where there is no evidence that he committed the murder there is no evidence that he acted on the motive, and as a matter of fact there is nothing to show that he wished to discontinue the allowance to his sister-in-law or to repudiate his liability to pay for her daughter's marriage. The evidence therefore that Jai Singh and his servants were guilty of this murder is not more than a vague suspicion and as such it must take its place along with the other evidence as to the general repute of the applicants before us. The suggestion is that Jai Singh's character took a change for the worse in the year 1926 and that he became oppressive to his tenants and so desperate and dangerous that he should not be allowed at liberty without

(1) A. I. R. 1922 Oudh 30=65 I. C. 551 : Cr. L. J. 119=24 O. C. 817.

(2) A. I. R. 1925 All. 694 =88 I. C. 862 : Cr. L. J. 1180=47 All. 732.

security. Specific instances have been adduced to show his oppressive nature and an attempt has also been made to produce witnesses of general reputation. The year 1926 was chosen as the starting point because from the year 1915 to 1926 Jai Singh had the strongest support of two officers of police, Mr. Young and Rai Bahadur Man Singh, both officers of the greatest experience who held a high opinion of Jai Singh during their tenure of the office of Superintendent of Police in the Hardoi district. We have considered very carefully the specific instances of so-called "desperate and dangerous" behaviour. The Magistrate remarked of these incidents that

"they might be connived at or ignored as petty frolics and privileges of a zamindar of his position and influence"

and the Judge has accepted this view. It appears that like many other zamindars Jai Singh had some disputes with his tenants and that on occasions he acted with some severity. But many of the examples have been excluded by the learned Judge and of those that he retained the only one which appears to us of any importance is the incident of one Inayet Khan who states that he had purchased a jungle and a grove and offered the wood for sale. Because he demanded Rs. 24 per chatta and Jai Singh only offered Rs. 14 Inayet says that he was taken to Jai Singh by Murli and Mata Din and kicked and assaulted and his cart-load of wood emptied at the accused's bhatta. This incident is corroborated by a witness described as unreliable, but we must accept it as proved and it is certainly an instance of violence. On the other hand no report was made of it and we cannot resist the conclusion that the incident was perhaps exaggerated and if it be taken as an isolated act of a young zamindar it would certainly not be a sufficient cause for taking action against him under S. 110, Criminal P. C. There are also some instances in which tenants have complained against Jai Singh. One of them, Mewa Ram, complained that his field had been trampled by his elephant, but Mewa Ram was a man who attempted to cultivate the fields as a sub-tenant against the wish of the zamindar and he was subsequently compensated by another field. Another tenant named Ohheda made a report of forcible

dispossession of his field, but this man appears to have attempted to assert a claim of tenancy two and a half months after Jai Singh had reported the land to be abandoned under S. 21, Oudh Rent Act. In our opinion such incidents are of common occurrence and there are few zamindars who have not at one time or another had similar disputes with their tenants and there is no special feature of guilt or oppression in these instances as they have been described which would lead us to connect the conduct of Jai Singh in his dealings with the tenants with the conduct of the person or persons who committed the horrible murder of three women and three children on 21st May 1928. Indeed we have on the one hand suspicion of an atrocious crime and on the other hand evidence pointing to a young zamindar who is inclined to use drastic measures in dealing with tenants. The two pictures do not coincide and we cannot disregard the fact that Jai Singh was able to produce in his defence no less than 74 tenants of whom 29 come from the village of Raigaon, and his witnesses in all represent 54 villages in a radius of twelve miles. All these persons describe him as a good landlord and deny that he is a man of violent or desperate character. In fact the only tenants who give evidence against him are those who speak to the specific incidents to which we have already referred.

The learned Judge deals very briefly with the evidence of general bad character and we have been referred to the evidence of one Qazim Husain who is clearly influenced by malice and who stated, in our opinion quite falsely, that Jai Singh had at the time when he agreed to pay the allowance to his sister-in-law threatened to lock her up in a kothri and murder her. This is not the only instance of evidence of an apparently vindictive nature brought forward in this case. The prosecution also relied upon the fact that Jai Singh's servants had been suspected of another murder, but in that case not only were they acquitted but the Court held that it was a false case got up by one of the witnesses for the prosecution in the present case.

We would also point out that the general evidence as to character in this

case hardly goes beyond the statement of the specific instances to which we have already referred. General reputation means the opinion of those members of the public who are in a position to know the man's character. Where a large number of persons come forward and swear that they believe a man to be of a desperate and dangerous character, and there is little or no counter-evidence of good character, such evidence will possibly justify a Court in taking action even if the grounds of belief are indefinite. But when an equal or greater number of persons in the same class or classes depose that the same man is of good character the Court must sift closely the grounds on which the prosecution witnesses have based their belief. If it is found that their belief is based on their suspicion that the accused has committed a crime and certain acts of oppression and the Court holds that the suspicion in the former case is unjustified and the so-called acts of oppression are merely "youthful frolics" the Court will be reluctant to demand security; and the position of the accused is much strengthened when, as in the present case a large body of public opinion finds him to be a good landlord and a peaceful citizen. In our opinion the evidence in the present case comes to this. A number of persons believe that Jai Singh and his servants are responsible for the murder of Mt. Deo Kuari, her daughter and her servants and they also consider that Jai Singh is an oppressive zamindar. On the other hand a great number of persons do not believe that Jai Singh and his servants were concerned in the murder and they consider that he is not an oppressive zamindar. Among these witnesses is included a vast majority of his own tenants. In our opinion Jai Singh is not shown to be unusually oppressive as a zamindar and there is insufficient reason for suspecting him of complicity in the murder. Thus there is no foundation for finding that he is so desperate and dangerous as to render his being at large without security hazardous to the community. Admittedly the case of the servants depends on that of the master. It is not suggested that independently of Jai Singh they are in any way dangerous to the

community. We therefore allow this application and set aside the order requiring security.

P.N./R.K.

Revisions allowed.

1930 Cr. Cases 848

(Bombay)

MIRZA AND BROOMFIELD, JJ.

Mangubhai Dahyabhai and another—Accused.

Emperor—Opposite Party.

Criminal Ref. No. 6 of 1930, Decided on 2nd April 1930, made by Sess. Judge, Surat.

(a) *Bombay Prevention of Gambling Act (1910), S. 12 (a)* — "Any place to which public have or are permitted to have access" includes hotel.

The words in the amended S. 12, *Gambling Act* "in any place to which the public have or are permitted to have access" would include an hotel. The public have a right to go to an hotel provided there is accommodation available in it, and can be said to have or to be permitted to have access to it: 30 *Bom. 348* and 14 *Cr. L. J. 167, Expl. and Dist.*

[P 849 C 2]

(b) *Bombay Prevention of Gambling Act (1910), S. 12 (a)*—Object of amendment explained.

The object of the amended S. 12 (a) was to free the word "place" which had been originally used in that section from the restricted meaning which it was held to bear, appearing as it did between the expression "public street" and the word "thoroughfare."

[P 850 C 1]

W. B. Pradhan—for the Crown.

Mirza J.—This is a reference made by the Sessions Judge, Surat, expressing an opinion that the conviction of the accused for an offence under S. 12, *Bombay Prevention of Gambling Act*, by the First Class Magistrate, Surat City, is bad in law. The case is reported to this Court for its consideration. The accused were arrested while they were gambling in a hotel. The First Class Magistrate, Surat City, who tried the case, was of opinion that the arrest was not illegal as a hotel could be regarded as a public place within the meaning of S. 12, *Gambling Act*. S. 12, *Bombay Prevention of Gambling Act*, is as follows:

"A police officer may apprehend without warrant

(a) any person found gaming in any public street, or thoroughfare, or in any place to which the public have or are permitted to have access or in any race-course . . ."

The Sessions Judge is of opinion that the case is covered by the authority

of *Emperor v. Hussein* (1), where the word "place" occurring in S. 12 as it then stood was held to mean "a place of the same general character as a road or thoroughfare." S. 12 (a), at the date of that decision read :

"A police-officer may apprehend without warrant :

(a) Any person found playing for money or other valuable thing with cards, dice . . . in any public street, place or thoroughfare."

The word "place" appearing in the section came between "public street and thoroughfare." Russell, J., in the course of his judgment observed (p. 30) :

"Several cases were referred to in course of the argument. The first was *Bangrish v. Archer* (2) where it was held that the railway carriage while travelling on its journey was an "an open and public place" or "an open and public place to which the public have or are permitted to have access."

Now if the words in the statute before us were the same as in that, of course the accused would have been rightly convicted, but in the statute there referred to (38 to 37 Vic. c. 38), the words used are "open place to which the public have or are permitted to have access."

It is clear from this passage in the judgment that the decision in *Emperor v. Hussein* (1) would have been different if the words "to which the public have or are permitted to have access" had governed the word "place" in the section as it then was. The legislature amended the Gambling Act in 1910 and the words "or in any place to which the public have or are permitted to have access" have been inserted in the section.

The Sessions Judge is of opinion that this Court followed the decision in *Emperor v. Hussein* (1) in the later case of *Emperor v. Chennappa* (3) and that was a case to which the provisions of S. 12 (a) since its amendment in 1910 applied. In that case the accused had been found playing for money with cards in a Math which was managed by Swami. It was found that the Swami could, if he chose, keep the people out. On those facts the Court set aside the conviction and sentence of the accused holding that the Math could not be regarded as a public place within the meaning of the Bombay

Prevention of Gambling Act 1887. In the report of the reference made by the District Magistrate to this Court the case of *Emperor v. Hussein* (1) was quoted and relied on for the view that it applied and that the conviction should be set aside. In the order of the Court no reference was made to *Emperor v. Hussein* (1). The order simply stated (p. 102) :

"We agree with the learned District Magistrate that the Math in which the card playing in this case was carried on cannot be regarded as a public place within the meaning of the Bombay Prevention of Gambling Act 4, 1887. We must, therefore, set aside the convictions of the accused, and direct their acquittal and discharge. The fines, if paid by them, should be refunded to them."

Section 12 (a), Gambling Act, quoted in a foot-note of the report of the case is the section as it stood prior to the amendment of 1910. It is not clear from the report whether the section which the Court was considering was the old section or the one since its amendment in 1910. The learned Sessions Judge remarks :

"The High Court, in a short judgment, merely expressed agreement with him (the District Magistrate) that the Math could not be regarded as a public place within the meaning of the Act but did not specify as to which of the reasons adduced by him was the basis of their decision. It would appear, however, that they must have followed the case *Emperor v. Hussein* (1) because at that date (1912), the Act had already been amended and the mere fact that the Swami had authority to exclude the public cannot have been a deciding factor."

We are unable to agree with the last statement in this passage. The fact that the Swami had authority to exclude the public could, in our opinion, have been made the basis of the judgment in *Emperor v. Hussein* (1) if that case was dealt with under the amended section.

The words in the amended S. 12, Gambling Act, "in any place to which the public have or are permitted to have access" would in our opinion, include a hotel. The public have a right to go to a hotel provided there is accommodation available in it, and can be said to have or be permitted to have access to it. It is no longer necessary to interpret the word "place" appearing in this section ejusdem generis with the words "public street" and "thoroughfare." Maxwell on the Interpretation of Statutes, 12th ed., 1913, 120.

(1) [1905] 30 Bom. 848=3 Bom. L. R. 22.

(2) [1882] 10 Q. B. D. 44=52 L. J. M. C. 47=47 J. P. 295=15 Cox. C. C. 194=31 W. B. 188=47 L. T. 548.

(3) [1918] 14 Cr. L. J. 167=19 L. C. 167.

pretation of Statutes (Edn. 7) at p. 218 states :

"Of course, the restricted meaning which primarily attaches to the general word in such circumstances is rejected when there are adequate grounds to show that it has not been used in the limited order of ideas to which its predecessors belong. If it can be seen from a wider inspection of the scope of the legislation that the general words, notwithstanding that they follow particular words are nevertheless to be construed generally effect must be given to the intention of the legislature as gathered from the larger survey.

It is clear that the object of the amended S. 12 (a) in 1910 was to free the word "place" which had been originally used in that section from the restricted meaning which it was held to bear appearing as it did between the expression "public street" and the word "thoroughfare." We agree with the interpretation put on the section by the First Class Magistrate and see no reason to interfere with the convictions.

Broomfield, J.—I agree.

S.N./R.K. *Convictions confirmed.*

*** 1930 Cr. Cases 850**
(Lahore)

JAI LAL, J.

Pritam Singh—Convict—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 137 of 1930, Decided on 22nd April 1930, against order of Sess. Judge, Ferozepore, D/- 16th December 1929.

Criminal P. C. S. 40—Grant of leave to Magistrate of Provincial Service does not take case out of S. 40.

The grant of leave to Magistrate who belongs to the Provincial Civil Service as an Extra Assistant Commissioner, does not cause the cessation of his criminal powers so as to take his case out of the category of the cases contemplated by S. 40 : 2 B. L. R. 536, *Ref.*; A. I. R. 1923 *Mad.* 598, *Dist.*

[P 851 C 1]

J. G. Sethi—for Petitioner.

R. C. Soni—for the Crown.

Judgment.—The three petitioners in Criminal Cases Nos. 137, 138 and 139 of 1930 have been convicted under S. 9 (c), Opium Act 1878, and have been sentenced to two years' rigorous imprisonment each. It has been found that each

of them was in possession of a large quantity of opium in contravention of the Act and this fact is not now disputed before me. Only two questions were raised by the learned counsel: one was as to the jurisdiction of the Magistrate to try the case; and the second was the question of sentence.

So far as the first question is concerned, it appears that the Magistrate, Sardhar Balwant Singh, was previously posted to another district where he exercised the powers of a Magistrate of the First Class. He took leave and on the expiry of his leave he was posted to the Ferozepore District where the accused were tried by him. When the case was put up before him for trial he recorded the evidence of the prosecution witnesses and also the statements of the accused, in fact he completed the whole trial and noted at the end that his powers had not yet been gazetted and therefore he postponed the decision of the case till such time as his powers be gazetted and it seems that after the gazette notification had been issued by the Local Government he concluded that case by convicting the accused persons. The learned counsel says that owing to the fact that the Magistrate had gone on leave he had ceased to exercise his powers of a Magistrate of the First Class and therefore before he could take any proceedings in the present cases it was necessary for the Local Government to invest him with magisterial powers.

The learned Sessions Judge has relied upon S. 40, Criminal P. C., and this section is also cited by the learned Assistant Legal Remembrancer. It provides that whenever any person holding an office in the service of the Government, who has been invested with any powers of the Criminal Procedure Code throughout any local area, is appointed to an equal or higher office of the same nature within a like local area under the same Local Government he shall, unless the Local Government otherwise directs or has otherwise directed, exercise the same powers in the local area in which he is so appointed. To this the learned counsel for the petitioners replies that in this province the Magistrates hold office as such and therefore on grant of leave to them they cease to

hold that office and consequently it was contended that S. 40 had no application. The real question is this : whether the grant of leave to the Magistrate who belonged to the Provincial Civil Service as an Extra Assistant Commissioner caused the cessation of his criminal powers so as to take his case out of the category of the cases contemplated by S. 40. I do not understand the learned counsel to contend that if the Magistrate had been transferred from his former district to the Ferozepore District it would have been necessary for the Local Government to notify his powers afresh before he could exercise any magisterial powers. I asked him what would have happened if the Magistrate had been granted casual leave. His reply was that in such a case no successor having been appointed to the Magistrate no question of conferring fresh powers on him would arise. Does it make any difference if a Magistrate is granted privilege leave and no successor is appointed or even if a successor is appointed and he is posted back to the same district ? In my opinion in a case like this the appointment of a successor does not affect the powers of the Magistrate.

2 B. L. R., p. 536, is a direct authority on the question. The petitioners' counsel, however, cited A. I. R. 1923 Mad. 598. But that case related to an officer who had retired from Government service and was later re-appointed and it was held that in the case of such a person it is necessary to confer powers upon him afresh. It is obvious that the case of such a person cannot fall under S. 40, Criminal P. C.

In my opinion, therefore, the Magistrate had the power to try the accused persons as a Magistrate, First Class, on taking charge of his duties in the Ferozepore District after the expiry of his leave. In this connexion a change that has been effected in S. 40, Criminal P. C., by amendment in 1923 is noticeable. The word "transferred" has now been substituted by the word "appointed" and this in my opinion materially strengthens the position of an officer who is appointed to another district on the expiry of his leave.

With regard to the second question it is true that a large quantity of opium

was found in the possession of the accused persons. At the same time the case for the prosecution is that they were agents of another person named Ganga Ram and therefore the maximum punishment provided by the law was not called for in the case. In my opinion a sentence of one year's rigorous imprisonment in the case of each of the petitioners would have met the ends of justice having regard to all the circumstances of the case.

While affirming the convictions of the petitioners therefore I reduce their sentences to one year's rigorous imprisonment in the case of each and to this extent I accept the petition.

V.B./R.K.

Sentences varied.

1930 Cr. Cases 851

(Sind)

PERCIVAL, J. C. AND RUPCHAND,
A. J. C.

Baksho and others—Accused:—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 179 of 1929, Decided on 28th February 1930, from judgment of Special First Class Magistrate, Dadu.

(a) Penal Code, S. 401—Reports made to police or brought to their notice showing names of particular suspects are inadmissible as hearsay—Criminal Trial.

Although there is no objection to police officers being called to prove the existence of a gang of cattle lifters and the frequency of thefts in the area where that gang operated, the reports made to them from time to time or brought to their notice showing the names of particular suspects are inadmissible as being hearsay and should be excluded. [P 855 C 2]

(b) Criminal Trial—General criminality of tribe cannot be imputed to the individual members.

The general criminality of the tribe to which several of the accused belong cannot be imputed to individual members of that tribe : 13 Cr. L. J. 39, Rel. on. [P 855 C 2]

(c) Penal Code, S. 401—Previous conviction and proceedings under S. 110, Criminal P. C., are admissible in cases under S. 401—Evidence Act S. 54.

Previous convictions and proceedings under S. 110, Criminal P. C., are admissible in a case under S. 401 for the purpose of proving habit though not of general bad character and are not excluded by S. 54, Evidence Act : 13 Cr. L. J. 539 ; 88 Cal. 488 and A. I. R. 1925 Bom. 195, Rel. on. ; 82 Mad. 179 and A. I. R. 1923 Bom. 71, Discussed and Dist. [P 856 C 1]

(d) Penal Code, S. 401 — Assessing sentence under S. 401—Magistrate can consider previous convictions and orders under S. 110, Criminal P. C., even when S. 75, Penal Code, does not apply.

In determining to what extent in any particular case the punishment should approach to or recede from the maximum limit prescribed by the section, the trying Magistrate has to take into account several factors, inter alia the antecedents of the prisoner whether such antecedents speak well or ill of him, such as his character and state of life whether good or bad including the previous convictions, if any. So while assessing sentence under S. 401 the Magistrate can take into consideration previous convictions and orders under S. 110, Penal Code, even when S. 75, Penal Code, does not apply: 89 Bom. 826, *Rel. on.* [P 854 C 2; P 856 C 2]

Partabrai D. Punwani — for Appellants.

G. M. Lobo—for the Crown.

Percival, J. C.—The appellants in this case are 11 men, who have been convicted by the learned Special Magistrate, First Class, Dadu, under S. 401, I. P. C., of the offence of belonging to a gang associated for the purpose of habitually committing theft or robbery, and have been sentenced to various terms of imprisonment. 12 persons were sent up originally, but one has been acquitted and the rest convicted.

The history of this gang is set out in para. 2 of the judgment of the learned Magistrate. He says:

"The case illustrates "pathari system" which is so rampant in this province, owing to its economical, geographical and social conditions. It deals with an alleged gang of cattle thieves, known as "patharidars" in Sind. Such patharidars having widespread organizations in the province, energetic police officers in some parts are now a days trying to bring them to book in order to paralyse their activities so as to be able to maintain peace and order in their charges. The combating of such organizations called "Patharis" had become necessary, as cattle-thieving in the province has assumed unmanageable proportions and clearing houses of stolen property have to be broken up. Directly a shrewd deathblow is given to the pathari system prevailing in any place, real organizers of cattle thefts must disappear, and organized cattle thefts should cease automatically."

He further points out that the present appellants, together with other "Shabanis" who have gone across the Indus to the Nawabshah District, have been engaged for considerable time in stealing cattle including camels, and taking them across the river in some cases from the west to the east and in other cases from the east to the west. The Deputy Superintendent of Police, Mr. Chimandas, having heard of the depredations of this

gang, made personal inquiries into the matter, and finally this case was sent up. A very large number of witnesses have been examined in the case, the exhibits running to 388. The prosecution have given the evidence of police officers, of zamindars, of persons whose cattle or other animals had been stolen, of persons who have paid bhung, of persons who have identified their cattle amongst those attached from the bhans of the accused, and of those who have seen the accused going about together and committing thefts together. The evidence goes to show that the gang began as long ago as 1922 or even earlier. The learned Magistrate in para. 12 of his judgment observes as follows:

"But how powerful this gang is and how its activities for cattle-lifting extend far and wide, is proved beyond doubt by the direct testimony of prosecution witnesses of different castes and creeds who have come forward to depose against its members. In fact it is an old established gang as the period of its activities is put down by some of the witnesses to over a decade and Ex. 268 on the record shows that some of its members were suspected in the year 1922, i.e. about seven years ago. It seems the residence of the accused in Kacha on the river side, has afforded to them a particularly favourable pasture ground for their crimes which go undetected, as the cattle of the left bank part of the river Indus can easily be transported across to the right bank country and vice versa, and such transfers of cattle to unknown parts cause despair to the police and terror to the people of the surrounding countries. Amid such a favourable situation this gang has gained confidence born of success, and its members have merrily carried on, almost with impunity, their nefarious career of cattle lifting which has assumed scandalous proportions in this country."

The Magistrate himself, in company with the parties or their representatives and the Tapedars concerned, visited the scenes of offence: Exs. 289-292 show that the accused resided near each other, being within the radius of about three or four miles from the central point. The main legal argument put forward by the learned pleader for the appellants was that the evidence of the police officers regarding the existence of the gang and regarding the particular members of the gang should be excluded as being based on hearsay. The learned Public Prosecutor agrees that such evidence should have been excluded as against the individual members of the gang. On the general question of the gang I am of opinion that such evidence is admissible; but that, even without

such evidence, the evidence that there was a gang associated for the purpose of habitually committing theft is overwhelming. As indicated above, there is a very large volume of evidence to show the depredations committed by different members of the gang for a number of years, and the close connexion between the different members and their association in the matter of committing thefts. I am of opinion that it is unnecessary to elaborate this part of the evidence, because the fact that some of the accused at least were members of the gang associated for the purpose of committing thefts is too clear to admit of any doubt. It may be mentioned, with respect to the identification of cattle found with the accused, that the bhans of several of the accused were raided, and 346 cattle and other animals in all were seized. Some of these animals have been identified by the Bhagias, while others have not been identified.

Objection has also been taken by the learned pleader for the appellant to the evidence of certain witnesses regarding previous convictions of some of the accused, and regarding orders passed against some of them under S. 118, Criminal P. C. The question of admissibility of such previous convictions and security orders has been the subject of somewhat conflicting rulings. But it is clearly laid down in *Emperor v. Haji Sher Mahomed* (1) at p. 959 (of 46 Bom.) as follows:

"There is no doubt that a previous conviction of theft or an order to give security on the ground of being a habitual thief is admissible against the person who is charged under S. 401, I. P. C., i. e. belonging to a gang of persons associated for the purpose of habitually committing theft or robbery, held in *Bhoni v. Emperor* (2) and *Emperor v. Tukaram Malhari* (3) at p. 375 (of 14 Bom. L. R.):"

and I see no reason to disagree with this ruling. The ruling in *Emperor v. Tukaram Malhari* (3) mentioned above runs as follows:

"Under S. 401, I. P. C., for the purpose of determining whether a party of accused persons constituted a gang of persons associated for the purpose of habitual theft, the evidence that each individual of that party is a convicted thief is relevant. That evidence can be tendered before or after the prosecution have established the association."

The same principle, in my opinion,

(1) A. I. R. 1923 B.M. 71=75 I. C. 67=24 Cr. L. J. 867=46 Bom. 958.

(2) [1911] 33 Cal. 408=12 Cr. L. J. 67=9 I. C. 555.

(3) [1912] 13 Cr. L. J. 539=15 I. C. 811.

applies to an order having reference to S. 110 (a), if not to all the clauses in that section. Coming now to the cases of the individual accused, they have been dealt with by the learned Magistrate at the conclusion of his judgment, and he has shown that against a number of accused the evidence of their connexion with the gang is extremely clear and does not call for any serious consideration. These remarks apply to the cases of accused 2, accused 4, accused 5, and accused 6, and accused 8 and 10.

There remains the cases of Nos. 1, 3, 7, 11 and 12. But even out of these five although regarding them we heard the learned pleader for the appellants in some detail I am of opinion that the cases against Nos. 3 and 11 are very clear and that they do not call for any special remarks.

After hearing the learned pleader for the appellants, the Court came to the conclusion that the cases of Nos. 1, 7 and 12 were the only cases in which it was necessary to call on the learned Public Prosecutor to give reasons showing that they were members of the gang. The learned Public Prosecutor accordingly dealt in detail with the cases only of these three accused, and he has shown that in the cases of accused 1 and 7 and also their association with other accused in the commission of theft has been clearly established. It is proved, in both the Nos. 1 and 7, that, one of the animals found with them has been identified as a stolen animal. There are also a number of cases in which they have associated themselves with other members of the gang, and their presence is proved at the bhans of the various other accused in connexion with the disposal of animals. For instance, Ex. 194 states that accused 1 and 7 agreed that they would restore the camel in question. The evidence of Ex. 89 also is important evidence against accused 1 and 7. There is moreover evidence to show that accused 7 was concerned in the case of return of another animal in exchange for an animal stolen, which is typically the conduct of a patharidar. After hearing the learned Public Prosecutor on these points, and hearing the learned pleader for the appellants in reply, I feel no doubt that the offence has been fully brought home also to

accused 1 and 7, namely Baksho and Sadaru. There remains only the case of No. 12 Belo, which I will discuss in some detail, because the evidence against him is rather weaker than the evidence against the other accused, and at the same time is typical of the evidence produced against the various accused. (Here the judgment considered evidence against accused 12 and concluded.) I am of opinion that there is ample evidence for the conviction of accused 12 also.

The learned Magistrate in concluding the case observed as follows:

"That Mr. Chimandas was very keen about the unearthing of this gang, is evident from his monthly reviews (some of which have been exhibited in the case) and from the cautious, careful and copious measures he undertook to find out the misdoings of the members of this notorious gang. The case is indeed not of an ordinary kind. Its voluminous proportions can be imagined from the fact that as many as 265 witnesses have been examined and besides 123 exhibits have been put in and proved in support of the evidence. It is thus abundantly clear that this able and energetic officer has neither spared himself time nor trouble in bringing this matter to successful close, and his brilliant work in connexion therewith needs special recognition from Government. I may also mention that, in his turn, Mr. Chimandas has been faithfully assisted by Mr. Ferozdin Sub-Inspector who was put on special duty concerning this case and also by the local Sub-Inspector Mr. Mahomed Shah. The learned Public Prosecutor Mr. Parmanand Tejmal, B. A. LL. B., has materially assisted me in the trial of this case."

I agree with these remarks, and I am of opinion that no better work can be done by Police Officers in Sind than in rounding up the gangs of patharidars. If this is done steadily and continuously throughout Sind, I am of opinion that, as observed by the learned Special Magistrate in this case, in due time organized cattle-stealing in Sind will entirely cease; an unorganized cattle stealing is a matter of minor importance. Similar remarks were made by Mr. Aston, Additional Judicial Commissioner in *Hyder Khush v. The Crown* (4), in which case he observed that deterrent sentences should be passed in the case of such offenders who are a curse in Sind. I myself made similar remarks in the same case, with reference, particularly to patharidars. I am of opinion that the learned Magistrate himself has dealt with the case with great care and that he deserves commendation for the industry with which he has elaborated

the case against each of the accused respectively.

In regard to the sentences I am of opinion that they err on the side of leniency. The Magistrate has sentenced three of the accused to a period of two years only. I think that, in the case of persons who have been proved to be members of the gang associated habitually for the purpose of disposing of cattle a sentence of three years might well have been passed, as was done in a somewhat similar case of a gang disposed of by Mr. Moos, when he was Additional Sessions Judge at Hyderabad namely the case against Yaru and 21 others, in which case sentences of three years and upwards were passed. Also leaders of the present gang might well have been sentenced to the maximum period allowed by the law, namely seven years rigorous imprisonment. As however alterations in the sentences would involve an addition of only one or two years, in each case, I do not think it necessary to propose an enhancement of the sentences, although I may observe that having regard to the immense harm that is done by these gangs of patharidars in Sind deterrent sentences are essential when a gang has been brought to book.

In regard to the sentences, it has been argued by the learned pleader for the appellants that in assessing the sentences the Magistrate should not have taken the previous convictions of some of the accused into consideration except where S. 75, I. P. C. applies. This contention however cannot be accepted; previous convictions, orders under S. 118, Criminal P. C., as well as bad conduct generally, can be taken into consideration, in assessing the sentence even when S. 75, I. P. C. does not apply. In fact in this instance nothing would have been gained by adding a charge under S. 75 even where this could have been done, as in the case of accused 2, because the sentence which can be passed under S. 401, I. P. C. is seven years, which is the same as the maximum sentence which a Magistrate empowered under S. 30, Criminal P. C. is authorized to pass.

Rupchand, A. J. C.—The offence of which the present appellants are convicted is of a very special character and is entirely the creature of statute. In

order to establish it, it was necessary for the Crown to make out that there existed at the times specified a gang of persons associated together for the purpose of habitually committing theft or robbery and that each of the accused persons was one of that gang.

• In order to establish both these ingredients, the Crown has led evidence to prove: (a) that the accused most of whom belonged to the Shahani tribe lived in the vicinity of one another near the banks of the river Indus, in places which afforded a convenient rendezvous for concealing and disposing of stolen cattle; (b) that Shahanis who had migrated to the other side of the river had been treated as criminal tribes; (c) that several accused were related to one another; (d) that they were found loitering about in the localities of the theft shortly about the time the thefts took place; (e) that cattle lifting was rife in the vicinity of the places where Shahanis lived; (f) that footprints of stolen cattle were often traced to near places of their residence; (g) that although the number of cases of lifting cattle reported to the police was comparatively small, the owners of the stolen cattle preferred to pay bhung or illegal gratification to the members of the gang in order to get restoration of their cattle; (h) that bhung was accepted by one or more members of the gang in the presence of several others of them; (i) that in several cases where bhung was paid stolen cattle was restored to the owners; (j) that some of them had been previously convicted of cattle lifting; (k) that proceedings under S. 110, Cl. (a) had been successfully taken against some of them and they had been bound down; (l) that at the raids made immediately before the present prosecution, certain heads of cattle were secured by the police from their bhandis or cattle pens and no less than 45 heads of cattle were definitely identified by their owners as being stolen property, (m) and that they had offered no reasonable explanation of the stolen cattle found from their possession.

Nearly two hundred witnesses were examined in the case and the record consists of no less than 700 typed pages. The learned pleader for the appellants has said that although a good deal of

the evidence against the accused is either irrelevant or inadmissible, there is a mass of evidence to bring home the offence to accused Nos. 2 to 6 and 10 and 11 and that he did not propose to argue their case. With regard to the others he has contended that the relevant evidence against them is not sufficient to warrant a conviction.

In the first place he has attacked the admissibility of police reports which contain of the names of some of the appellants as suspects. Now although there was no objection to police officers being called to prove the existence of a gang of cattle-lifters and the frequency of thefts in the area where that gang operated, the reports made to them from time to time or brought to their notice showing the names of particular suspects were inadmissible as being hearsay and should in my opinion have been excluded.

It is next contended that evidence of the general criminality of the Shahani tribe to which several of the accused belong or the fact that members of that tribe who had migrated to the other side of the river had been treated as a criminal tribe could not be imputed to individual members of that tribe under this section, and that the section must be strictly construed in the interests of the liberty of the subjects. Reliance had been placed on *Kedar Sundar v. Emperor* (5) and *Rattanlal's Unreported Criminal Cases*, p. 418.

This objection is also well founded. But excluding both these pieces of evidence from our consideration, I am of opinion that there is sufficient unimpeachable evidence against the remaining accused, also that they formed members of the gang, and were associated together for the purpose of habitually committing cattle thefts.

There is a mass of evidence against them of their being found in company with the other accused on different occasions about the time of thefts by persons who were searching for the stolen cattle, of their presence when bhung was demanded and paid to the leaders of the gang and of one or more heads of stolen cattle being found from the possession of each of them. There is also evidence against them except accused 10-12 of being previously con-

victed of stealing cattle or of being bound down under S. 110, Criminal P. C.

It was argued that the evidence with regard to the first and second facts had been given under police pressure and therefore not true, but we are not prepared to accept this view. I also think that the evidence of previous convictions and proceedings under S. 110 has been rightly admitted. Such evidence is admissible for the purpose of proving habit though not of general bad character under S. 14, Evidence Act, and is not excluded by the provisions of S. 54 of that Act: *Emperor v. Tukaram Malhari* (3), *Bhona v. Emperor* (2), *Emperor v. Motiram Hari* (6). Our attention was invited by the learned pleader for the accused to the *Public Prosecutor v. Bonigiri Pottigadu* (7) and *King-Emperor v. Haji Sher Mahomed* (1). Neither of these rulings help the accused. In *Public Prosecutor v. Bonigiri Pottigadu* (7) the accused were being prosecuted under S. 400, I. P. C., and evidence was tendered to prove that the accused had committed crimes other than dacoities. It was rightly held that such evidence could not be given to prove habit of committing dacoities; or of bad character and was clearly inadmissible. In *King-Emperor v. Haji Sher Mahomed* (1) likewise the charge was under S. 400, I. P. C., and it was said that although a previous conviction of theft or an order to give security on the ground of being an habitual thief was admissible against an accused person in a case where he was charged under S. 401, I. P. C., it was of no use as evidence under S. 400, I. P. C. It is true that with regard to accused 1 and 12 there is no previous conviction against them nor have they been bound down under S. 110, Criminal P. C., but such evidence is not essential for a conviction.

In the end it was argued that the learned Magistrate was in error in taking into account the previous convictions of the accused in assessing their sentences. This argument is altogether ill founded. S. 75, I. P. C., on which reliance was placed is an enabling section: it provides for a sentence being awarded to an accused person in excess

of the maximum sentence provided by the section under which he is convicted, subject, however, to certain conditions. In the present case, the Magistrate has not exceeded and could not exceed the maximum sentence provided by S. 401, I. P. C., and therefore there was no occasion for calling into aid S. 75 of the Code. In determining to what extent in any particular case the punishment should approach to or recede from the maximum limit prescribed by the section, the trying Magistrate has to take into account several factors, inter alia the antecedents of the prisoner. whether such antecedents speak well or ill of him, such as his character and state of life whether good or bad including the previous convictions if any: Halsbury's Law of England, Vol. 9, para. 822. And the proof of such convictions is in no way excluded by S. 54, Evidence Act. In *Emperor v. Ismail Ali Bhai* (8), at 328, while dealing with this point, Heaton, J., said:

"The impressing of sentence is, within the wide limits allowed by the law, a matter of discretion; it is not a matter of proof. That is, it is a matter within the sphere not of evidence but of penology. S. 54, Evidence Act, is a part of the law of evidence, not a part of the penal law. It regulates what is relevant for the purpose of proof at the enquiry or trial, not what is relevant for the purpose of deciding whether a long or a short sentence should be imposed. Its purpose is quite plain; ordinarily evidence of bad character, including a previous conviction, is irrelevant to help to establish an accused person's guilt. But the law of evidence does not define or profess to define those matters which a Court should consider in using its discretion in passing sentence. What these matters are to be, is largely left to practice and to the common sense and knowledge of the world of the Court."

In this case, as pointed out by the learned Judicial Commissioner, the sentences err on the side of leniency, but they are not so grossly inadequate as to call for interference in revision. For these reasons I concur that the convictions and sentences should be confirmed and the appeals dismissed. I also agree with the observations made by the learned Judicial Commissioner with regard to the care with which the learned Magistrate has dealt with the case, and the energy shown by Mr. Chimandas, Deputy Superintendent of Police, in rounding up this gang.

S.N./R.K.

Appeals dismissed.

(6) A. I. R. 1925 Bom. 195=89 I. C. 527=26 Cr. L. J. 1891.

(7) [1909] 82 Mad. 179=9 Cr. L. J. 567=2 I. C. 807.

(8) [1914] 89 Bom. 826=16 Cr. L. J. 88=26 I. C. 995.

1930 Cr. Cases 857

(Calcutta)

JACK AND MITTER, JJ.

In re—A Pleader.

Civil Rule No. 223 of 1929, Decided on 28th March 1929.

Legal Practitioners' Act, S. 12—Where pleader is convicted of criminal offence, High Court is not bound to strike him off the roll—Junior pleader convicted of criminal breach of trust—To certain extent he being victim of his senior pleader—He paying back sums embezzled though after discovery of fraud—Subsequently he conducting himself well—One year's suspension from practice was sufficient.

Although where a pleader is convicted of criminal offences that prima facie renders him unfit to be a member of the lawyer's profession, still the Court is not bound to strike him off the roll. The word 'may' after the words 'the High Court' in S. 12 shows that the discretion of the Court in each particular case is absolute. [P 858 C 2]

A junior pleader of six years standing was convicted of criminal breach of trust and abetment of the same. But to some extent he was the victim of his senior pleader. He had also paid the sums embezzled by him though after the discovery of the fraud. He conducted himself well and had done nothing wrong since his last offence and had expressed his repentance.

Held: that instead of striking him off the roll he should be suspended from practising for one year: 22 *All. 49 (P.C.)*, *Cons. In re, Weare*, (1898) 2 Q. B. 439, *Appl.* [P 859 C 1]

H. D. Bose, Saratkumar Mitter and Anilchandra Ray Chaudhuri—for Petitioner.

Jack, J.—By this rule under S. 12, Legal Practitioners Act, S pleader, has been directed to show cause why he should not be suspended or dismissed, on the ground that he has been convicted of two offences of breach of trust and abetment of the same, implying a defect of character unfitting him to be a pleader. He does not dispute the accuracy of the recitals of the two judgments of the Chief Presidency Magistrate in the cases in which he was convicted.

From these, we find that C his co-accused in one of these cases, was previously prosecuted for embezzlement and had been declared an insolvent and prohibited by the Court from withdrawing money on behalf of clients from the Court. Knowing all this, S withdrew, in each of these cases, a large sum on ac-

count of a client of C by virtue of a power-of-attorney, in which his name was entered, unknown to the client. These sums were not paid to the clients and hence his conviction in these two cases. Further, it appears, that when asked for the money, he told various untruths to explain the delay in payment.

In his application to be allowed to resume practice in the Small Cause Court, he urged: (i) that he always acted bona fide under the direction of his senior (i.e., his co-accused in one case, little knowing that he would be put to such trouble, and now repents his extreme indiscretion; (ii) that he has paid up the amount of the defalcations; (iii) that he has already suffered considerably through his prosecution and conviction.

These pleas indicate that he scarcely seems to appreciate the extent of moral delinquency indicated by his conduct. Such conduct is not compatible, as he seems to imagine, with bona fides and is not merely a matter of indiscretion. That he should have thought such pleas justified in the circumstances seems in itself an indication that his present character unfits him to be a member of an honourable profession and that he is not a man to whom the affairs of clients could be safely entrusted. His learned advocate very wisely does not now seek to justify his conduct, though he still seems anxious to put most of the blame on his co-accused.

He has, it is true, since he was convicted, paid up the amount of the defalcations and, putting the most favourable interpretation on this, some credit must be given to him for restoration of the amounts embezzled. But the fact that he did not act in a straight forward manner, after the defalcations occurred, is very much against him. An order of dismissal seems almost to be demanded in the interests of the profession and of the litigant public. So much so, that it is with some hesitation that we refrain from ordering that his name be struck off the roll of pleaders and adopt the alternative course suggested in the rule. Both the Chief Judge of the Small Cause Court and the Chief Presidency Magistrate regard, as a mitigating circumstance, the fact that he was apparently

led astray by *C* and in this view of the case we are disposed to treat him leniently, in the hope that, when he resumes practice, he will have been so impressed with the heinousness of such conduct that nothing of the kind will recur. We accordingly order that *S* be suspended from practice as a pleader for one year from this date.

Mitter, J.—This rule was issued by the Full Court, by virtue of the powers vested on the High Court by S. 12, Legal Practitioners Act (18 of 1879), by which *S*, a pleader practising in the Calcutta Small Cause Court, was called upon to show cause why he should not be suspended or dismissed on the ground that the offences of which he was convicted imply a defect of character which unfits him to be a pleader.

It appears that the pleader was charged with aiding and abetting another pleader, *C* in committing breach of trust of a sum of Rs. 1,002 withdrawn on 14th November 1925, by the said *C* from the Court, the sum being due to one Bholaram Kundulal. He was convicted under Ss. 406 and 109, I. P. C., by the Chief Presidency Magistrate and was sentenced to undergo rigorous imprisonment for six weeks. He was also charged under S. 409, I. P. C., with criminal breach of trust for misappropriation of a sum of Rs. 1,350 drawn on behalf of his client, one Sudarsan-chandra Mallik, and he was sentenced to another six weeks' imprisonment on this charge. The pleader moved the High Court and *C. C. Ghose* and *Gregory, JJ.* reduced the sentences, observing in their judgment that he has tried to make amends after his conviction. *Mr. H. D. Bose* has appeared on behalf of the pleader and has argued that the money misappropriated had been paid up and that, as the pleader was a junior pleader of only six years' standing and that as regards the first offence, the Presidency Magistrate observed in his judgment that he was to some extent the victim of the co-accused *C* a merely nominal punishment should be given.

When a pleader does an act, which involves dishonesty, it is for the interest of the suitors that the Court should interpose and prevent a man,

guilty of such misconduct, from acting as a pleader of the Court. In this case, the pleader had been proceeded against criminally and has been convicted of breach of trust and abetment of the same and, upon those convictions being brought to our notice, it is the bounden duty of the Court to act. It is not permissible to us to go behind the conviction, nor has learned counsel for the pleader asked us to do so. In our opinion, the convictions followed by the sentences were sufficient, without further enquiry, to justify the High Court in taking proceedings under S. 12 of the Act, for it is now firmly established that the pleader cannot be allowed to have indirect appeals against the judgment of the Chief Presidency Magistrate confirmed by the High Court: *In the matter of Rajendra Nath Mukerji* (1). Where a pleader has been convicted of criminal offences, for misconduct committed strictly in his professional character, that prima facie, at all events, renders him unfit to be a member of the honourable profession. I do not, however, mean to say that wherever a pleader has been convicted of a criminal offence the Court is bound to strike him off the roll. The use of the word 'may' in S. 12 after the words "the High Court" shows that the discretion of the Court in each particular case is absolute. In this connexion, the following observations of Lord Esher, Master of the Rolls, are instructive and may be usefully referred to :

"Where a man has been convicted of a criminal offence, that prima facie, at all events, does make him a person unfit to be a member of the honourable profession. That must not be carried to the length of saying that, wherever a solicitor has been convicted of a criminal offence, the Court is bound to strike him off the roll. That was argued on behalf of the Incorporated Law Society in the case of *Re a Solicitor, Ex parte Incorporated Law Society* (2). It was there contended that, where a solicitor had been convicted of a crime, it followed, as a matter of course, that he must be struck off; but *Baron Pollock* and *Manisty, J.*, held that, although his being convicted of a crime prima facie made him liable to be struck off the roll, the Court had a discretion and must inquire into what kind of a crime it is of which he has been convicted, and the Court may punish him to a less extent than if he had not been punished in the criminal proceed-

(1) [1899] 22 All. 49=26 I. A. 242 (P.C.).

(2) [1889] 61 L. T. 842.

ing. As to striking off the roll, I have no doubt that the Court might, in some cases, say 'under these circumstances we shall do no more than admonish him', or the Court might say 'we shall do no more than admonish him and make him pay the costs of the application'; or the Court might suspend him or the Court might strike him off the roll. The discretion of the Court in each particular case is absolute. I think the law as to the power of the Court is quite clear: see *In re, Weare* (3)".

Bearing these observations in mind, let us consider what are the circumstances of mitigation in this case. There is the fact that he has paid the sums withdrawn by him. On the other hand, it is to be noticed that the repayment was after the discovery of the fraud. If he had spontaneously come forward and acknowledged the truth and of his own accord had made good the loss his clients had sustained through the embezzlement in question, I think that would have entitled him to much more favourable consideration than the mere fact of his payment on the discovery of the fraud. He paid the money more for the purpose of protecting himself from the consequences of his misconduct rather than from any contrition on his part and desire to make good the mischief he had done. But still, taking into consideration the facts that he has paid the money, that he was, to some extent, the victim of circumstances, in that he associated himself with his senior pleader, whose conduct was known not to be above board, that he has conducted himself well and had done nothing wrong since his last offence, that he, through his counsel, has expressed his repentance and has given us the assurance that he would lead an honourable life henceforth, we think we are not called upon to go to the extent of striking him off the roll; but we cannot pass the case over without marking our sense of the misconduct of the pleader in the two instances of misappropriation which are found to have taken place. The least that we can do is to say that he must be suspended from practising as a pleader for the period of one year from date. For these reasons I agree with my learned brother in the order which he proposes to make.

S.N./R.K.

Order accordingly.

(3) [1893] 2 Q. B. 489 = 62 L. J. Q. B. 596
58 J. P. 6=69 L. T. 522.

1930 Cr. Cases 859

(Calcutta)

SUHRAWARDY AND COSTELLO, JJ.

Fazlar Rahaman and others—Appellants.

v.

Emperor

Criminal Appeals Nos. 984 and 985 of 1929, and Criminal Revn. No. 29 of 1930, Decided on 5th May 1930.

(a) Criminal P. C., S. 253—Magistrate can discharge accused at any time before recording evidence and in course of recording evidence if charge is groundless—Though as a general rule when a Magistrate proceeds to take evidence he must take the whole of the evidence.

A Magistrate can discharge an accused at any stage before recording any evidence or in the course of recording evidence if he is of opinion that the charge is groundless: 34 I. C. 305 and 10 Cal. 67, *Ref.*: A. I. R. 1928 Mad. 129, *Dist.* [P 861 C 2, P 862 C 1]

(b) Criminal P. C., Ss. 253 and 476—Cases held groundless and Magistrate's view supported by police report—Complainant need not be asked to prove his case.

Where the Magistrate has held that the case against the accused is groundless and has before him the report of the police in support of his view it is not necessary that he should again ask the complainant to prove his case which the Magistrate has disbelieved even before he examines the complainant and his witnesses: 5 C. W. N. 106, *Ref.* [P 862 C 2]

(c) Criminal P. C., S. 476—"Preliminary enquiry"—Meaning and scope explained.

Section 476 gives the discretion to the Court to hold or not to hold a preliminary enquiry. If the Court is of opinion that no preliminary enquiry is necessary it may at once make the complaint. If, on the other hand, it thinks that it is desirable to have a preliminary enquiry, it may adopt any course for the purpose of such an enquiry. The words "preliminary enquiry" under S. 476 may be co-extensive with if not wider than the words "enquire into the case" in S. 202, Criminal P. C. A. I. R. 1928 All. 21, *Ref.*: A. I. R. 1925 Pat. 310; 43 Bom. 300 and 49 I. C. 917 *Dist.* [P 862 C 2, P 863 C 1]

(d) Criminal P. C., S. 476—Any person who appears to have committed an offence under S. 195 (1) (b) and not only parties to proceedings is contemplated by S. 476.

Section 476 is not restricted to the party making the complaint or actually before the Court, but is wide enough to include any person who appears to have committed an offence mentioned in S. 195 (1) (b) which is not restricted to parties to the proceedings like Cl. (c) of that section. The Court has therefore jurisdiction to prosecute a person who causes a false complaint to be lodged. All that S. 476 requires is that the Court should be satisfied that it is expedient in the interest of justice that an enquiry should be made into an offence.

which appears to it to have been committed in or in relation to a judicial proceeding. It does not speak of a party to the proceeding.

[P 864 C 2]

Mahendra Kumar Ghose and Sures Chandra Talukdar—for Appellants.

Debendra Narain Bhattacharjee—for the Crown.

Suhrawardy, J.—These two appeals and the revision case are connected and arise out of the same matter. Aziz Mia, the appellant in appeal No. 935 and the petitioner in revision case No. 29 of 1930, filed a complaint before the Chief Presidency Magistrate against one Afaq Ali on the allegation that he had given him Rs. 50 to be made over to Fazlar Rahaman, the appellant in appeal No. 934 of 1929, and the money was misappropriated by Afaq Ali. The learned Magistrate ordered the issue of a warrant on a charge under S. 406, I. P. C. The case was adjourned from time to time as the warrant was not returned. On 1st October 1929 the warrant came back executed, but as the accused did not appear a proclamation was ordered to be issued. The order was thus recorded:

"Proclamation dates: date of publication 21st October 1929 put up 28th October 1929. Date of appearance 21st November 1929."

On 21st October the accused appeared in Court, surrendered and was released on bail. The order passed was:

"Recall proclamation. Inform complainant fixing date 28th October 1929."

It was the date originally fixed for the matter to be put up before the Magistrate after the publication of the proclamation. On 28th October the following order was passed:

"Complainant absent said to have gone to his native country. Accused says that the complainant was seen in Court. Pleader for complainant now asks for a month's time. This is absurd. The accused is discharged under S. 253, Criminal P. C."

The certified copy of the order which has been placed before us shows that the accused was discharged under S. 203, but it appears from the Magistrate's explanation that the order was passed under S. 253; and as the original record is not before us we must take it that the order passed by the Magistrate on 28th October 1929 was under S. 253; and it is conceded that if it was passed under that section it must have been passed under Cl. (2) of that section. Thereafter Afaq Ali applied to the Magis-

trate to prosecute the complainant Aziz Mia for having brought a false case against him. The Magistrate examined Afaq Ali and sent the matter to the C. I. D. for enquiry and report. On receipt of the report the learned Magistrate lodged a complaint under S. 476, Criminal P. C., in the Court of the Third Presidency Magistrate for prosecuting Aziz Mia and Fazlar Rahaman under S. 211, I. P. C. The two appeals are by Aziz Mia and Fazlar Rahaman against this order passed by the Magistrate under S. 476, Criminal P. C. The revision case is directed against the order of the Magistrate dated 28th October 1929. It will be convenient to deal with the revision case first.

It is argued on behalf of the petitioner that the Magistrate was not justified in passing the order discharging the accused under S. 253 (2) in this case. The charge against the accused was cognizable and non-compoundable and hence the Magistrate could not pass an order under S. 259. It is contended that in a cognizable and non-compoundable case the Magistrate is bound to adjourn the case even if the complainant is absent and to carry on the prosecution on behalf of the State; and in support of this case reliance is placed on the case of *Maung Thu Daw v. U. Po Nyun* (1). There it was held, and rightly held, that where there is reasonable ground for believing that an offence has been committed, the Magistrate should not, because the complainant is absent, dismiss the case and discharge the accused but the final responsibility for the conduct of such case rests with the State, and once the machinery of the law has been set in motion the right of arresting its progress rests with the State alone. This brings us to the consideration of the question as to whether there was reasonable ground for believing that an offence had been committed. The case brought by the complainant against the accused is of a class of cases which are fairly common in Calcutta and such cases by their recurrence have won the name of "Noakhali cases." It is to be noted that both parties hail from Noakhali. In such cases the usual complaint is that

(1) A. I. R. 1927 Rang. 174 = 108 I. C. 105 = 28 Cr. L. J. 649 = 5 Rang. 136.

the complainant had entrusted some money to the accused who was going home to make it over to someone in the native village of the complainant but the accused instead of so doing appropriated the money to himself. Some of these cases may be true, but the learned Magistrate who has wide experience of these matters observes that many of them are brought for the purpose of satisfying private grudge. In the present case the defence of the accused was that he had never come to Calcutta and had never been entrusted with money by the complainant, that he was the maternal uncle-in-law of Fazlar Rahaman and had some disputes with him regarding some land and that this case was brought against him by Fazlar Rahaman through the complainant for the purpose of harassing him and putting him in trouble. The learned Chief Presidency Magistrate is of opinion that the case against the accused is not true considering the conduct of the complainant and the other circumstances in the case. It has further been broadly argued that the Magistrate had no power under S. 253 (2) to discharge the accused, without hearing the evidence for the prosecution merely because the complainant was absent on the date of hearing.

If the Magistrate is satisfied that *prima facie* there is a case against the accused or has reason to suspect that an offence has been committed he has power to proceed under S. 252, Criminal P. C., but if on the date of hearing he has reason to suspect that the case is a false one and that there is no reasonable ground for suspecting that an offence has been committed, he has the right to proceed under S. 253 which is couched in wide terms. That section makes it clear that if a Magistrate after taking evidence under S. 252 finds that no case has been made out he may discharge the accused, and it further says that nothing in that section (that is taking of the evidence under S. 252 and making such examination of the accused and finding that no case has been made out against the accused), shall be deemed to prevent the Magistrate from discharging the accused at any previous stage of the case if for reasons to be recorded by such Magistrate he considers the charge to be groundless.

Under Cl. 1 the Magistrate may discharge the accused if after recording the evidence for the prosecution he finds that no case has been made out against him. Under Cl. 2 he may discharge the accused at any stage even before recording any evidence if he considers the charge to be groundless. The wording of the section is so plain that it is hardly necessary to cite any authority for the view thus expressed. But it has been so held in *Gobinda Das v. Dulall Das* (2), where the learned Judges say :

"Having regard to the terms of S. 259 we are of opinion that in warrant cases not coming within that section except under the last clause of S. 253, which is not applicable, a Magistrate is not competent to pass an order of dismissal or discharge in consequence of the absence of the complainant."

It is further remarked that a Magistrate can pass an order of dismissal or discharge an accused in consequence of the absence of the complainant under Cl. 1, S. 253. Our attention was also drawn to a recent decision of the Madras High Court in *Mahomed Sheriff Sahib v. Abdul Karim Sahib* (3). In that case the Magistrate had discharged the accused and refused to examine all the witnesses cited by the complainant holding that no case had been made out against him. It was held that the Magistrate could not hold that no case had been made out against the accused without examining all the witnesses for the prosecution; and that if he purported to discharge the accused under the last clause of S. 253 he did not in his order say that the charge was groundless which was a different thing from saying that a case had not been made out. It is further observed there that where a complaint *prima facie* discloses an offence a Magistrate cannot hold the charge to be groundless unless he knows what is the sort of evidence that is going to be adduced to prove it. The rule that can be deduced from this case is that where the Magistrate proceeds to take evidence he must take the whole of the evidence before holding that no case has been made out against the accused. I do not quarrel with this view, but I hold that he can discharge the accused at any stage

(2) [1884] 10 Cal. 67.

(3) A. I. R. 1928 Mad. 129=28 Cr. L. J. 995=105 I. C. 819=51 Mld. 185.

before recording any evidence or if in the course of recording evidence he is of opinion that the charge is groundless: see the case of *V. R. Alexander v. P. W. Connors* (4). The order of the learned Chief Presidency Magistrate does not contain the word "groundless" but reading it as a whole and considering it with the explanation submitted by the Magistrate which we are bound to do under S. 441, Criminal P. C., it seems that he believed that the charge was groundless in view of the absence of the complainant, the statement made by the accused and the further fact that no steps were taken by the complainant to have the sale proclamation issued. The learned Magistrate further disbelieved the story that the complainant had gone to his native country; and he found at the time when he passed the order that the case was one of the class which he characterizes as Noakhali cases was brought for the purpose of settling private disputes. This ground accordingly must fail.

The next ground taken in the revision case by Mr. Ghose is that full opportunity should have been given to the complainant before ordering his prosecution for an offence under S. 211. It appears that on 6th December the complainant applied to the learned Magistrate to revive his complaint which the Magistrate declined to do. It is not necessary for us to consider that order. The present rule is directed against the order discharging the accused. Mr. Ghose has relied on certain cases of which it is enough to cite one, namely the case of *Lalji Gope v. Giridhari Chowdhury* (5), where it was held that the Magistrate does not exercise a proper discretion, who on receipt of a police report that the complaint is false forthwith orders the complainant to be prosecuted under S. 211, I. P. C., and rejects the prayer of the complainant for hearing the complaint. But if the Magistrate examines the complainant and his witnesses and comes to the conclusion that the charge is false he can then proceed under S. 476, Criminal P. C. This case and other cases similar to it proceed on the assumption that the complaint of the complainant has not been finally and judicially disposed

of. But where the Magistrate has held that the case against the accused is groundless and has before him the report of the police in support of his view it is not necessary that he should again ask the complainant to prove his case which the Magistrate has disbelieved even before he examines the complainant and his witnesses. The procedure recommended in cases ordering prosecution under S. 211 is that the complainant if his complaint is pending should be given an opportunity of proving his case before he is directed to be prosecuted. In the present case the complaint had been finally disposed of by the Magistrate under S. 253 and therefore there was nothing before him into which he should make any further enquiry. This ground also fails, and in this view the rule is discharged.

With regard to the appeal by the complainant Aziz Mia the real ground is that no complaint should have been made under S. 476 before the complainant had been given opportunity of proving his complaint. This point has already been disposed of. The other point raised is that before making a complaint under S. 476 the learned Magistrate had asked the C. I. D. to report on the complaint. This inquiry was a preliminary enquiry as contemplated by S. 476. It is argued on behalf of the appellant that the preliminary enquiry under S. 476 should be conducted by the Court and not by any other agency as is provided for by S. 202, Criminal P. C. The wording of S. 476 is so plain that it can hardly be argued that the words "such preliminary enquiry" in the section should be qualified by reading into it "by the Court itself" words which the legislature has not thought fit to use. The section simply says that if the Court is of opinion that an offence has been committed in respect of a judicial proceeding before it such Court may after such preliminary enquiry, if any, as it thinks necessary record a finding etc. This section gives the discretion to the Court to hold or not to hold a preliminary enquiry. If the Court is of opinion that no preliminary enquiry is necessary it may at once make the complaint. If, on the other hand, it thinks that it is desirable to have a preliminary enquiry, he may adopt any course for the purpose of such an en-

(4) [1916] 84 I. C. 805=7 Cr. L. J. 403.

(5) [1901] 5 C. W. N. 103.

quiry. The words "preliminary enquiry" under S. 476 may be co-extensive with if not wider than the words "enquire into the case" in S. 202, Criminal P. C. There is no direct authority on this point but the question did come up for observations in some cases. In *Chamari Singh v. Public Prosecutor of Patna* (6), the Sessions Judge made a complaint under S. 476 and sent the case to the Magistrate to enquire if any offence was committed by the accused and, if so, to prosecute him under certain sections of the Criminal Procedure Code. This procedure the learned Judges condemned and observed:

"It is for the Court acting under S. 476 to make any enquiry that is necessary and then to make a complaint against the person or persons who, he is satisfied, have committed an offence."

They do not mean to lay down that it is the Court acting under S. 476 which must hold the enquiry. What they mean is that the Court acting under that section should make an enquiry and make a complaint as the result of such enquiry and not delegate the function to another Court for they observe that this section does not contemplate that the Court should send the case to a Magistrate for enquiry as to whether an offence has been really committed and for prosecution if the Magistrate is so satisfied. This decision does not help the appellant as it only lays down that an enquiry preliminary to a complaint should be made by the Court which does not necessarily mean by the Court itself examining witnesses. The case of *Emperor v. Waman Dinkar* (7), is not also in point. It does not support the appellant but it may be turned against him on some of the observations made in that case. There the Assistant Collector who had sanctioned the prosecution made a complaint by holding a preliminary enquiry in the shape of a part by himself and the rest of it by the C. I. D. It was held that the Assistant Collector was bound to hold the whole enquiry himself as he had started it. In *Raja Rao v. Emperor* (8), the point on behalf of the accused was that

they were not allowed at the preliminary enquiry to cross-examine the witnesses produced against them. Waller, J., observed:

"What a Court has to decide under S. 476 is: (a) whether an offence of the kind contemplated appears to have been committed, and (b) whether it is expedient in the interest of justice that it should be further enquired into. In order to arrive at a decision, the Court may, if it thinks fit, hold such preliminary enquiry as it considers necessary. The nature, method and extent of the preliminary enquiry are, it seems to me, entirely at its discretion."

This observation of the learned Judge is against the appellant in so far as it holds that "the nature, method and extent" of the enquiry are in the discretion of the Judge. The method adopted in the present case by the learned Magistrate was to have an enquiry made by the C. I. D. The only case which lends some support to the appellant's contention is the case of *Sakhi Rai v. Emperor* (9) a decision of a single Judge. The facts shortly stated were that a person lodged a complaint before a Sub-Divisional Officer who without examining him on oath ordered the complaint to be put up with the police report. He subsequently passed an order calling upon the complainant to show cause why he should not be prosecuted under S. 211. In showing cause the complainant produced several witnesses who were examined under the order of the Sub-Divisional Officer by different Subordinate Magistrates. On a perusal of the police report and the evidence recorded by the Magistrates the Sub-Divisional Officer made a complaint against a witness for the complainant under S. 476 on a charge under S. 193, Criminal P. C. The learned Judge held that the complainant could be called upon to show cause why he should not be prosecuted only under S. 476 and that the preliminary enquiry to be held under S. 476 could not be directly held by any other Magistrate except the Sub-Divisional Officer himself who on the police report thought that the complaint was a false one. In that point of view the learned Judge was of opinion that the evidence recorded by the subordinate Magistrates was recorded without jurisdiction and could not form the basis of prosecution. On the facts of that case the decision is right as the Sub-Divisional Officer

(6) A. I. R. 1925 Pat. 880=68 I. O. 730=26 Cr. L. J. 170=4 Pat. 24.

(7) [1919] 43 Bom. 800=20 Cr. L. J. 438=51 I. O. 257.

(8) A. I. R. 1926 Mad. 1008=27 Cr. L. J. 1149=97 I. O. 689=50 Mad. 660.

(9) [1919] 20 Cr. L. J. 245=49 I. O. 917.

could not without entrusting the holding of the preliminary enquiry to a subordinate Magistrate, merely delegate the work of recording evidence to such Magistrate while himself assuming to hold the preliminary enquiry. But if the learned Judge meant to lay down the law generally that the preliminary enquiry could not be made except by the Court acting under S. 476, I beg to express my respectful dissent. The question now before us was not directly raised in that case and the observation made by the learned Judge must be taken in connexion with the particular facts of that case. On the other hand, a decision of the Allahabad High Court in *Shabbir Hasan v. Emperor* (10) supports the view I have expressed. Dalal, J. is reported to have there said :

"If the civil Court so desires an enquiry may be ordered by the police but in that case when the police papers arrive the civil Court has to determine whether it is necessary to take action against particular persons under S. 476."

The result of an examination of these cases and of the consideration of the words of S. 476 itself is that the preliminary enquiry mentioned in that section may be conducted by the Court either by itself or by any other method available. This appeal accordingly fails and is dismissed.

The next appeal (No. 934 of 1929) is by Fazlar Rahaman who was not the complainant nor does it appear from the record that he was in any way connected with the complainant. Afaq Ali's case is that this man was the wire-puller behind the screen. His case is that he had a long standing dispute with the appellant Fazlar Rahaman for possession of a plot of land in their native country and that the complainant Aziz Mia was set up by this appellant to lodge a false complaint against him. The Criminal Investigation Department held an enquiry into this matter and reported against both. On receipt of the report the learned Chief Presidency Magistrate said that it was expedient for the ends of justice that an enquiry should be made into an offence under S. 211, I. P. C., against both. Under that section a person who institutes a criminal proceeding as also a person who causes such proceed-

ing to be instituted may both be guilty of an offence under that section. The question before us is whether this Fazlar Rahaman can be said to have committed an offence in or in relation to a proceeding in the Court of the Chief Presidency Magistrate within the meaning of S. 476, Criminal P. C. That section is not restricted to the party making the complaint or actually before the Court but is wide enough to include any person who appears to have committed an offence mentioned in S. 195 (1) (b), which is not restricted to parties to the proceeding like Cl. (c) of that section. The Court has therefore jurisdiction to prosecute a person who causes a false complaint to be lodged. All that S. 476 requires is that the Court should be satisfied that it is expedient in the interest of justice that an enquiry should be made into an offence which appears to it to have been committed in or in relation to a judicial proceeding. It does not speak of a party to the proceeding. An offence enumerated in S. 195 (1) (b) may be committed by a person who is not a party to the proceeding but if the Court is satisfied that such an offence in relation to a judicial proceeding has been committed, it can lodge a complaint under S. 476 against any person committing the offence : see *Shabbir Hasan's* case (10). We agree with the view taken by the Full Bench of the Rangoon High Court in *Emperor v. Syadkhan* (11). We think therefore that the order passed by the Chief Presidency Magistrate sanctioning the prosecution of Fazlar Rahaman is not illegal. This appeal also is accordingly dismissed.

Costello, J.—I agree.

V.B./B.K. Appeals and revision dismissed.

(10) A. I. R. 1928 All. 21=135 I. C. 810=28 Cr. L. J. 986.

(11) A. I. R. 1925 Rang. 321=91 I. C. 86=27 Cr. L. J. 4=3 Rang. 303 (F.B.).

1930 Cr. Cases 865

(Sind)

WILD, A. J. C.

on difference between

PERCIVAL, J. C. AND RUPCHAND, A. J. C.

Mohammed Yusif and another—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 189 and 191 of 1929, Decided on 10th December 1929, from judgment of Sess. Judge, Sukkur.

(a) Penal Code, S. 302—Mere fact that conviction is based on circumstantial evidence is no reason why lesser sentence should be passed—Criminal trial—Circumstantial evidence

In a case of murder the mere fact that the conviction is based on circumstantial evidence is no reason why a lesser sentence should be passed. If the case though depending on circumstantial evidence, is perfectly clear and conclusive and excludes all other reasonable hypotheses except the guilt of the accused, death sentence can be passed : 76 *I. O.* 97, *not foll.* ; *A. I. R.* 1921 *Mad.* 428 ; *A. I. R.* 1929 *Sind* 179, *Rel. on.* 7 *S. L. R.* 109, *A. I. R.* 1921 *Sind* 145 and *A. I. R.* 1925 *Sind* 289, *Ref.* [P 868 C 1]

(b) Criminal Trial—(Per Percival, J. C., and Wild, A. J. C.) Accused committing criminal offence—It is no palliation of his guilt that to absolve himself from punishment he commits another more grievous offence, namely murder—(Per Rupchand A. J. C.) It is not improper to inflict lesser sentence where there are circumstances demanding exercise of discretion, e. g., absence of strong motive coupled with possibility of murder having been committed, without premeditation and under temporary derangement of mind due to fear of being prosecuted and convicted of criminal offence—Penal Code, S. 302.

Per Percival, J. C. and Wild, A. J. C.—Where an accused commits one criminal offence, it is no palliation of his guilt that to absolve himself from punishment he commits another and more grievous offence, namely murder.

[P 868 C 1 ; P 883 C 1]

Per Rupchand, A. J. C.—It is not improper to inflict a lesser sentence where there are circumstances demanding the exercise of such discretion as for instance the absence of strong motive coupled with the possibility of the murder having been committed without premeditation and under temporary derangement of the mind due to the fear of being prosecuted and convicted for a criminal offence. But the exercise of such discretionary powers under S. 302, Penal Code, in any particular case must depend on its own facts considered in the light of various circumstances such as the magnitude of the mischief which the crime has a tendency to produce, the effect of the punishment in preventing similar crimes the motive or inducement to the crime, aggravating or instigating circumstances and the like. When murder is committed for lust or for rage perhaps it is necessary to take the life

of the murderer not so much as to prevent him from committing similar offences but to serve as a deterrent to others for committing similar offences. Again when a crime of a particular character is rampant in any locality, extreme penalty of law is necessary to serve as a deterrent, [P 880 C 1, 2]

(c) Penal Code, S. 302—Delay.

Per Wild, A. J. C.—In the case of an ordinary murder the delay in confirming sentence of death may be taken into consideration but not so when the murder is not ordinary : 21 *I. C.* 882, *Dist.* [P 884 C 1]

(d) Evidence Act, Ss. 159 and 161—(Per Rupchand, A. J. C.) It is extremely undesirable that notes of post-mortem examination be put in evidence through Medical Officer en bloc—(Per Percival, J. C.) Pleader for accused not objecting to notes going on record—No discrepancy between evidence of Medical Officer and notes—Placing of notes on record does not do any harm to accused.

Per Rupchand, A. J. C.—Ss. 159 to 161 permit a limited use being made of post-mortem notes of Medical Officer, namely that they be used by the witness who made them for refreshing his memory or by a party for the purpose of contradicting the witness. It is extremely undesirable that such notes of post-mortem examination be put in evidence through the Medical Officer en bloc as it is prejudicial to both parties. [P 876 C 1, 2]

Per Percival, J. C.—When pleader for accused takes no objection to the post-mortem notes going on the record and when there is no discrepancy between the post-mortem notes and the evidence of the Medical Officer, the placing of the post mortem notes does not do the accused any harm : 9 *Cal.* 455 and 27 *Cal.* 295, *Ref.* [P 868 C 2]

(e) Criminal P. C., S. 342—S. 342 is intended for getting explanation if any which accused wishes to offer against case which Crown has proved by evidence on record—Questions in the nature of cross-examination or filling gaps in prosecution case should be avoided.

Per Percival, J. C.—The Court is bound to put to the accused the salient facts and circumstances of the case in a succinct form and to ask him if he has any explanation to offer but incriminating questions and questions in the nature of cross-examination must be avoided. [P 869 C 1]

Per Rupchand, A. J. C.—The examination of the accused under S. 342 is intended for no other purpose than to enable the accused to explain any circumstances appearing in the evidence against him. The Court ought not to put questions which are intended to elicit answers calculated to supplement the case of the prosecution or to obtain admissions of fact which might incriminate the accused or to obtain information from him for the purpose of filling the gaps in the evidence of the prosecution : *A. I. R.* 1925 *Cal.* 361 ; 10 *Mad.* 295 ; 2 *C. W. N.* 709, 14 *I. C.* 667, 27 *Mad.* 238, 86 *Mad.* 457, 42 *All.* 522 and *A. I. R.* 1928 *Lah.* 225, *Rel. on.* [P 875 C 1]

(f) Evidence Act, S. 27—Scope.

Only so much of the information given by the accused as relates distinctly to the fact

thereby discovered can be proved : *A.I.R.* 1929 *Law*, 344, *Rel. on.* [P 884 C 1]

(g) Criminal Trial, P. C., S. 162—Useful test of admissibility of statement made by accused to police is to ascertain purpose for which it is being put to by prosecution—Statement cannot be used for corroborating prosecution witnesses.

Per *Rupchand*, *A. J. C.*—The fact that an accused person has made a statement with the object of exculpating him or that his statement if believed would exculpate him does not by itself render it admissible in evidence. If notwithstanding the form in which it has been made the statement is nevertheless an admission of incriminating circumstances and is used by the prosecution as such, it is not admissible in evidence. A useful test as to the admissibility of a statement made by an accused person to the police is to ascertain the purpose for which it is being put to by the prosecution. Where the prosecution rely upon the statement as corroborative proof of certain facts deposed to by the prosecution witnesses and not with the object of proving their falsity, the statement is not admissible in evidence : *A. I. R.* 1925 *Sind* 237 ; 6 *Bom.* 34, 14 *Bom.* 260 (*P.B.*) ; 19 *Bom.* 362 and *A.I.R.* 1926 *Sind* 151, *Rel. on.* [P 874 C 2 ; P 875 C 1]

(h) Criminal Trial—As a general rule it is reasonable to expect that innocent person can explain suspicious circumstances connected with his person, dress or conduct—If he attempts to account for them, by false representation force of suspicious circumstances is thereby augmented.

Per *Rupchand*, *A. J. C.*—As a general rule to which however exceptions undoubtedly genuine from time to time occur, it is reasonable to expect that an innocent party can explain suspicious or circumstantial appearances connected with his person, dress or conduct that the desire of self-preservation if not a regard for truth will prompt him to do so and that whenever a party attempts no explanation of facts which he may reasonably be presumed to be able and interested to explain or attempt to account for them by false representation, the force of suspicious circumstances proved against him is thereby augmented. [P 877 C 1, 2]

(i) Criminal Trial—Crime proved to have been committed by other evidence, then motive is immaterial—Weak case cannot, however, be strengthened by motive.

Per *Rupchand*, *A. J. C.*—It is well settled that on the one hand absence of ascertainable motive comes to nothing if the crime is proved to have been committed by other evidence, and on the other to make out a weak case by way of motive apparently tending towards possible crime is a very unsatisfactory and dangerous process. [P 878 C 2]

(j) *Sind Courts Acts*, S. 9(c)—Third Judge is not restricted to matters in difference.

Per *Wild*, *A. J. C.*—S. 9 (c) does not restrict the 3rd Judge to giving his opinion on the points or points of difference only, but makes it obligatory on him to give his opinion on the appeal or confirmation as the case may be : 38 *Cal.* 203, *Rel. on.* [P 881 C 2]

(k) Criminal Trial—Case referred to third Judge on difference—He should not differ

from other two unless there are strong reasons for so doing.

Per *Wild*, *A. J. C.*—Where a case is referred to a third Judge on difference, he should not differ from the other two unless there is a mistake of law, or some fact which tells in favour of the accused has escaped notice, or in short unless there are strong grounds for so doing : 46 *I. C.* 593, *Rel. on.* [P 881 C 2]

(l) Criminal Trial—It is not necessary for prosecution to prove motive.

Per *Wild*, *A. J. C.*—It is not necessary for the prosecution to prove the motive though it is more satisfactory when the motive for the crime can be inferred. [P 883 C 1]

T. G. Elphinstone and *Partabrai D. Punwani*—for Appellants.

O. M. Lobo—for the Crown.

Percival, J. C.—The two appellants, Mahomed Yusif and Zaibulnissa, have been convicted by the Sessions Judge of Sukkur, Mr. P. N. Moos, of murder, under S. 302, I. P. C., of the two step-brothers of accused 1, Bashir Ahmed and Rafique Ahmed, aged 6 and 3 respectively; and the former has been sentenced to death and the latter to transportation for life. The case also comes before this Court for confirmation of the death sentence passed on accused 1. The case has been dealt with by the learned Sessions Judge in an able and exhaustive judgment; and it is necessary therefore to refer only to its salient features, especially as the case, although depending on circumstantial evidence, appears to me to be perfectly clear and conclusive in respect of accused 1, and to exclude all other reasonable hypotheses except the guilt of this accused.

The evidence shows that Chiragdin, the father of accused 1 who was a wealthy hide merchant of Sukkur, was on bad terms with his son, accused 1, whom he regarded as a wastrel and a thief, as the notice published by him in the "Alhak" newspaper on 24th November 1927, shows. Accused 1 had one wife, but he married a second wife, accused 2, who was a Parsi but became a Mahomedan. Chiragdin disinherited accused 1 in May 1928.

On the day in question, namely 17th November 1928, the two deceased boys went to the house of accused 1 at about 3 p. m. The prosecution story is that they were taken into the part of the house occupied by accused 2. When they did not return, Chiragdin went to inquire about them. Accused 1 then said

that they had left the house. Much search was made for them and the police were informed, but nothing was found, and the Inspector put men at night to watch the house. He thought that the accused would perhaps secretly remove the boys at night, and therefore put the watchmen there. At about 3-30 a. m. one of the watchmen, Khuda Bux, heard a subdued thud, and on going near found outside the house of accused 1 the dead bodies of the two boys, who had been strangled.

In the early morning inquiry was made by the police, and they found in the room of accused 2: (i) a blood-stained Khes (bed cover), (ii) a suthan (pair of trousers) soaked in a bucket of water, but still showing some blood-stains on them; and (iii) a silk agath (a tape for trousers) wet from recent immersion in water lying concealed in a cupboard which accused 2 unlocked.

Later on in an inner room downstairs the police discovered what the learned Sessions Judge rightly describes as "the most damning piece of evidence against the two accused," namely a newly dug grave 3 ft. x 2½ ft. x 2½ ft. large enough for the interment of both the corpses. Two spades were found near the grave. The key of the room was with accused 1. The inference suggested by the Crown is that the accused, or at least accused 1, either buried or intended to bury the boys in the grave, but changed his mind and tried to take them out, when intentionally or by accident the bodies were dropped outside the house. The medical evidence is to the effect that the murder took place about 1-45 a. m. This statement may be accepted as correct; the Medical Officer was not cross-examined on the point. Certain doubt has been thrown on some facts of the prosecution story on behalf of the appellants; but it is sufficient to say that I see no reason to doubt it at all. To my mind it is sufficiently proved, among other things, that the boys were taken not merely into the house but into the room of accused 2, and were last seen there. The grave in the inner room was undoubtedly dug by the two accused or by one of the two accused, not by the police or anyone else. The dead bodies were dropped outside the house by persons from inside the house

and not by any outside person. The suggestion that they were dropped by any outside person has been described by the learned Judge as "far-fetched and puerile."

Taking then first the case of accused 1 we have the following facts: (1) there was a motive for the murder. The exact intention of the accused is a matter of surmise, but probably he intended first to hold the boys to ransom, but later decided to murder them; (2) the boys were taken by accused 1 to his house; (3) they were taken into the room of accused 2; (4) on search being made accused 1 said that the boys had gone out. This, as the subsequent evidence shows, was a false statement; (5) the boys were never seen alive again after going into the apartment of No. 2; (6) the boys were murdered about 1-45 a. m.; (7) Chiragdin so strongly suspected accused 1 at the time that he placed men to watch the house at night; (8) the dead bodies of the strangled boys were thrown out of the house in the middle of the night; (9) the blood-stained and newly washed articles were found in the room of No. 2; (10) the freshly dug grave was found in the inner room, of which the key was with No 1.

These reasons are much the same as those given by the learned Sessions Judge at lines 342 to 366 of his judgment, though I have worded them slightly differently. The above evidence shows to my mind beyond any manner of doubt that the two boys were deliberately murdered by accused two or by one of the two accused. The point remaining only against accused 1 is whether it can be held that the murder could have been committed by accused 2 only and that accused 1 is guilty, if at all, only under S. 201, I. P. C.

To my mind this is an impossible hypothesis, having regard to all the facts of the case as mentioned above. The evidence of Chiragdin, who has deposed against his own son, accused 1, is to the effect that he had no enmity with anyone in the locality "save of course Yusif himself." On the face of it it is very improbable that the wife should kill the children without the assistance of the husband. Accused 1 was in the house when the murder was committed. The grave was in the inner room down below specially in the occupation of ac-

used 1, of which the key was with accused 1. The blood-stained trousers of accused 1 were found in a bucket of water evidently being washed.

On the whole evidence there is a bare possibility of the murder having been committed by accused 1 without the help of accused 2, but there is not the bare possibility of the murder having been committed by accused 2 without the help of accused 1. The time of the murders, the motive, the blood-stained trousers, the digging of the grave and the throwing out of the bodies, are among the matters which make it clear that accused 1 had a share in the actual murders.

In regard to the sentence the learned Sessions Judge has observed that : "the double murder of two innocent boys was diabolical in conception and brutal in execution. So far as Mahomed Yusuf is concerned there are absolutely no redeeming features to warrant the infliction of the lesser sentence."

I quite agree with this view. The mere fact that the conviction is based on circumstantial evidence is no reason why a lesser sentence should be passed. As has been often stated, witnesses may lie but facts cannot lie. Nor in my opinion is it any excuse that accused 1 may have originally intended to hold the boys for ransom and later decided to kill them. It merely comes to this: that accused 1 intended to commit one very serious offence; but, finding some difficulty in carrying out this offence, he changed his mind and committed a far more serious offence, namely that of murdering the two boys. That to my mind cannot be regarded as an extenuating circumstance. I would therefore confirm the conviction and sentence and dismiss the appeal in the case of accused 1.

In the case of accused 2 the evidence is also very black and the case is somewhat similar to that of *Reg. v. F. G. Manning and F. Manning*, where the husband and wife were both convicted and sentenced to death on circumstantial evidence regarding a murder committed in their house. However, I am willing to accept the view that there is a bare possibility that the murder was committed by accused 1 alone and that accused 2 only assisted in the concealment thereof. The case, however, in any event, in view of the age and the rest of the evidence, obviously falls at least under S. 201, I. P. C. Also the maxi-

mum sentence under that section should in my opinion certainly be passed. I would therefore change the conviction in the case of accused 2, Zaibulnissa, to one under S. 201, I. P. C., and change the sentence to one of seven years' rigorous imprisonment.

The police in my opinion deserve credit for having brought home the offence to the accused. Since writing the above I have had the advantage of reading the judgment of my learned brother. I regret, however, that I do not find sufficient reason, according to my view, to alter the sentences on the appellants which I have proposed. On this question I would add only the following remarks :

The Public Prosecutor in addressing the Sessions Judge observed :

"I press for capital sentence so far as Yusuf is concerned. No redeeming features. Murders brutal."

The learned pleader for accused 1 observed : "I concede murder was atrocious." He did not ask for a sentence other than a capital sentence, but only for an acquittal.

In the grounds of appeal to this Court there was no appeal that the sentence was excessive.

A lesser sentence was asked for by the learned counsel for accused 1, as far as I remember, only on the ground that the evidence was circumstantial, not direct. This, however, in my opinion is not sufficient reason for a lesser sentence.

I also regret that I do not entirely agree with the criticism of the learned Additional Judicial Commissioner of the procedure adopted by the Sessions Judge.

In regard to post-mortem notes my experience is that they are usually put in with the consent of the pleaders for the accused, merely to save the Court from having to rewrite the remarks contained therein, in the evidence of the Medical Officer. It appears to me that, when this is done, and when there is no discrepancy between the post-mortem notes and the evidence of the Medical Officer, the placing of the post-mortem notes on the record does not do the accused any harm. In this case accused 1 was represented by a very experienced criminal lawyer, Diwan Bahadur Murlidhar ; but it appears that he took no

objection to the post-mortem notes going on the record.

In regard to the questions put by the learned Sessions Judge under S. 342, Criminal P. C., I agree that the Judge should not cross-examine an accused person. But on the other hand it has been laid down that the object of S. 342 is:

to enable the accused to explain each and every circumstance appearing against him."

The position therefore, I take is briefly, as laid down in *Emperor v. Ali-muddin Naskar* (1) that :

"The Court is bound to put to the accused the salient facts and circumstances of the case in a succinct form, and to ask him if he has any explanation thereof to offer, but incriminating questions and questions in the nature of a cross-examination must be avoided."

Rupchand, A. J. C.—Accused 1 and 2 Muhammad Yusuf and Zaibunissa are husband and wife. They have been convicted by the learned Sessions Judge of the double murder of two innocent infants Bashir and Rafique, aged six and two and half years respectively, both of them being consanguine brothers of accused 1. Accused 1 has been sentenced to death, subject to the confirmation of his sentence by this Court, and accused 2 to transportation for life.

The evidence on which their conviction is based is purely circumstantial and consists of the following facts or links in the chain of such evidence which are said to have been proved by the Crown:

That at about 3 p. m. of the day of their murder both boys were in the living apartments of accused 1 and 2 and were not seen alive after that time.

That shortly thereafter accused 1 when questioned, said that they had left his house;

That a vigorous search was made for them in the town of Sukkur and Rohri between 4 p. m. and midnight but with no result;

That after that search had failed, Chiragdin, father of accused 1 and the murdered boys, suspected that accused 1 might have hidden them and might remove them from Sukkur with the object of ransom and kept a watch of three persons, Khudabux, Ex. 16, Muhammad Hayat Ex. 23, and Nur Mahammad Ex. 30, round about the house of the accused;

That at about 3-30 a. m. Khudabux heard a subdued thud on the road to the north of the house of the accused, and on going up found the dead bodies of the boys lying on the road in front of the house: the dead body of Bashir was in a gunny bag and the other outside the bag;

That the medical evidence showed; (a) that both boys had been strangled to death; (b) that Bashir had a mark which might have been caused by a soft cord or a silk tape like the one found at the search in the cupboard of accused 2; (c) that the boys had bled through their nostrils; (d) that there were no other marks of violence on them except that Rafique had his right femur fractured and had three small bruises all of which were in the opinion of the doctor caused after death, and (e) that both boys had been murdered probably after midnight;

That at the search held on the day when the dead bodies were found, the police discovered three incriminating pieces of evidence in the living apartments of the accused: (a) a khes or bed-spread lying crumpled on a bed stained with blood which was proved on chemical analysis to be human blood, (b) a pair of trousers of accused 2 lying in a bucket of water having stains which on chemical analysis were found to be of blood, and being in a disintegrated condition, it could not be ascertained if they were stains of human blood, (c) an agath or trouser-tape which was wet and was kept on a piece of cloth inside a locked cupboard in the main living room;

That on a subsequent search held one day later in one of the inner rooms of the business premises of accused 1 which were on the ground floor of that building, a freshly dug pit 3' x 2½' x 2½' was found with the earth dug out of it lying on its edge and with two spades lying over it;

That the explanations offered by the accused of the incriminating pieces of evidence did not carry conviction of their truth;

That the accused were on inimical terms with Chiragdin and that accused was financially weak at that time;

That no other persons in that locality had any possible motive in murdering the boys;

And lastly, that no person had any motive in foisting the guilt on the accused by throwing the bodies at that place. (Here his Lordship went into the history of the family prior to date of murder and found that accused and his father were carrying on business for a number of years and accused 1 had married another Parsi wife accused 2, and concluded as follows). I have no hesitation in holding that relations between accused 1 and Chiragdin remained estranged up to the day of the murder and at that time accused 1 was financially weak. How far these two factors form an adequate motive by themselves or in conjunction with any other circumstance which had subsequently transpired, shall be dealt with in its proper place.

The evidence of what transpired on the day of the murders and thereafter requires a more careful scrutiny. In weighing it I have experienced considerable difficulty, partly on account of certain additions made in it in the Sessions Court by the relatives of accused 1, and partly on account of certain defects in the procedure adopted there, inter alia the admission of certain inculpatory statements made by accused 1 and submitting him in his examination by the Court to a much severer test than is in my opinion permissible under S. 342. I shall presently refer to these defects.

According to the prosecution, on the day of the murders, accused 1 invited his full sister Khadijanbibi to the apartments of his first wife Subhanbibi on the allegation that he and accused 2 were leaving that night for Hyderabad, and that Khadijanbibi should keep company with Subhanbibi who would be alone. He hired a tonga for her and left for his place on foot. At about 3 p. m. Khadijanbibi, her two children, Bashir and the two murdered boys went in the tonga to the southern staircase of the building and went up to Subhanbibi's apartment; from there Bashir and the two murdered boys went to the apartments of accused 1 and 2 which have been referred to by Bashir in his evidence as the house of accused 1. At 3-30 p. m. Bashir went back to his own house by the northern staircase, leaving the two murdered boys and accused 1 and 2 together in those apartments. On

his return he was questioned by Chiragdin about the boys and was at once sent off to fetch them. As he was going up by the same staircase, he was met by accused 1 who told him that the boys had left his house. He reported that fact to Chiragdin and a search for them was commenced in that locality at once by Chiragdin, Khudabux and Muhammad Hayat. At 5 p. m. both Khadijanbibi and Subhanbibi came to the house of Chiragdin and stayed there for the night. At 6 p. m. accused 1 met Chiragdin and both went to the police station to make a report, and the report was actually made in the name of accused 1. At 8 p. m. accused 1 again met Chiragdin and suggested a search at Rohri which was accordingly made by Khudabux and Muhammad Hayat. They returned back to Sukkur at midnight and then Chiragdin suspected that accused 1 might have hidden the boys with the object of ransom. He therefore plated Khudabux and Nur Muhammad to watch the northern road and Muhammad Hayat the southern street lest the boys might be removed from there to another place. At 3-30 a. m. there was a soft thud on the northern road in front of the building which attracted the attention of Khudabux. On going up he found the two dead bodies lying in front of the house. Bashir's body was in a gunny bag and Rafique's near the mouth of the bag.

Accused 1 has admitted that he invited Khadijanbibi to the apartments of Subhanbibi and had hired a tonga for her but has stated that he subsequently learnt that she went there with her children and the two boys. He has also admitted that at about 4 a. m. he heard weeping on the road and on going down found the corpses of his brothers there. But his case is that the boys never went to the apartments of accused 2, that he never told Gulzar that they had left his house, that like others he went in search of the boys at the request of Gulzar and Chiragdin, and reported the matter to the police, in the evening, that he was out searching them late that night, and that at night when he came down he found that Khudabux and Muhammad Hayat or Nur Muhammad had the corpses of his brothers on their shoulders, suggesting thereby that the corpses had been brought there.

Now the fact that the murdered boys went into the apartments of the Parsi wife at 3-30 p. m. depends upon the evidence of Gulzar, and it has been adversely criticized on several grounds. It is argued that the tonga man does not support his version that he and Rafique were not asked by defendant 1 to go to his house nor did Gulzar say at the time when his statement under S. 164 was recorded that accused promised to play the gramophone for them. It is further urged that no gramophone was noticed at the search and that therefore the story of the gramophone is a myth.

I am not prepared to attach much weight to any of these points. The tonga man had no occasion to observe the details or reason to remember them; the statement under S. 164 was not intended to be exhaustive and the search by the police does not appear to be so very careful as it might have been as will presently appear.

On the other hand, there are other circumstances which strongly support Gulzar. In his statement under S. 164 he said:

"On Saturday last, I took my brothers Bashir Ahmed and Rafique Ahmad to Yusuf's house before his Parsi wife. My father asked me where I left the boys. I told him that I had left them in Yusuf's house before the Parsi girl. My father then detailed me to fetch them. I went to Yusuf's house after ten minutes and asked Yusuf where my brothers were. Yusuf said that they were not there. I also asked whether they were upstairs. Yusuf said they were not there . . ."

It is abundantly clear from this statement that he told Chiragdin that he had left the boys in the living apartments of the Parsi woman, and not those of Subhanbibi, and that was evidently the reason why Chiragdin sent him off at once to fetch the boys. The fact that Gulzar went to the northern part or front part of the building to fetch them amply corroborates him that he had left the boys there and had come out from there through the northern staircase.

Chiragdin would not have shown the same anxiety if he had been told that the boys were with Khadijanbibi and Subhanbibi in the apartments occupied by them. Chiragdin had no objection to go into the apartments of Subhanbibi and unless he was satisfied with the truth of the story of Gulzar would in

the ordinary course of events have gone to Subhanbibi's rooms to find out if the boys were there before making a search for them.

With regard to the inquiry made from him by Gulzar and Chiragdin accused 1 said before the committing Magistrate:

"Then leaving the carriage driver there (i. e. at the house of Chiragdin), for the purpose of fetching Khadijanbibi and her children and paying him his fare, I went away. Then I went and sat down in my shop on the ground floor. I was there till 4-30 p. m. and had not gone up, when Gulzar came there inside the shop and said: 'Bashir Ahmed and Rafique Ahmed have disappeared. They took a pice each and went down to buy something. I don't know where they have gone to.' I got out with him to search for them. On the way I met Chiragdin near the carriage stand, and said that the boys had disappeared."

This explanation is hardly believable. If accused 1 had not been upstairs the first thing he would have done would be to make a search for the boys there. So far as his allegation that he accompanied Gulzar to make a search and that during that search he met Chiragdin and informed him that the boys were missing, is concerned, it is contrary to the evidence of Gulzar and Chiragdin and is belied by their conduct.

In this connexion it was argued that there was an obligation on the Crown to examine Khadijanbibi and Subhanbibi as witnesses and an application has been filed before us asking us to examine them. Their evidence was material for the purpose of proving that the boys had passed from the apartments of Subhanbibi to those of accused 2 on that day. Prima facie, therefore, their evidence was of some importance to the Crown, at any rate, for the purpose of supporting Gulzar.

In the case of *Empress v. Dhumo Kazi* (2) at 124, Sir Arthur Wilson stated the law on this subject as follows:

"The only legitimate object of a prosecution is to secure not a conviction but that justice be done. The prosecutor is not therefore free to choose how much evidence he will bring before the Court. He is bound to produce all evidence in his power directly bearing upon the charge. It is prima facie his duty according to call those witnesses who prove their connexion with the transaction in question and also must be able to give important information. The only thing that can relieve the prosecution from calling such witnesses is the reasonable belief, that if called they

would not speak the truth. If such witnesses are not called without sufficient reason being shown (and the mere fact of their being summoned for the defence seems to us by no means necessarily a sufficient reason), the Court may properly draw an inference adverse to the prosecution."

It will be noticed that I have substituted the word "power" which I have underlined for the word "favour" as appearing in the report. I have done this in view of the observations of Sir Lawrence Jenkins in *Ram Rajan Roy v. Emperor* (3), at p. 427 that "favour" is a misprint for "power."

The exemption from the obligation to call all available material witnesses, namely the bona fide belief that if called they would not speak the truth is universally recognized: see *Queen-Empress v. Durga* (4) and *Ranjit Ahir v. Emperor* (5).

The prosecution have explained that their failure to call those witnesses comes within the exemption. Their case is that as these women were in purda Chiragdin objected to their being examined by the police or by the Magistrate under S. 164, Criminal P. C. After the proceedings had started in the committing Magistrate's Court, there was a desire on the part of the relatives of accused 1 to save them, and, therefore, not only that they had a bona fide belief that these witnesses would, if called, not speak the truth, but they were as a matter of fact examined as defence witnesses in the committing Magistrate's Court and did not support the prosecution.

Though I am of the opinion that the investigating officer would have been well advised if he had insisted on the statements of these witnesses being recorded at the earliest opportunity, I am not prepared to hold that under the circumstances which had subsequently transpired, any adverse inference could be drawn against the prosecution for failure to examine them as witnesses. I am also not prepared to hold that it is a fit case in which we should order that they be examined at this stage. If the accused took the chance of relying upon the alleged weaknesses in the

prosecution case knowing full well that these two witnesses were not being examined, it is now too late for them to have the case reopened for their benefit.

In this connexion the counsel for the accused has drawn our attention to the evidence of Chiragdin at line 440 where he has said that Khadijanbibi and Subhanbibi had told him (when they came to his house that evening) that the boys had left the house of the accused after taking money and had not returned again. He has also drawn our attention to another answer of his which is as follows:

"He (referring to one Ishak, a boy 12 or 13 years old) had met me in the course of the search..... He told me that he had seen them (the two boys) purchasing sugar-cane near Mir Hussan's shop. He did not say when he saw them. All that he said is that he had seen them shortly before."

With regard to the first set of answers it is to be observed that they were contrary to what Chiragdin had said before the committing Magistrate, and when confronted with his previous answers he had to go back upon them. With regard to the conversation with Ishak, it would appear that he had made no mention of it in the previous proceedings.

We have been asked to examine Ishak, but we must decline to do so. His name was not disclosed at the investigation and it is beyond doubt that there is no obligation on the Crown to examine each and every person as a witness whose name has been disclosed in the course of the cross-examination of the prosecution witnesses. We are told by the Public Prosecutor of Sukkur that the answers about Ishak were recorded by the Court on the undertaking given on behalf of the accused that Ishak would be called as a defence witness, of which undertaking there is no note on the record. If any such undertaking was given, that is an additional reason for discarding these answers from consideration. I have no hesitation in holding that these like several other answers were not true and were given with the object of saving accused 1. I am of opinion that the Crown has substantially proved the first and second links in the chain of circumstances referred to above.

(3) [1915] 47 Cal. 423=18 I. C. 170=27 I. C. 554.

(4) [1894] 16 All. 84=(1894) A. W. N. 7 (F.B.)

(5) A. I. R. 1928 Pat. 418=74 I. C. 705=24 Cr. L. J. 801=2 Pat. 809.

Links three to eight in the chain : Each of these links has also been amply proved by evidence. The main part of the evidence admits of very little criticism. The implied suggestion in the statement of accused 1 that the corpses had been brought there by Khudabux, Muhammad Hayat and Nur Muhammad hardly requires comment. The first two were employed under Chiragdin and the third under Nur Hassan, a close relative of Chiragdin. It is too absurd to suggest that they had all conspired to foist the guilt on the accused by removing the corpses on their shoulders from somewhere else to the place where they were found. The only argument which requires notice is that it appears from the notes of inspection by the learned Judge of the site that it was not possible for the accused to have dropped the dead bodies from the second floor and that, therefore, the story of Khudabux that his attention was attracted to the spot in consequence of a soft thud is not true. But it was a wintry night and everything was quiet at 3.30 a. m. ; and there is nothing inherently probable in the sound, described as a soft thud, caused by the corpses falling on the road from a height of three or four feet while they were being carried, travelling to the place where Khudabux was. I shall deal with the question whether the boys were done to death after midnight or not later.

A good deal has been said as to the finding of the freshly dug pit on the second day of the search. As previously observed by me, the search on the first day after the murder was not so careful as it might have been. It appears that a suit-case was lying in the apartments of accused 2 which was not searched. One of the rooms on the ground floor in which the police subsequently discovered a freshly dug pit was likewise not searched, as it is said that it was looked at the time the police party was passing through the ground floor premises and the key of the lock was said not to be available at that time. On the following night, the police found that the apartments of accused 2 had been burgled and the contents of the suit case removed.

The prosecution case as deposed to by the Inspector and the Sub-Inspector of

Police was that in connexion with the inquiries into the burglary accused 1 represented to them that the suit case contained ornaments and other articles of the value of about Rs. 7,000 and had been made ready to be taken by the accused with them on their intended visit to Hyderabad, and said that he used to deposit the ornaments in a tin box " which he had buried in the inner room on the ground floor " and that this led to the search of this room on the following day and to the discovery of the freshly dug and unused intended grave of the boys.

These questions were objected to but the Court allowed them observing :

" Accused's statement leading to the discovery would be admissible under S. 27, Evidence Act. Objection overruled."

In his examination by the Court, accused 1 denied having made any such statement to the police and averred that this room had been searched on the first day and that the evidence of the pit was fabricated. In dealing with this point, the learned Judge, after pointing out that the search was carried on by responsible officers and that there was no scope for fabrication of the evidence of the pit, has said :

" Their failure to search the room on the first day was admittedly a serious lapse on their part and indicates that the investigation was not altogether efficiently carried out. All the same it was a bona fide error and I cannot impute any wilful intention to fabricate evidence. The District Superintendent of Police's word is a sufficient guarantee that the investigation was fair and proper. Since the room was never searched on the first day, the accused's explanation is obviously false. It lends support to the allegation of Inspector Brotherton and Sub-Inspector Beansting that it was accused Muhammad Yusuf himself who had hinted at the existence of the pit in the inner room by making an exculpatory statement that he had dug it for the safe deposit of his valuables. He had evidently offered this explanation because he knew that sooner or later the pit would be discovered and would implicate him further. I am certain that the pit was intended as a grave for the reception of the bodies of the murdered boys."

There has been a good deal of criticism on this part of the finding of the learned Judge below. The learned Public Prosecutor has frankly admitted that the statement of accused 1 that he used to bury his jewellery on the ground floor was not admissible under S. 27, Evidence Act. In the first place accused 1 was not accused of the offence of murder and the information given by

him did not pertain to that offence, and in the next place, only "so much" of the information given by him "as relates distinctly to the fact thereby discovered" could be proved: *Emperor v. Ilahibux* (5a) and *Sukhan v. Emperor* (6). The existence of the inner room was known to the police and was not discovered in consequence of the information supplied by accused 1 and the existence of the pit inside was not discovered in consequence of the information but of the search. In this connexion it is to be noted that there is no allegation in the evidence to show that the accused said that he used to bury the ornaments underground in a pit or that that pit was in the room or that he would show the pit.

A further question which arises is whether a statement made by an accused person not in the course of the investigation of the offence for which he is being tried, but in the course of an investigation of another offence altogether in which the accused makes a statement to the police in his capacity as the complainant but which is of an incriminating nature so far as the offence for which he is being tried goes, falls within the purview of Ss. 26 to 27, Evidence Act.

This point has not been argued before us properly, and I do not consider myself called upon to go into it, as I find that the evidence of the District Superintendent of Police is to the effect that he knew of the existence of the pit from an informer, and that the mashir who was present when the alleged statement is said to have been made to the subordinate police officers, denied that any such statement was made. On the very face of it the alleged statement is not true. Accused 1 possessed a safe on the ground floor. His living apartments were on the second floor where accused 2 lived. There was no occasion for him to bury the jewellery in this room or to make an untrue statement to the police that he used to bury it there. I am also of the opinion that the search took place after the District Superintendent of Police got information about the existence of the pit from his informer. I

am not prepared to attach much weight to the subsequent statement of the Sub-Inspector that the search took place earlier than what he had deposed to at first, as the diary which he relied upon in support of his subsequent statement does not show the different periods of the day when each information was noted.

I, however, agree with the view taken by the learned Judge that the pit was discovered by the police inside this room at the search made on the following day, that the room was not searched on the first day owing "to a serious lapse" on the part of the police, and that there is no justification for holding that that room had been tampered with during the time of the first and the second search or that it was tampered with by the police.

The other defects in the proceedings to which our attention has been drawn might be conveniently dealt with here. The first refers to the admission in evidence of the following statement made by accused 1 to the police:

"Yusif stated to me he had not committed the offence. He had told me that he had taken Bashir Ahmed and Rafique Ahmed to his senior wife's apartment along with his sister, that he had paid three annas to the tongawalla and that he had gone on foot, that Gulzar had gone and brought his senior wife who was then not in her apartment, that after some time he went to his Parsi wife's apartment through the communicating door, that Gulzar Ahmed had come up later and inquired about the two boys whereupon he told Gulzar they were not with him, that at 4 or 4/30 a.m. he saw on hearing a noise that the corpses of two boys were lying in front of his house, that while searching for the boys he had stained his trousers with mud and that the stains on the trousers were not blood-stains, that the green tape belonged to his Parsi wife."

This was objected to and the learned Judge passed the following order:

"I have read accused Yusif's statement recorded by the police. From beginning to end it is self-exculpatory and if believed would go in his favour.

"Section 164, Criminal P. C., does not apply to statements made by accused persons but merely relates to statements of witnesses.

Self-exculpatory statements made by accused persons to police officers, which do not in any way incriminate them are not confessions but mere admissions and accordingly admissible in evidence."

The fact that an accused person has made a statement with the object of exculpating himself or that his statement if believed would exculpate him

(5a) A. I. B. 1929 Sind 175=1929 Cr. C. 453.

(6) A. I. B. 1929 Pat. 344=115 I. C. 6=30 Cr. L. J. 414=10 Lah. 289 (F. B.).

does not by itself render it admissible in evidence. If notwithstanding the form in which it has been made, the statement is nevertheless an admission of incriminating circumstances and is used by the prosecution as such, it is not admissible in evidence; a useful test as to the admissibility of a statement made by an accused person to the police is to ascertain the purpose for which it is being put to by the prosecution: *Umer Durz v. Emperor* (7). *Imperatrix v. Pandharinath* (8), *Queen-Empress v. Nana* (9), *In re, Jivan Ambaidas* (10), as pointed out in the case of *Hussainbibi v. Emperor* (11).

In the present case the prosecution were relying upon the first part of the statement as corroborative proof of certain facts deposed to by the prosecution witnesses and not with the object of proving their falsity. With regard to the last part of the statement referred to above, the prosecution had no occasion to put it in as that was the explanation which the accused had offered before the committing Magistrate. I think that the learned Judge was in error in allowing the statement to go in.

The second defect refers to the nature of the questions put to accused 1 in the Sessions Court under S. 342, Criminal P. C.. Now it has been repeatedly laid down that the examination of the accused under that section is intended for no other purpose than to enable the accused to explain any circumstances appearing in the evidence against him; attempts to put questions which are intended to elicit answers calculated to supplement the case of the prosecution or to obtain admissions of fact which might incriminate the accused or to obtain information from him for the purpose of filling up gaps in the evidence of the prosecution have been repeatedly deprecated: *Queen-Empress v. Rangji* (12), *Queen-Empress v. Bhairab Chunder* (13), *Tufina v. Emperor* (14), *Mohidin Abdul*

Kadir v. Emperor (15), *Jeremiah v. Vas* (16), *Mohansing v. Emperor* (17) and *Devi Dayal v. Emperor* (18).

The object with which some of the questions have been put to accused 1 and the form in which they have been put appear to me to be contrary to the intention of the legislature as declared by this section. It will be sufficient to refer to some of the questions and answers which are follows:

Q. Can you assign any reason why you and your wife wanted to go to Hyderabad?

A. To visit my wife's sister, brother and mother.

Q. By which train did you intend to leave?

A. By 10-30 p. m. train. We dropped the idea of going on account of disappearance of my brothers.

Q. Were you aware that your father had cut you off from his will?

A. No.

Q. Will you state your movements from the time you went to your father's house till the time you were arrested?

A. It was 2-30 or 3 p. m. that I went to fetch my sister from Charagdin's house. I brought a tonga, informed my sister, paid the driver and asked him to drive to the back lane of my house. I went walking. I went before the tonga left.

Q. Why did you not accompany your sister in the tonga?

A. I thought she would be accompanied by maidservant or children as usual. I have never before accompanied her. I learnt afterwards that Gulzar Ahmed had accompanied my sister.

Q. Where did you go?

A. I first went to the bazar and then to my shop. I remained downstairs and did not know whether my sister had arrived or not. About 20 or 25 minutes later Gulzar Ahmed came to me and asked me to go to search for Bashir Ahmed and Rafique Ahmed who had disappeared.

Q. Did he tell you or did you ask him from where they had disappeared?

A. Gulzar did not tell me from where they had disappeared nor did I ask him.

Q. Did anyone else tell you that they had disappeared from your house?

A. Yes, my sister told me they had come to my house and gone away again.

Q. Were you aware before you went to bed that Chiragdin had posted men to watch your house?

A. No. He never suspected me.

Q. What happened at night.

A. At 4 or 4-30 a. m. I heard people weeping outside. I went outside and saw Khudabux and Mahomed Hayat or Nur Mahomed holding the corpses of my two brothers on

(7) A. L. R. 1925 Sind 237=86 I. C. 410 = 26 Cr. L. J. 778=19 S. L. R. 132.

(8) [1882] 6 Bom. 84.

(9) [1890] 14 Bom. 960 (F.B.).

(10) [1895] 19 Bom. 862.

(11) A. L. R. 1926 Sind 151=93 I. C. 248 = 27 Cr. L. J. 456=26 S. L. R. 74.

(12) [1887] 10 Mad. 295.

(13) [1898] 20 W. N. 702.

(14) [1912] 14 I. C. 667=18 Cr. L. J. 288.

(15) [1904] 27 Mad. 238.

(16) [1918] 36 Mad. 457=12 Cr. L. J. 585=512 I. C. 961.

(17) [1920] 42 All. 522=22 Cr. L. J. 84=50 I. C. 172.

(18) A. L. R. 1928 Lah. 225=73 I. C. 805=24 Cr. L. J. 693=4 Lah. 55.

their shoulders. They were on the road in front of my house and Fasal Illahi's house.

Q. Did you see a gunny bag there?

A. No.

Q. What did you do?

A. I wept and kissed my brothers.

Q. Was Chiragdin present?

A. Yes.

Q. Since you had taken your sister to stay the night with your first wife can you tell me whether she had taken any change of clothes with her?

A. I do not know.

Q. Where did your wife (accused 2) keep her ornaments?

A. In a leather box. She had ornaments of value of about Rs. 8,000. They used to be kept in the suit case. The police had searched all the trunks and suit cases.

Q. What was the safe on the ground floor meant for?

A. For hundis and account books and cash.

Q. Did you keep the ornaments in the safe below?

A. No. They used to remain with my wife.

In my opinion most of these questions were indubitably intended to fill up the gaps in the prosecution story and the form in which they were put was that of cross-examination.

I wish, however, to safeguard myself from being misunderstood that the trial Court should put either few questions or only general questions. The number of questions put to an accused person must necessarily depend upon the circumstances which are brought out against him in the evidence for which an explanation is needed, and the questions must be so framed as to enable him to know what he is required to explain. But every care should be taken to see that the questions aim at getting an explanation if any which the accused wishes to offer against the case which the Crown has proved by the evidence on the record.

The last defect in the procedure to which our attention has been invited is the admission en bloc of the post-mortem notes of the Medical Officer as part of his evidence. Our attention has not been invited to any section of the Evidence Act under which such procedure is permissible. Ss. 159 to 161 only permit a limited use being made of such documents namely that they be used by the witness who made them for the purpose of refreshing his memory or by a party for the purpose of contradicting the witness. In *Roghuni Singh v. Empress* (19) Field, J., said:

"Then Dr. Shaw refers to the 'report' that

(19) [1899] 9 Cal. 455=11 C.L.R. 569.

is the report of the post-mortem written in the form usually filled up by Civil Surgeons at the time of making the post-mortem examination. Now this report was not evidence and, therefore, no facts could have been taken therefrom. The Assistant Surgeon might have used this report to refresh his memory when giving evidence, but the report itself was not admissible in evidence."

In *Empress v. Jadab Das* (20), at p. 143, likewise said:

"Now that report (notes of post-mortem examination) is not admissible as evidence except to contradict the officer who made it. It may, however, be used by that officer when under examination for the purpose of refreshing his memory."

It appears to me that it is extremely undesirable that such notes should be put in evidence through the medical officer en bloc as it is prejudicial to both sides. The attention of neither side is drawn to each and every circumstance detailed therein and it is open to the accused to take advantage of reticence therein in the course of argument which the Crown could easily have explained if its attention was drawn to such reticence. It is equally clear that several facts noted therein are likely to escape the attention of the counsel of the accused if the notes are exhibited en bloc and there would be no cross-examination on them. We have been told that it is the usual practice in the Courts in Upper Sind to exhibit such notes. If that is so I think it should be discontinued.

It is rather unfortunate that these defects in the procedure adopted by the lower Court should have clouded the issues in the case. After carefully excluding from my consideration every piece of evidence which I have considered to have been improperly admitted I cannot but hold that there is no getting out of the conclusion referred to that links 1 to 8 have been proved and that under the circumstances the presumption of innocence of the accused was sufficiently displaced by the Crown.

Links 11 and 12 in the chain: It is sufficient to say that these have also been amply proved. Not only Chiragdin had no other enemy in the locality but the two boys were so scantily dressed that the question of their being done to death with the object of robbing them is out of the question.

The blood-stained trousers of accused 1 were found in a bucket of
(20) [1899] 27 Cal. 295=4 C.W.N. 129.

water. The only explanation offered by accused 1 is that they had got dirty in his wanderings in search of his missing brothers. But that does not account for the stains of blood on them or his anxiety to wash them at night. It was suggested that as accused 1 dealt in skins and hides the stains of blood might have been caused by the handling of fresh skins. In the first place that is not his explanation and in the next place we have inspected the trousers and I find that the portions cut out by the Chemical Analyser for the purposes of analysis are small specks in different parts of the trousers some of them being in the upper portion which are not likely to have been caused by the handling of a fresh skin for purposes of inspection by a merchant.

The explanation by accused 2 that she had dropped the wet agath in the cupboard in the hurry of the moment when she was taking out her burka to cover her face from the police is belied by the stains left on the sheet over which it was lying. The further explanation that it was washed as it had been used by her during the period of menstruation in no way accounts for its being washed in the early hours of the morning probably after the corpses were noticed by Khudabux and shortly before the arrival of the police so that it had not got dry at about 7-30 a.m. when the search took place. Her explanation that she washed the agath as it was used by her during her menstruation period is again inconsistent with her failure to wash the khes which was blood-stained and therefore it was more necessary for her to wash that than the silk agath which, assuming that it was used as a substitute for an ordinary cape for keeping in position pieces of cloth used as a substitute for sanitary towels, would be worn near the waist where there was no likelihood of its being stained with blood.

Lastly the suggestion that the freshly dug pit was the work of the police or the enemies of accused, that is to say the father of accused and his helpmates was false on its very face. It has been pointed out in *Wills on Circumstantial Evidence* at p. 97 that as a general rule to which, however, exceptions undoubtedly genuine from time to time occur, it is reasonable to expect that an inno-

cent party can explain suspicious or circumstantial appearances connected with his person, dress or conduct, that the desire of self preservation, if not a regard for truth will prompt him to do so and that whenever the party attempts no explanation of facts which he may reasonably be presumed to be able and interested to explain or attempts to account for them by false representations the force of suspicious circumstances proved against him is thereby augmented.

These observations apply with full force in the present case and it may fairly be presumed that both the accused or either of them were concerned in the murder of the boys or in suppressing the evidence of their murder.

This brings us to the question as to the offence or offences if any which the accused or either of them have committed.

It has been argued on behalf of accused 1 that it was possible for either of the accused to have murdered the boys without the knowledge of the other in the long interval which elapsed between 3-30 p.m. and 3-30 a.m. and that therefore the only charge which could be substantiated against any of them is under S. 201, and not S. 302, I. P. C. Our attention has been invited to R. 4, of the Rules pertaining to circumstantial evidence enunciated by *Wills* in his valuable book at p. 31 which reads as follows:

"In order to justify the inference of guilt the inculcating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis than that of his guilt."

Considerable stress has been laid on the observations of Baron Alderson in *Rex v. Patch* referred to at p. 314 of that book that it is not only necessary that the conviction as to the guilt of the accused should be a rational conviction but it should be the only rational conviction which the circumstances would enable the Court or the jury as the case may be to draw.

It has been argued that too much reliance cannot be placed on the medical evidence that the boys were strangled at about midnight and reference has been made to *Taylor*, Edn. 10, at pp. 337 and 338. But there are other circumstances which also show that the murders were committed

about that time and in the presence of accused 1.

Blood had oozed out only from the noses of the murdered boys. They had no other injury and unless accused 1 was present or had come in close proximity of either of the murdered boys almost at once his trousers could not have got blood-stained. According to accused 1 he returned home at about midnight and the blood stains on his trousers were therefore more likely than not caused after his return. If the boys had not been done to death before midnight both the accused would have had sufficient time to wash and dry the pair of trousers, the agath and the khes before the search.

I am therefore not prepared to hold that accused 1 was not present when the murders were committed. Nor am I prepared to hold that accused 2 would or could commit murders in the presence of accused 1 without his concurrence. The case of accused 2, however, stands on a different footing. If accused 1 was the murderer accused 2 who is his wife might have been a helpless observer and there is not only a possibility of her not having taken any part in the murders, but of her having dissuaded accused 1 from committing it though subsequently she might have helped in the disappearance of the evidence of the murders. I would therefore uphold the conviction against accused 1 under S. 302, I. P. C. and acquit accused 2 of that charge.

With regard to the question whether accused 2 should be convicted for an offence under S. 201, I. P. C., or not, I am not prepared to differ from the learned Judicial Commissioner on that point because I find that accused 2 has not satisfactorily explained the finding of the wet agath in her cupboard or the blood-stains on the khes both of which she claims to be her property and there is evidence to show that the death of one of the boys might have been caused by the agath.

Reliance was placed on the finding of two spades near the freshly dug pit as evidence that both accused had taken part in digging the pit; but assuming that both the spades were there, it is not sufficient to warrant the inference that both spades were used or

that accused 2 used one of the spades for that purpose. I would therefore exclude this piece of evidence from consideration.

I am also not prepared to take the same serious view of her offence as has been taken by the learned Judicial Commissioner or to hold that

"the evidence was against her is also very black and the case is somewhat similar to that of *Reg. v F. G. Manning and F. Manning* where the husband and wife were both convicted and sentenced to death regarding a murder committed at their house"

especially as the only record of that case I have been able to see is a note in *Kenny's Cases of Criminal Law*, p. 446, edition of 1903, which is of a very scrappy nature and only gives such facts as are material for understanding that part of the charge of Pollak, L. C.B., to the jury which is reproduced there.

It may be observed that in the present case except the fact that accused 2 was an eyesore to Chiragdin's family as she was a Parsi woman and had supplanted a relation of theirs who was the first wife of accused 1 there is nothing to show that she herself had any enmity against the family of Chiragdin, more so against the two infants so as to justify the suggestion that she was a party to the commission of this double murder.

In arriving at my conclusion as to the guilt of the accused, I have refrained from referring to the motive of the alleged murders for fear of constructing my structure on so slippery a foundation. It is well settled that on the one hand absence of ascertainable motive comes to nothing if the crime is proved to have been committed by other evidence; on the other to eke out a weak case by way of motive apparently tending towards possible crime is a very unsatisfactory and dangerous process. I, however, propose to refer to the motive in considering the question of sentence.

As said above it has been established that the relations between accused 1 and Chiragdin remained strained up to the day of the murders and that at that time accused 1 was financially weak. But this alleged motive has its weak points. The burglary of Rs. 20,000 two years before was not as satanic as it might at first appear to be. Accused 1 had been an active partner

of his father in the business for nearly twenty years. He was not a waif as alleged. The account books produced by Ghiragdin showed that he used to keep accounts at that time and no less than Rs. 60,000 were credited to him for purchases made through him. However improper or ill advised and criminal a step he might have taken to misappropriate Rs. 20,000 during his father's absence he got nothing more as his share in the property earned by his father with his active help. If he married a stranger as his wife he was not absolutely dead to all public opinion and allowed his first wife to remain under the same roof and admittedly paid rent for her portion as well, and when he was going to Hyderabad he thought of bringing his sister to live with his first wife during his absence. If Gulzar is to be believed accused 1 did not go with the intention of luring the boys to death or of decoying them. He casually saw Gulzar and Rafique in the street and asked them to accompany his sister to his house. He did not even know then that Bashir would also accompany them. If he has speculated in forward contracts after he left his father there was nothing new in it. His father used to do the same and lost though not to the same extent. If he had suffered losses there was no immediate pressure on him and nothing to suggest that he could not meet them except by extracting money from his father. The causa causans of the murders will in my opinion remain in oblivion.

I do not therefore consider these factors as a sufficient incentive for the murder of two innocent boys either by their consanguine brother or by his wife although she was a convert. It has been suggested that once the boys had come to the apartments of accused 1, the primary motive why they were not permitted to go back to their house was to retain them for the purpose of ransom and that when accused 1 found that the matters had gone too far and the discovery of the boys from his possession might lead to his conviction for the offence of wrongful confinement he put them to death. This may or may not be true; but assuming it is true it is a circumstance which cannot be lost sight of in deter-

mining whether the punishment of death or of transportation should be inflicted on him.

Our attention has been invited to several conflicts in rulings on the question of adequate sentence in a case based purely on circumstantial evidence. Of the rulings quoted on behalf of accused 1 perhaps the strongest is the case of *Abdul Wahab v. Emperor* (21) where the Judicial Commissioner of Peshawar Court held that purely circumstantial evidence, however overwhelming and convincing it may be, has the character which must leave some loophole for the contingency however remote or infinitesimal of possible error and although it is wholly illogical in case of a trial for murder to accept as proved for the purpose of conviction and to throw any doubt on such proof in considering the question of sentence, yet this is an illogicality which has been duly and consistently recognized by the Courts and that the Court should be reluctant to launch a person into eternity except in a case of exceptional strength.

On the other hand reference might be made to the case of the *Public Prosecutor v. Paranadi* (22), where it was held that where the Court was satisfied beyond reasonable doubt that the accused was guilty of murder and the circumstances required the imposition of the death penalty the fact that the conviction was based on circumstantial evidence was not a reason for passing a lesser sentence allowed by law.

Reference might also be made to two rulings of this Court in one of which *Bahadur v. Emperor* (23) the sentence of death was reduced to that of transportation for life by a Bench consisting of Kincaid, J. C., and Aston, A. J. C. In that case the accused had a quarrel with the woman whom he loved three days prior to the death and both had set out together and at a distance of three miles from their house the woman was found to have been murdered. All that was said in support of the reduction of sentence was that the peculiar circumstances of that

(21) [1928] 76 I. C. 97.

(22) A. I. R. 1931 Mad. 428=61 I. C. 524=32 Cr. L. J. 396=44 Mad. 443.

(23) A. I. R. 1925 Sind 299=58 I. C. 7=26 Cr. L. J. 1063=19 S. L. R. 71.

case justified the infliction of the lesser sentence.

The other case is that of *Karim Baksh v. Emperor* (24) where, on an appeal filed by Government, a Bench consisting of B. Lee, Ag. J. C., and Aston, A. J. C., enhanced the sentence of transportation for life to that of death in a case which depended merely on circumstantial evidence.

It may be observed that in the cases of *Paranadi* and of *Karimbux* the motive for murder was sordid, namely the theft of property on the person of or in possession of the deceased, and that was proved to the hilt. In the *Madras* case the accused was said to have removed jewels from the person of the murdered boy and had disposed them off. In the *Sind* case the accused was a guest of the deceased on the night of the murder and had disappeared and was found in possession of the stolen property which was with the deceased on the night of the murder.

Now, though I do hold that the fact that a conviction is solely based on circumstantial evidence is by itself no ground for not inflicting the sentence of death, I do think that it is not improper to inflict a lesser sentence where there are other circumstances demanding the exercise of such discretion, as for instance the absence of a strong motive coupled with the possibility of the murder having been committed without premeditation and under a temporary derangement of the mind due to the fear of being prosecuted and convicted for a criminal offence. Unlike the English law where the Court is bound to pronounce judgment of death on a person above the age of 16 years who is convicted of murder, S 302, I. P. C., confers a jurisdiction on the Court to inflict the lesser sentence in befitting cases. The reason why no discretion is vested in the Judges in England is that down to the end of the reign of William IV such discretion was exercised by the King in Council, the King being always personally present. The list of persons capitally convicted was carefully gone through and the question who was and who was not to be executed considered and decided. That practice was discontinued at the beginning of the reign of Queen Victoria and was substituted by

(24) A.I.R. 1929 Sind 179=1929 Cr. C. 414.

the Secretary of State for the Home Department being vested with jurisdiction to advise His Majesty in such matters: Vol. 3, Stephen's Criminal Laws of England, p. 89.

It is no doubt true that the discretion vested in the Courts should be judiciously exercised. But the exercise of such discretionary powers in any particular case must depend on its own facts considered in the light of various circumstances such as the magnitude of the mischief which the crime has a tendency to produce, the effect of the punishment in preventing similar crimes, the motive or inducement to the crime, disposition of the criminal, aggravating or mitigating circumstances and the like and not on the long-cherished now exploded theory of a tooth for a tooth and an eye for an eye.

When murder is committed for lust or for rape perhaps it is necessary to take the life of the murderer not so much as to prevent him from committing similar offences, but to serve as a deterrent to others for committing similar offences. Again when a crime of a particular character is rampant in any locality as for instance wife murder in Sind the extreme penalty of the law is necessary to serve as a deterrent: *Kadirbux v. Emperor* (25). On the other hand the reasons which have induced the Courts to lean towards the secondary sentence of transportation for life are too numerous to mention and it is neither easy nor proper to crystallize the circumstances under which such discretion should be exercised in favour of the secondary sentence. Without therefore making any such attempt it is sufficient for me to hold that this is a fit case in which it will not be unwise for this Court to exercise its discretion in favour of accused 1. Not only the motive is deficient but there is possibility of the facts having been done in a moment of temporary madness and lastly so far as I am aware the murder of an infant brother is so rare that it does not necessarily call for the extreme penalty of the law so as to prevent others from committing similar offences. I also feel that the sentence of transportation will so far as accused 1 himself is concerned

(25) [1911] 5 S. L. R. 256=19 Cr. L. J. 585=15 I. C. 807.

be a much severer punishment for him than death.

With all deference therefore to the learned Judicial Commissioner, I am not prepared to confirm the sentence of death upon accused 1, but I would alter it to one of transportation for life.

With regard to the sentence of accused 2, I am also not prepared to take the same serious view as that taken by the learned Judicial Commissioner. If accused 1 was the murderer and if accused 2 helped him in washing the agath or the pair of trousers or offered a false explanation in respect of the inculpatory circumstances which would have exposed her husband to a charge of murder, it cannot be said that she deserves the maximum punishment provided under S. 201, I. P. C. Taking into consideration her subordinate position in the house I think that the sentence of four years' rigorous imprisonment should meet the ends of justice. I would accordingly confirm the conviction of accused 1 and sentence him to transportation for life under S. 302, I. P. C., and would alter the conviction of accused 2 to one under S. 201, I. P. C. and sentence her to four years rigorous imprisonment. (On a difference of opinion the case was referred to a third Judge).

Wild, A. J. C.—This is a reference under S. 9 (c), Sind Courts Act, 1866. The two accused in this case being respectively husband and wife were convicted by the learned Sessions Judge of Sukkur of the murders of two little boys who were the step-brothers of accused 1. Accused 1 was sentenced to death and the second accused to transportation for life. The accused appealed and the appeal and the confirmation case were heard by the learned Judicial Commissioner and the learned Mr. Rupchand, A. J. C. They agreed that the first accused was guilty of murder and that the second accused was guilty of an offence under S. 201, I. P. C. They, however, differed as to the sentences which should be passed on the two appellants. The case was therefore referred to me as the third Judge under S. 9 (c), Sind Courts Act.

The matter on which I am particularly asked to give my opinion is the sentence which should be passed on the two accused but I am seized of the whole case. It is no doubt illogical in a case like this,

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where the learned Judges who have decided the appeals are agreed as to the guilt of the accused and differ only as to the sentences which should be passed, that the opinion of the third Judge should be allowed to prevail if he differs from them on points on which they agree. S. 9 (c), however, does not restrict the third Judge to giving his opinion on the point or points of difference only, but makes it obligatory on him to give his opinion on the appeal or confirmation case as the case may be. This was so held in *Sarat Chandra Mitra v. Emperor* (26), which was in respect of a reference to a third Judge under S. 429, Criminal P. C. The case has therefore been argued on merits.

Mr. Elphinston for accused 1 has laid stress on the improbabilities of the conduct attributed to his client in first concealing the children and then murdering them; and in first digging a grave for the corpses and then throwing them on the open road. He has pointed out the various weak points in the prosecution case including the want of an adequate motive for accused 1 to commit two such atrocious murders. All these difficulties, however, had been brought to the notice of and considered by the Judicial Commissioner and the learned Additional Judicial Commissioner and in spite of them they have held that the evidence is to be believed and that the murders were committed by accused 1. A third Judge should not in my opinion differ from the other two in such a case unless there is a mistake of law or some fact which tells in favour of the accused which has escaped notice; or in short unless there are strong grounds for so doing. In this connexion the case of *Corporation of Calcutta v. Grande Venkata Ratnam* (27) may be referred to. Now, there is ample evidence to connect accused 1 with the murders. The boys were last seen alive with him in his house and their corpses were found a few hours later on the road outside the house, which shows that when accused 1 said that they had left his house he told a falsehood. A freshly dug grave was found in a room of the house of which accused 1 had the key and newly washed and blood-stained articles were

(26) [1910] 89 Cal. 202=11 Cr. L.J. 515=7 I.C. 641.

(27) [1918] 19 Cr. L. J. 788=46 I. C. 598.

discovered in a part of the house occupied by accused 1 and his wife, accused 2. A possible motive for the murders was the ill feeling which existed between accused 1 and his father.

It was contended that most of the above facts fit in with the theory that the murders were committed by accused 2 who bore her father-in-law ill will as he had not approved of his son's marriage with her and had not received her into the family, and that accused 1 merely helped her to conceal traces of the crime and committed an offence under S. 201, I. P. C. As, however, the learned Judicial Commissioner points out, it is very improbable that the wife should kill the children without the assistance of the husband, and one piece of evidence particularly connects accused 1 with the actual commission of the murders. This is that blood stains were found on his trousers which shows that he touched the children before their blood dried.

A point was taken which apparently has not been taken in appeals and this is that the murders were actually committed about 9 p. m. and not as the medical witness states at 1.45 a. m. and that accused 1 was outside the house when the murders were committed and till 1.30 a. m. or even later. The ground for the theory that the murders were committed several hours before the time given by the Medical Officer is that some half digested food was found in the stomach of one of the murdered children. It is argued that the last meal which the children had was at 2 p. m. when they ate their tiffin, and as undigested food was found in the stomach of one of them the murders could not have been committed more than seven hours after the meal. If however accused 1 and 2 kept the children in their house, there is no reason why they should have omitted to feed them, and if they had had a meal at 7 or 8.0 p. m. the opinion of the Medical Officer that the murders were committed at 1.45 a. m. would not be wrong. If, however, the murders were committed at an earlier hour, it does not help accused 1, because, though there is evidence that he was outside his house and pretending to look for the children at various times up to 1.30 a. m. the witnesses certainly do not

show that he was continuously absent from his house during the whole time that the murders may have been committed. I see then no reason to differ from the learned Judicial Commissioner and the learned Additional Judicial Commissioner as to the guilt of accused 1, and in my opinion, he is proved to have committed the murders and to be guilty of an offence under S. 302, I. P. C.

As regards accused 2, the Police Inspector (Ex. 58) proves that when the house was searched a newly washed "agath" was found in the cupboard. Accused 2 was questioned about this and said that she had washed it because she had used it during her menstruation. She took the Police Inspector to the cupboard in the dressing room and pointed out rags and pads which she said she had used for menstruation, but they were found to be dry and not soiled. It is clear then that the explanation of accused 2 was false and as it is in evidence that one of the children might have been strangled with this agath it is a fair inference from the conduct of accused 2 that the agath was used for the commission of the crime and was blood-stained and that accused 2 washed it to remove traces of the crime. I agree then with the learned Judicial Commissioner and the learned Additional Judicial Commissioner that accused 2 knowing that the murders were committed caused evidence of the commission of the murders to disappear with the intention of screening accused 1 from legal punishment and with that intention gave false information to the police. My opinion therefore is that she is guilty of an offence under S. 201, I. P. C.

Coming now to the question of the sentences which is the question particularly referred to me for decision, it is to be noted that the learned Judicial Commissioner quoted with approval the remarks of the learned Sessions Judge that the double murder of two innocent boys was diabolical in conception and brutal in execution, and that there was absolutely no redeeming feature to warrant the infliction of the lesser sentence. He was therefore for confirming the death sentence and I agree with him. The learned Additional Judicial Commissioner was for passing a sentence of transportation for life on three grounds.

He remarks that the motive is deficient and that there is a possibility that the murders were committed without premeditation, and under a temporary derangement of mind due to a fear of prosecution for a criminal offence, and lastly he points out that the murder of an infant brother is so rare an offence that it does not necessarily call for the extreme penalty of the law. It is, however, settled law that it is not necessary for the prosecution to prove the motive though it is more satisfactory when the motive for a crime can be inferred. Nor is there any evidence that accused 1 was under any temporary derangement of mind when he committed the murders. The fact that he did so owing to a fear of being prosecuted for the confining of the two boys does not to my mind make his case any better. He had already committed one criminal offence and it is no palliation of his guilt that to absolve himself from punishment he committed another and more grievous offence. The case is much the same as that of man who commits an offence when in a state of drunkenness. He has wrongly put himself into a position in which he may be more likely to commit an offence. But drunkenness is no excuse if an offence is committed. Lastly, it is no doubt true that the murder of an infant brother is not a common offence and that a murder as atrocious as that committed by accused 1 is a rare occurrence. It does not, however, follow that because an offence is so atrocious as to be unusual, it should be punished with anything else than the extreme penalty provided by the law. The learned Additional Judicial Commissioner held that the fact that the conviction is solely based on circumstantial evidence is by itself no ground for not inflicting the sentence of death. Mr. Elphinstone, however, for accused 1 has quoted certain cases in which the lesser sentence has apparently been passed on the ground that the evidence was circumstantial. He has relied on the case of *Abdul Wahab v. Emperor* (21), where it was said that although it is wholly illogical in a case of a trial for murder to accept facts as proved for the purpose of conviction and to throw any doubt on such proof in considering the question of sentence, yet this is an illogicality which has been fully and consistently recog-

nized by the Courts. I am not prepared to follow this ruling as there is no settled practice of this or any other Court that in a case of murder where the evidence is circumstantial the lesser sentence should be passed. For instance in the *Public Prosecutor v. Paramandi* (22), it was said that if the Court is satisfied beyond reasonable doubt that the accused is guilty of murder and the circumstances require the imposition of the death penalty, the fact that the conviction is based on circumstantial evidence is not a reason for passing the lesser sentence allowed by law. Cases have been cited in which, in this province the lesser sentence has been passed in murder cases where the evidence has been circumstantial. The first of these is *Isarsing Swansingh v. Emperor* (28), where the sentence of transportation for life was apparently passed by the Sessions Judge of Hyderabad in a murder case where the evidence was circumstantial. In *Emperor v. Mahomed Bux* (29), where the case was referred to the High Court under S. 307, Criminal P. C., a sentence of transportation for life was passed in a murder case in view of the circumstantial nature of the evidence and the unanimous verdict of the jury for acquittal. In a similar case, however, which is unreported a reference was made by the Sessions Judge of Poona to the High Court of Bombay where the evidence of the murder was entirely circumstantial and there was a unanimous verdict of the jury for acquittal. The High Court in that case agreed with the Sessions Judge that the accused was guilty of murder and sentenced him to death. In *Bahadur v. Emperor* (23), which was a confirmation case, the appeal Court did not confirm the death sentence passed by the Sessions Judge of Hyderabad in the peculiar circumstances of the case. Lastly, in *Bhag Shaikh v. Emperor* (30) the appeal Court said:

"We cannot conceal from ourselves the fact that the evidence is purely circumstantial and that we are by no means altogether satisfied as to what the motive was," and while confirming the conviction for an offence under S. 302 reduced the sen-

(28) [1918] 7 S. L. R. 109=15 Cr. L. J. 497=24 I. C. 585.

(29) A. I. R. 1921 Sind 145=85 I. C. 583=26 Cr. L. J. 609=16 S. L. R. 142.

(30) Con. Cas. 23 of 1924.

tence to one of transportation for life. On the other hand in the recent case of *Karimbukhsh v. Emperor* (24), a Bench of this Court on an appeal filed by Government enhanced the sentence of transportation for life to one of death in a case which depended merely on circumstantial evidence. From the above cases it is clear that there is no practice of this Court that the lesser sentence should invariably be passed in a murder case where the evidence is merely circumstantial. It is not the practice of the Madras or Bombay High Courts and in England most of the murderers are hanged on circumstantial evidence. In this case the circumstantial evidence is to my mind very clear and the murders were particularly atrocious as the murdered boys were so young and were the stepbrothers of accused 1. I see therefore no reason why the death sentence should not be confirmed.

It was urged that though the learned Sessions Judge might have been right in passing a sentence of death, in the first instance, it would not be right to confirm that sentence now owing to the delay which has occurred since the sentence was first passed. In this connexion the case of *Autar Singh v. Emperor* (31) has been referred to. That was a case where the Judges forming a Bench which heard the appeal and the confirmation case differed and the matter was referred to a third Judge. The third Judge was oppressed by the feeling that the appellants had, through no fault of theirs, capital sentences suspended over their heads for nearly six months and apparently also took into consideration the circumstance that one of the learned Judges of the Court expressed himself as dissatisfied with the evidence. The date on which the sentence of death was passed was 24th August 1929 which is a little more than six months ago but the case can be distinguished, if necessary on the ground that there was a difference of opinion between the two Judges as to the guilt of the appellants while that is not so here. In the case of an ordinary murder the delay in confirming a sentence of death may perhaps be taken into consideration, but this is not an ordinary murder. I see then no ground for passing the lesser sentence on account of the delay which has unfor-

tunately occurred in confirming the death sentence.

As regards the sentence to be imposed on accused 2, the learned pleader for accused 2 has referred to two cases, *Adho v. Emperor* (32) and *Kudaon v. Emperor* (33). In the former case a sentence of nine months was passed for an offence under S. 201 and in the second case a sentence of four years' rigorous imprisonment. The learned Judicial Commissioner presumably thinks that as the offences sought to be concealed was the offence of murder, the maximum penalty for an offence under S. 201 should be passed, that is the sentence of seven years' rigorous imprisonment. The learned Additional Judicial Commissioner takes into consideration that the person to be shielded from prosecution was the husband of accused 2. Taking into consideration the subordinate position of accused 2 in the house, he thinks that a sentence of four years' rigorous imprisonment would meet the ends of justice. I am impressed by the reasoning of the learned Additional Judicial Commissioner and think that as accused 2 is not proved to have committed the murder and acted with the intention of screening her husband from punishment, the sentence suggested by the learned Additional Judicial Commissioner is sufficient and appropriate. I would therefore confirm the sentence of death passed on accused 1 and would dismiss his appeal. I would alter the conviction of accused 2 from one under S. 302 to one under S. 201 and would sentence her to four years rigorous imprisonment under the latter section.

P.N./R.K.

Order accordingly.

(32) A.I.R. 1925 Sind 257=86 I.C. 961=26 Cr. L.J. 897=19 S.L.R. 6.

(33) A.I.R. 1925 Nag. 407=91 I.C. 226=27 Cr. L.J. 60=21 N.L.R. 86.

1930 Cr. Cases 884

(Privy Council)

(From Ashanti : Eastern Province)

10th March 1930

LORD CHANCELLOR, VISCOUNT DUNDIN, LORDS DARLING, ATKIN AND
THANKERTON.

Benjamin Knowles—Appellant.

v.

Emperor—Opposite Party.

Privy Council Appeal No. 54 of 1929.

(a) Privy Council—Board is not a Court of criminal appeal unless grave injustice is done—Criminal Trial.

The Privy Council does not sit as a Court of criminal appeal. To allow criminal proceedings to be reviewed by it there must have been substantial and grave injustice done: *Dillet's case* (1887) 12 A. C. 459, *Foll.*

[P 885 C 2]

(b) Criminal P. C., S. 287—Distinction between manslaughter and murder not considered—Conviction for murder not sustainable—Conviction was quashed—Criminal Trial.

In the judgment of the lower Court which convicted the accused of murder without the aid of a jury there was not the slightest enquiry into whether, assuming that the shot which resulted in the death of the deceased was fired by the accused, the act amounted to manslaughter and not murder. There was no attempt to face the question of whether the standard of proof required to prove murder as against manslaughter had in the case been reached.

Held: that if the case had been before a jury and the Judge had not explained to them the possibility of a verdict of manslaughter but had said if not accident the only alternative is murder, that would have been an erroneous summing up. The question as between manslaughter and murder being entirely undealt with and in the absence of evidence sufficient to reach the standard of proof necessary to involve a conviction for murder the conviction must be quashed. [P 888 C 1, 2]

D. L. Pritt and Horace Douglas—for Appellant.

Attorney General C. H. Pearson—for the Crown.

Viscount Dunedin.—This appeal, for which special leave was granted by His Majesty in Council is against a conviction of the appellant for the murder of his wife, Mrs. Knowles, by the Acting Circuit Judge of Ashanti on 23rd November 1928. The case was tried by the Judge without a jury and the appellant was not allowed the assistance of either solicitor or counsel. The grounds of appeal are first, no jurisdiction, and second, that there was no evidence on which a conviction of murder could be maintained. The Court of Ashanti by which the appellant was tried was established by the Ashanti Administration Ordinance No. 1 of 1903. The sections of the Ordinance, as amended by subsequent ordinances which bear on the method of trial in criminal cases are the following:

Section 8: "Where not otherwise provided by some other statute, ordinance, or other law for the time being in force in Ashanti, the Court shall in causes and matters brought or arising before it, be guided by the law in force in the Gold Coast Colony as set forth in

Ss. 14 and 19, of the Supreme Court Ordinance of the said Colony."

Section 9: "So far as it is practicable and local circumstances permit, the procedure in the Court, civil and criminal, shall be the same as the procedure in the Supreme Court of the Gold Coast Colony."

Section 10: "In no cause or matter, civil or criminal, shall the employment of a barrister or solicitor be allowed."

It is unnecessary to quote the various sections of the Acts which regulate procedure in the Gold Coast, as it is clear that if the trial had been in the Gold Coast it would have been imperative to have a jury for a capital case and the prisoner would, if he chose, have had the assistance of counsel and solicitor. The appellant therefore contends that a jury for a capital case was a *sine qua non*, and that a conviction by a Judge sitting alone cannot stand. The Attorney-General stated, and it was not denied by the appellant, that as a matter of fact there never has been hitherto trial by jury in Ashanti.

Now the direction that in Ashanti the criminal procedure of the Gold Coast shall be the guide is not absolute, but is qualified by the provisions of S. 9. If jury trial is not practicable, or not permitted by local circumstances, then the direction does not apply. Practicability and the state of local circumstances are questions which can only be determined in Ashanti on the spot. It is impossible for their Lordships of this Board to form a conclusion on such matters, and it is not for them to turn themselves into a local tribunal. They are of opinion that this is a matter to which the maxim *Omnia praesumuntur rite et solemniter acta* clearly applies, and they are therefore unable to sanction this ground of appeal.

Before dealing with the question of the evidence their Lordships think it necessary emphatically to repeat what has been said on many occasions, that they do not sit as a Court of criminal appeal. To allow criminal proceedings to be reviewed, to use the words of Lord Watson in *Dillet's case* (1) at p. 467, there must have been "substantial and grave injustice done." In the present case if it had turned out that it was against the law for a Judge to try a capital case without a jury, that would have been substantial injus-

(1) [1887] 12 A. C. 459=16 Cox. C. C. 241=36 W. R. 81=56 L. T. 615.

tice, for it would have been conviction without jurisdiction, and it was on that ground that leave of appeal was manifestly granted. But the case once brought up it is incumbent on their Lordships to examine the judgment as given. Even in this somewhat exceptional case, however, their Lordships are still not sitting as an ordinary criminal Court of appeal in which case they would be entitled to consider what would have been their own verdict. Though the criterion is hardly as strict as it would have been on an application for leave based on the simple ground that the evidence did not support the verdict, yet they must be satisfied to use the words of Lord Sumner in *Ibrahim v. The King* (2) at p. 615, "there is something which in the particular case deprives the accused of the substance of fair trial."

Now the facts of the case as proved are simple enough. The appellant and his wife were alone in their bedroom after luncheon. There had been guests at luncheon, and they had gone away shortly after 2 p. m. without anything noticeable having happened. Their native servants heard loud voices suggestive of quarrelling. The appellant and his wife, it was proved, lived generally on good and, indeed, affectionate terms but had occasional quarrels which were greatly induced by the fact that both the appellant and his wife were addicted to the taking of too much liquor, and the appellant drugs (sic), and were often in a drunken or semi-drunken and dazed condition.

The evidence as to the time is confused and contradictory, but somewhere between 4 and 5 the native servants heard a shot and a cry. They were frightened and one of them ran off to the District Commissioner, who had been one of the guests at the luncheon and said what he had heard. The District Commissioner took his car and went off to the house of the accused, whom he saw, and asked if there had been an accident. The accused said it was all right. The District Commissioner then went away. The native servant went back again later and two

hours later the District Commissioner wrote saying the native servants were very excited, and asking if he could be of any service. To this letter he got no reply. About the same time the native servant was called into the room and told to clean up a pool of blood. The accused said to his wife he would like to send her to the hospital. He then said he would go himself, and went. When he was gone, the cook, by desire of Mrs. Knowles, lifted a revolver which was by the bed put it into a box, locked it, and gave her the key. While clearing up the blood he picked up something which he did not recognise, but which was a revolver bullet.

That evening the accused got a sleeping draught containing morphia from the dispensary of the hospital. Next evening he got a repetition of the medicine and a hypodermic syringe with two ampoules of morphia. About 3 o'clock that day Dr. Gush, who lived at Kumasi, heard that something had happened and in consequence drove down to Bekwai, where the accused lived. He found the accused in a somewhat dazed condition and bearing signs of the results of alcohol and the drugs above referred to. The accused volunteered the information that there had been "a domestic fracas," and showed him his left leg covered with bruises which he said had been inflicted by his wife with an Indian club. He also said that she had been nagging him and he had said if she didn't stop he would put a bullet in her. Dr. Gush asked to see Mrs. Knowles, and heard her say she would like to see him. He then went into the bedroom with the accused and examined the wounds, which he found had been treated with iodine by the accused, a proper, though in the circumstances scarcely a sufficient, treatment. The wound was such a wound as would be inflicted by a revolver bullet. It was in a peculiar direction. The bullet had entered the left buttock and proceeded in an upward direction, and making its exit at the lower side of the abdomen on the right side, having, as was afterwards disclosed at a post-mortem, pierced the intestine, the bladder and the uterus. It was not bleeding directly when Dr. Gush saw it, but there was some blood coming from the vagina.

(2) [1911] A. C. 539=82 L. J. P. O 185=80
T. L. R. 363=74 Cox. C. C. 174=111 L. T.
20.

He asked Mrs. Knowles how the accident happened and she said she had been examining her husband's revolver which had been recently cleaned by the police, that she had put the revolver down on a chair, and shortly after sat upon it, that she tried to remove it from underneath her, but the open-work sleeve of her dress caught in the trigger and the revolver went off.

Dr. Gush said she must go to the hospital but had better have a bath first. He found the accused at the fire quite dazed. He went to fetch his car, and on coming back got the revolver from Mrs. Knowles, and found in it five cartridges and one empty shell. He noticed a hole in the mosquito net which covered the two beds. Mrs. Knowles died the next day, but before she died she made a dying declaration. This was to the same effect as to what she had said to Dr. Gush with two small differences. She mentioned that the revolver had been cleaned, but did not say "by the police," and she said that before it happened the boy had come in with afternoon tea. Other matters to be mentioned are that the mosquito net had several holes in it: that the accused said that on one occasion his wife had put a bullet past him while he was in bed; that another bullet was found by the police and certain marks on the furniture. Further, on 22nd October the Acting and Assistant Commissioner of Police went to Bekwai and found the accused in bed lying in blood-stained sheets and having on blood-stained pyjamas. He was weak and ill, but they considered him rational. They told him that they were going to detain him on a charge of causing grievous bodily harm and that a dying declaration was to be taken from his wife. He then made several remarks, viz.: "I think she will roll up" (i. e., die), "This is a bad business, I may go to prison." "If she rolls up I am afraid I am for it." He went with them to Kumasi, and in the Assistant Commissioner's bungalow, while the Acting Commissioner went for a warrant, he said: "I don't care what happens to me, I am worried about my wife," and then, "If my wife rolls up it means a murder case," and again, "If my wife rolls up I will be hung by the neck until I am dead."

Their Lordships must now examine the judgment. In the judgment of the Circuit Judge is to be found what to a jury would have been the summing up, and then the verdict. Now the Judge examines at great length the possibilities as to which bullet of the two bullets found, one of which had made dents in the furniture was the bullet which caused the wound. Upon this question he comes to no certain conclusion, being oppressed by the difficulties as to either theory. In their Lordships' view this enquiry is quite by the mark. It is quite certain that the deceased was killed by a revolver bullet, and there being no certain evidence as to the position of the parties at the time, no conclusion can be drawn from the possible indicia as to the flight of the bullet. The Judge next takes up the story of the deceased as given in the evidence of Dr. Gush, and as given in the wife's dying declaration, and along with it the story as given by the prisoner himself when he gave evidence at the time. That story, abbreviated, is as follows: That he had had a quarrel with his wife about nothing, which ended, that he then went to bed to sleep, that he saw his wife come in and start to undress and afterwards went to sleep, that there was a shot fired which woke him, and he heard his wife say she had been shot, that he jumped up and said: "show me, show me" (this was a remark heard by one of the servants behind the door), that he plugged the wound and put her to bed, and she said: "People will think I have done this purposely," to which he replied she had only to lie quiet and he would take the blame. That he did not trouble about the District Commissioner's note, as being a medical man himself he had done what was needful and that he did not want her disturbed. That afternoon he took drink and drugs, and to use his own words:

"I had the fixed idea of protecting my wife, and didn't realize until later that my statements were dangerous. I had an idea fixed that I would take any punishment if I could save my wife."

As regards the revolver he said that he usually kept it under his pillow fitted in a holster; that on this occasion he took it out of the holster, cocked it and laid it on the book case. The Judge then examines these accounts and finds

them unsatisfactory. He is particularly pressed by the statement of Mrs. Knowles as to the servant bringing tea, which was not true, and he saw no reason for the appellant taking out the revolver and cocking it, and points out the discrepancy as to its place, the appellant saying it was on the book case, while Mrs. Knowles said it was on the chair. He lays stress on the various remarks made by the appellant after the event, which he considers were not made, except as to those on the 22nd when in a dazed condition. He thinks it proved that there was a domestic fracas, and considers the remark that he would put a bullet through his wife if she did not stop, very significant. He, therefore, comes to the conclusion that the wife's story was not true, and then he says: "Taken as above the evidence against the prisoner is overwhelming."

Now the learned Judge was entitled to draw his own conclusions as to whether Mrs. Knowles's account was true, and their Lordships, not being as above stated, an ordinary Court of criminal appeal, would not consider themselves entitled to set that aside upon the ground that they would come to a different conclusion on the facts as found. Having come to the conclusion that the story of an accident could not be substantiated, and the position and direction of the wound excluding all idea of deliberate self-infliction, he was driven to the conclusion that the shot was fired by the appellant. That there was criminality in what happened is a necessary result of that conclusion. In a fit of drunken recklessness to fire a shot to silence a nagging woman, which shot the woman, even though the shot was not intended to hit her, is a crime.

But the fatal flaw in the judgment is that having set aside Mrs. Knowles's account of the occurrence as accident he at once assumed that the only alternative to accident is murder. There is not the slightest inquiry into whether assuming that the shot was fired by the accused, the act amounted to manslaughter and not murder. There is no attempt to face the question of whether the standard of proof required to prove murder as against manslaughter, has in this case been reached. If the case had been before a jury and the Judge had not explained to them the possi-

bility of a verdict of manslaughter, but had said, if not accident the only alternative is murder, that would have been an erroneous summing up. That is what is to be found in the judgment. The question as between manslaughter and murder is entirely undealt with, and their Lordships are, therefore, as the learned Judge failed to consider the question, bound to consider whether the evidence here reached the standard of proof necessary to involve a conviction for murder. They are clearly of opinion that it did not. A conviction for manslaughter might have been a different matter, but that is not before their Lordships. They have, therefore, humbly advised His Majesty to quash the conviction.

M.N./R.K. *Conviction quashed.*

Solicitors for Appellant—*Wynne, Baxter & Keeble.*

Solicitors for Respondent—*Burchells.*

1930 Cr. Cases 388

(Allahabad)

BOYS, J.

Chhotay and others—Appellants.

v.

Emperor—Opposite Party.

Criminal App. No. 977 of 1929, Decided on 14th April 1930, from an order of Addl. Sess. Judge, Etah, D/- 7th September 1929.

Penal Code, S. 99 — Right of private defence.

An amin assisted by a karinda, the karinda's master and accompanied by the police and some servants who were probably employed as lathials of the zamindar went to attach a crop. The party went in some force because they had information that the attachment would be resisted with violence and was in fact resisted with violence. The zamindar was struck to the ground and received several injuries. Thereupon and practically instantly, the zamindar's men rushed on his assailants and severely beat two, with some minor injuries to one or more. The two men severely beaten were the man whose crop was to be attached and his father, they being also the two who are said to have commenced the attack on the attaching party. Both these two severely injured men died.

Held: that the fact that the assailants did not actually succeed in assaulting anyone but the zamindar did not show anything by way of intention of assailants in the light of the fact that the counter-attack by the zamindar's men in defence of the zamindar was probably instantaneous and zamindar's men were entitled to plea of right of private defence. [P 389 C 1]

Saila Nath Mukerji and Shakir Ali—
for Appellants.

*Sankar Saran—*for the Crown.

Judgment.—Six men appeal from a conviction under S. 304, I. P. C., and a sentence thereunder of three years' rigorous imprisonment. The facts briefly are that an amin assisted by a karinda, the karinda's master and accompanied by the police and some servants who were probably employed as lathials of the zamindar went to attach a crop. The party went in some force because they had information that the attachment would be resisted with violence. The circumstances are of course peculiar to this particular case, and it is, therefore, unnecessary to detail them in view of the fact that while I have been asked to read the whole judgment carefully I have not had any of the evidence laid before me. The findings are quite clear. The party intending to effect the attachment was resisted with violence. The zamindar was struck to the ground and received several injuries. Thereupon, and I have no doubt practically instantly, the zamindar's men rushed on his assailants and severely beat two, with some minor injuries to one or more. The two men severely beaten were the man whose crop was to be attached and his father, they being also the two who are said to have commenced the attack on the attaching party. Both these two severely injured men have died, and the question is what is the right view to take of the responsibility of the present appellants. The Judge has held that they committed their acts on grave and sudden provocation. He has refused them the benefit of a plea of the right of self defence because he says that there is nothing to show that the attacking party were going on to do anything further. With that view I do not think that I should agree. The whole of the circumstances would indicate that the fact that the assailants did not actually succeed in assaulting anyone but Azhar Husain, the zamindar, does not show anything in the light of the fact that the counter-attack by the zamindar's men in defence of the zamindar was probably instantaneous. I should, therefore, have been inclined to give the accused the full benefit of their plea but for the fact that they have undoubtedly exceeded their right in

view of the number of injuries inflicted on Ohhattar. But taking all the facts into consideration I do not think that a sentence of three years' rigorous imprisonment was called for. It is in my view always desirable to make every effort to discover who was responsible for the initiation of violence and to punish such person heavily while dealing more leniently with the man whose violence was provoked, even if he exceeded the limits of his rights. In this case I would have given a sentence of six months' rigorous imprisonment. The accused have already suffered that and a little more. I, therefore, while maintaining the conviction, reduce the sentence to the period already undergone. The six appellants will be forthwith released.

V.B./R.K.

Sentence reduced.

1930 Cr. Cases 889

(Bombay)

MIRZA AND BROOMFIELD, JJ.

*Dhanraj J. Parmar—*Accused.

v.

*Emperor—*Opposite Party.

Criminal Revn. Appln. No. 30 of 1930, Decided on 20th March 1930, from decision of Mag., First Class, Dohad.

Petroleum Act, S. 15 (c)—Accused granted licence headed as "licence for possession of dangerous petroleum" — Licence providing, that accused was entitled to store 1,000 gallons of petroleum in his shed—Licensee possessing excess quantity but storing it in another's shed—As heading of licence was merely descriptive and accused never stored more than prescribed quantity, he was not liable to be convicted.

The licence granted to the accused was headed as "licence to possess dangerous petroleum". The licence then proceeded, "Licence is hereby granted to.....for the storage in the storage shed described below of 1,000 gallons of dangerous petroleum." The accused on several occasions got possession of more than 1,000 gallons, but he never stored in his shed more than 1,000 gallons, the excess quantity being stored on his behalf by another who had proper licence.

Held: that the heading of the licence was merely descriptive and so, as the accused never stored more than the permitted quantity in his shed, he was not liable to be convicted.

[P 890 C 2]

*G. G. Mahadevia and M. K. Mehta—*for Applicant.

*W. B. Pradhan—*for the Crown.

Broomfield, J. — The applicant in this case has a licence for the possession and storage of dangerous petroleum in

Form B issued in accordance with R. 3, Chap. 4, Part 2, of the rules under the Petroleum Act. He has been convicted and fined Rs. 50 under S. 15 (c) of the Act which renders penal the breach of any condition contained in a licence granted under the Act. The licence granted to the applicant is in this form. It is headed :

"Licence to possess dangerous petroleum, otherwise than in bulk, in quantity exceeding 40 gallons."

It then proceeds as follows :

"Licence is hereby granted to Mr. D.T. Parmar of Surat for the storage, in the storage shed at Dohad described below, of 1,000 one thousand gallons of dangerous petroleum subject to the rules for the storage of petroleum published in Notification No. 2572 dated 18th May 1909, and to the further conditions on the back of the licence up to 31st December 1928."

Then there follows a description of the storage shed. We are not concerned with the further conditions on the back of the licence as it has not been suggested that there has been any breach of those. The facts of the case are that on three occasions, viz., 16th March 1929, 20th June 1929 and 10th August 1929, 660 cans of dangerous petroleum which had been consigned to the accused's firm were delivered to the manager of the firm at the Dohad Railway Station. 660 cans contain 1,320 gallons, but the whole quantity was not on any of these three occasions stored in the shed belonging to the accused in respect of which the licence has been granted to him. On the first two occasions the excess quantity was stored on the accused's behalf in a properly licenced storage shed belonging to one T. K. Singaporewala. On the third occasion the excess quantity beyond the 1,000 gallons which the accused was entitled to store in his shed was consigned by rail to M. C. Parikh, a partner of the firm, at Suth Road Station.

The contention of the prosecution is that the licence granted to the accused prohibits his being in possession of more than 1,000 gallons of dangerous petroleum, whether the petroleum is stored in his own licenced shed or in any other place. The trial Magistrate has referred to the definition of the word "possession" given by Sir James Stephen in his Digest of Criminal Law (p. 243) :

"A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other per-

sons, and when the circumstances are such that he may be presumed to intend to do so in case of need."

The learned Magistrate has taken the licence granted to the accused to be a licence for the possession of 1,000 gallons of dangerous petroleum in the above sense of the word "possession" and considers therefore that there has been a breach of the conditions of the licence. The learned Government Pleader has supported this view. He relies upon the heading to the licence and contends that this ought to be regarded as one of the terms. In our opinion this is not a reasonable view to take. The words at the beginning :

"Licence to possess dangerous petroleum, otherwise than in bulk, in quantity exceeding 40 gallons"

are clearly no more than a descriptive heading. It would be quite unreasonable to regard it as one of the terms of the licence, particularly as no definite quantity of petroleum is specified therein. The operative part of the licence is contained in the clause which I have already given and which merely provides for the storage of 1,000 gallons of dangerous petroleum in the accused's storage shed at Dohad. As the accused has not been shown to have stored more than 1,000 gallons in his shed it does not appear to us that there has been any breach of the conditions of the licence. It was suggested to us by the learned Government Pleader that if a person to whom licence has been granted in respect of 1,000 gallons may store 1,000 gallons in his own shed and may also store further quantity in a shed or sheds belonging to other persons there may perhaps be an avoidance of the payment of fees to Government. There is no evidence on the record on the question of fees, but anyhow it is obvious that if Government desires that the possession of dangerous petroleum in the sense of the word "possession" which has been suggested to us should be restricted, nothing could be easier than for Government to prescribe a licence in a form which would cover it. The licence in the present case obviously does not cover it or cover anything else than the storage of 1,000 gallons in the storage shed described in the licence. In our opinion, the accused has been wrongly convicted. We set aside the conviction.

and sentence and direct that the fine, if paid, be refunded.

Mirza, J.—I agree.

S.N./R.K. *Conviction set aside.*

1930 Cr. Cases 891

(Bombay)

MIRZA AND BROOMFIELD, JJ.

In re Shivlingappa Bhaagappa.

Criminal Revn. Appln. No. 16 of 1930, Decided on 1st April 1930, from order of Sub-Divisional Magistrate, First Class, Third Division, Dharwar.

(a) Criminal P. C., S. 155 (2)—Complaint.

Application requiring sanction of the Court for making an investigation under S. 155 (2) is not a complaint. [P 891 C 2]

(b) Criminal P. C., S. 173—Court ordering investigation under S. 155 (2)—After investigation charge sheet filed—Charge sheet giving sections of Penal Code but not giving any details or circumstances—Prosecution cannot be based on such charge sheet treating it either as complaint or report—Criminal P. C., S. 190 (1) (b).

Where the Court makes an order for investigation under S. 155 (2) and a charge sheet is filed after making the investigation, that charge sheet can be regarded as coming under the description of report; but if such charge sheet, after mentioning sections of Penal Code, fails to give any details or circumstances of any description, the provisions of S. 173 which require that the nature of the information should be stated and those of S. 190 (1) (b) which require that the facts constituting the offences should be stated are disregarded and so prosecution cannot be based on such charge sheet treating it either as report or complaint: 37 Cal. 49 and A. I. R. 1924 Cal. 476, *Foll.*

[P 892 C 1]

H. C. Coyajee, B. J. Desai and S. B. Jathar—for Applicant.

W. B. Pradhan—for the Crown.

Mirza, J.—This is an application for revision of an order made by the Sub-Divisional Magistrate, First Class, Third Division, Dharwar, refusing to take action on an application made by the petitioner to that Court that the proceedings against him now pending in the Court of the same Magistrate may be terminated and he may be discharged. The petitioner is being tried for offences under Ss. 164 to 165 and 109, I. P. C. They are cognizable offences. Proceedings against the petitioner were started by Ex. 1-A which was an application made to the District Magistrate asking that an investigation may be directed against the petitioner under the provisions of S. 155 (2), Criminal P. C. The District Magistrate having made an order for investigation under that section

the police officer, N. S. Gurtu, made an investigation and thereafter filed a charge sheet before the Court. The case has proceeded on the basis of this application, Ex. 1-A, and the charge sheet.

It is contended on behalf of the petitioner, firstly, that no report has been made to the Court as required by S. 173, Criminal P. C., and, secondly, that if the charge sheet in the case is to be regarded as a report, it is not a valid report under S. 190 (1) (b) because it fails to set out the statement of facts which would constitute the offences with which the petitioner is being charged. It is also contended on behalf of the petitioner that the procedure followed in the case contravenes the provisions of S. 190, Criminal P. C., which are that the Magistrate may take cognizance of any offence: (a) upon receiving a complaint of facts which constitute such offence; (b) upon a report in writing of such facts made by any police officer.

It is clear from the facts stated that the application first made to the District Magistrate cannot be regarded as a complaint. It was not put forward as a complaint but as an application requiring sanction of the Court for making an investigation under S. 155 (2), Criminal P. C. The charge sheet subsequently filed before the Court, however, can in my opinion, be regarded as coming under the description of a report. The District Magistrate has evidently treated this charge sheet as a report and has taken cognizance of the offence under S. 190 (1) (b) on the strength of this report. S. 173 (1) (a) provides that the police report on which the Magistrate is to take cognizance of the offence should be a report in the form prescribed by the Local Government. The report has to set forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case. The form used in this case appears to be the form sanctioned by the Local Government. In column 7 of the charge sheet the offences with which the petitioner is charged are set out as follows:

"In connexion with Hubli town C.R. Nos. 36 and 37 of 1927 the accused noted in the charge sheet and others conspired with each other and abetted one another in committing offences under Ss. 161, 162, 163, 164, 165 and 109, I. P. C."

From this description it is clear that the charge sheet, treating it as a report within the meaning of S. 190 (1) (b), fails to comply with the requisites of that section in important particulars. S. 190 (1) (a) states "upon receiving a complaint of facts which constitute such offence" and S. 190 (1) (b) states "upon a report in writing of such facts made by any police officer." The facts to be stated in the report clearly are facts which would constitute the offences charged. The case before us seems to be covered by the authority of the rulings in *Lee v. Adhikary* (1) and *Nagendra Nath Chakravarti, In re* (2). The order here will be similar to the order which was made in *Lee v. Adhikary* (1). The rule should be made absolute and the proceedings set aside. If the prosecution intend to proceed against the present applicant then the procedure of the Code as indicated in S. 190 and also in S. 173, if it be requisite to rely on that section, must be followed.

Broomfield, J.—I agree. It appears to me that there is no doubt that what happened in this case was that the District Magistrate took cognizance of the offence under S. 190 (1) (b), Criminal P. C., that is to say, upon a report in writing made by the police officer, N. S. Gurtu. The report was made in the form which appears to have been prescribed by Government for the purpose and if the form had been correctly filled in there would have been no difficulty about the case. The heading of column 7 of this form is :

"Charge or information, name of offence and circumstances connected with it in concise detail and under what section of the Penal Code charged."

In filling in the column, however, the sections of the Indian Penal Code have been mentioned but no details or circumstances of any description have been set out. Plainly, therefore, the provisions of S. 173 of the Code, which require that the nature of the information should be stated, and those of S. 190 (1) (b), which require that the facts constituting the offences should be stated, have been disregarded.

A suggestion was made by the learned Government Pleader that the charge-sheet might, if necessary, be treated as

a complaint and that it was, therefore, open to the District Magistrate to take cognizance under S. 190 (1) (a). The case to which we were referred, *Emperor v. Shivaswami* (3), is an authority for that proposition. But we do not understand how the prosecution case would be benefited thereby, inasmuch as the complaint, equally with the report of the police officer, must contain the facts which constitute the offence. As my learned brother has pointed out there is no reason whatever why the previous application Ex. 1-A, asking the District Magistrate to direct an investigation, should be treated as a complaint, and even if it could be so treated that also does not, in our opinion, contain sufficient details of the offences charged. I agree with my learned brother that the case is covered by the two Calcutta authorities to which we have been referred and that a similar order ought to be made.

S.N./R.K. *Rule made absolute.*

(3) A. I. R. 1927 Bom. 440=105 I. C. 459=23
Cr. L. J. 939=51 Bom. 493.

1930 Cr. Cases 892

(Calcutta)

SUHWARDY AND COSTELLO, JJ.

Nagendra Nath Chakravarty and another—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 21 of 1929, Decided on 7th May 1930, from an order of Sess. Judge, Hooghly.

Criminal P. C., S. 476—Forgery in civil suit—Appeal filed—Proceedings under S. 476 need not be stayed—Question of stay does not come under Civil P. C., S. 115.

When the Court has found a forged document used by a party before it, it is entitled to make a complaint and there is no reason why the making of the complaint should be stayed till the final disposal of the appeal which may pass through more Courts than one. The disallowance of a petition of stay by lower Court cannot come under S. 115, Civil P. C. [P 898 C 1]

Herambo Chunder Guha and Hara Krishna Pramanik—for Petitioners.

Judgment.—This Rule was issued under S. 115, Civil P. C., against an order passed by the Sessions Judge of Hooghly under S. 476-B, Criminal P. C., on appeal from an order under S. 476 by the Munsif of Amta. The petitioners are two in number, Nagendra Nath Chakravarty and Giribala Devi. Petitioner 2 brought a suit in the Court

(1) [1910] 37 Cal. 49=11 Cr. L.J. 145=5 I. C. 553.

(2) A. I. R. 1924 Cal. 476=81 I. C. 220=35
Cr. L. J. 732=51 Cal. 402.

of the Munsif of Amta and in support of her claim got a document produced through petitioner 1 which was found by the Munsif to be a forged one. He accordingly made a complaint under S. 476 against the plaintiff Giribala Devi as well as against her witness Nagendra Nath Chakravarty who is the son of Giribala. The learned Judge on appeal has upheld the order of the Munsif. As regards Giribala Devi, in our judgment, no case has been made out for our interference with the order of the Courts below. She was the plaintiff in the suit, the document was produced on her behalf and she may be presumed to know the nature of the document. Any point that may be urged in defence will undoubtedly be dealt with by the trial Magistrate. It is further urged on her behalf that she has filed an appeal against the judgment of the Munsif and therefore proceedings under S. 476, Criminal P. C., should be postponed till the disposal of the appeal. That is not a matter which comes exactly under the provisions of S. 115, Civil P. C. The learned Judge says that when the Court has found a forged document used by a party before it, he is entitled to make a complaint and there is no reason why the complaint should be stayed till the final disposal of the appeal which may pass through more Courts than one. The result is that the Rule obtained by Giribala Devi is discharged.

As regards the petitioner Nagendra Nath Chakravarty the point is raised that he not being a party to the suit the Court has no jurisdiction to lodge a complaint against him under S. 476 read with S. 195, Criminal P. C., in view of the alteration in the law made by the Amending Act of 1923. We think that the question is of some importance and we should like to have the help of the Crown in this matter. We accordingly direct that the papers be sent to the Legal Remembrancer with a request to make it possible for him to appear before us by an advocate to show cause in this case on the ground stated above. Let this matter be placed before us as soon as the Legal Remembrancer has entered appearance. The order staying further proceedings in this matter will continue to be in force until the disposal of this Rule.

M.N./B.K.

Order accordingly

1930 Cr. Cases 893

(Lahore)

JAI LAL, J.

Lorind Singh—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 300 of 1930.
Decided on 14th April 1930, from order of Dist. Judge, Jhelum, D/- 11th February 1930.

(a) Criminal Trial—Stay of—Rule of staying criminal trial when civil litigation pending is rule of prudence and its application must depend on merits of each particular case.

The rule that ordinarily criminal proceeding should not be started when the same question is involved in a pending civil litigation is not a rule of law but a rule dictated by prudence and its application must depend on the merits of each case. [P 894 C 2]

(b) Criminal Trial—Stay of—Documents tampered with after filing them in civil litigation—Criminal trial may not be stayed.

Where documents were tampered with after they were filed in the Court there is no reason why criminal prosecution should be stayed till the decision of the civil suit in which they were filed. [P 894 C 2]

Amar Nath Chona—for Petitioner.*M. Sleem*—for the Crown.

Judgment.—The petitioner instituted a suit for the recovery of a fairly large amount against the Secretary of State for India in Council in the Court of the Senior Subordinate Judge at Rawalpindi. This suit was defended by the Secretary of State whom Mr. Ram Lal, Assistant Legal Remembrancer, represented in the Court.

In support of the defendant's case a large number of documents were filed in Court and during the progress of the case, Mr. Ram Lal apparently noticed that some documents filed by him had been tampered with by making erasures and additions. He communicated his impression to the Senior Subordinate Judge and stated that when he filed the documents he had read them carefully and made notes thereof and could say from personal knowledge that they had been tampered with. Apparently the alterations in the documents are such as would benefit the plaintiff to a large extent, and it seems that an enquiry, which the Senior Subordinate Judge has described as a confidential enquiry, was held with a view to find out if any official of the Court was implicated in the matter. The evidence recorded in that enquiry and the conclusion of the

Senior Subordinate Judge have not been made available to this Court.

Subsequently, Mr. Ram Lal presented an application to the Senior Subordinate Judge asking him to make a complaint against the plaintiff Lorind Singh the petitioner before me, under various sections of the Indian Penal Code, for having made the alterations in the documents. The Senior Subordinate Judge granted this application and made a complaint accordingly.

In the order of the Senior Subordinate Judge it is distinctly stated that the enquiry made by him was confidential and had not been made use of in making the order complained against. He, however, based his order on certain presumptions which it is not necessary for me to consider at the present stage.

The petitioner presented an appeal to the District Judge of Rawalpindi which was transferred to the District Judge of Jhelum who has upheld the order of the Senior Subordinate Judge though not on the grounds mentioned by him but on some of the statements recorded by the Senior Subordinate Judge in the course of the confidential enquiry which statements, according to the District Judge, were recorded in the presence of the petitioner. The petitioner has presented an application for revision in this Court under S. 439, Criminal P. C.

A preliminary objection is taken on behalf of the respondent that an application under S. 439, Criminal P.C., does not lie as that section is confined to interference by this Court with orders passed by the subordinate criminal Courts. Reliance is placed in support of this objection on 40 Cal. 477 and 26 Cal. 229. At the same time the learned counsel for the respondent very properly referred to a judgment of a Full Bench of the Chief Court of the Punjab reported as 5 P. R. 1908 in which a contrary view was taken. This last case is open to some criticism, and if it had been necessary for me to decide the question in the present case I would have felt constrained to refer it for more authoritative decision, but the petitioner's counsel contends that his case falls under S. 115, Civil P.C. Whether it falls under that section or under S. 107, Government of India Act, I need not decide as I am of opinion that this is a fit case in which I must interfere under either

of the two sections mentioned above and for this reason also I do not decide whether this application is competent under S. 439, Criminal P. C.

The District Judge, as I have stated above, has based his conclusion on the statements made in the course of the confidential enquiry, but, it does not appear that the entire evidence recorded on that occasion was made available for criticism to the petitioner. It is obvious that it was unfair to the petitioner to make use against him of a portion of that record, concealing the rest from him. It was his right under the circumstances either to claim that the entire record of the confidential enquiry should be ruled out as inadmissible or the whole evidence be considered by the District Judge after being subject to criticism on behalf of the petitioner.

In my opinion, therefore, the petitioner has been seriously prejudiced by the procedure adopted by the Courts below and I propose to send the case back to the Senior Subordinate Judge for a preliminary enquiry such as is mentioned in S. 476, Criminal P. C. But the petitioner's counsel contends that this Court should not send the case back for further enquiry, but should stay the criminal proceedings altogether till the decision of the civil case, and in support of this prayer he made a passing reference to a number of cases in which it has been held that ordinarily criminal proceedings should not be started when the same question is also involved in a pending civil litigation. That however, is not a rule of law but a rule dictated by prudence, and its application must depend on the merits of each case. In the present case it is alleged that the documents were tampered with after they had been filed in Court. It is not a case where the allegation is that at the time when they were filed by a party they had been forged and in my opinion this circumstance makes a substantial difference in considering whether the criminal proceedings should or should not be stayed. On the present record, therefore, I am unable to accede to the petitioner's prayer that the original proceedings should be altogether stayed till the decision of the civil suit. At the same time, after the preliminary enquiry that I am directing the Senior Subordinate Judge, to hold, if it trans-

pires that criminal proceedings should be stayed it will be open to the Courts below to take this action and for the petitioner, if he is dissatisfied, to move this Court, but, at the present stage, I see no reason to stay the criminal proceedings.

I, therefore, accept this petition and, setting aside the orders of the Courts below, direct the Senior Subordinate Judge to hold a preliminary enquiry under S. 476, Criminal P. C., in the presence of the parties and also to allow the petitioner to produce such evidence in rebuttal as he may desire to produce. I consider that this latter course is necessary in the present case because in order to enable the trial Court to determine whether a prima facie case has been made out against the petitioner, his point of view must be properly presented before him, specially because this is not a case in which after recording the evidence of the parties the Court has come to the conclusion that an offence has been committed. This petition is accepted and the case sent back to the Senior Subordinate Judge, Rawalpindi. The complaint made against the petitioner is hereby withdrawn.

V.B./R.K.

Petition accepted.

1930 Cr. Cases 895

(Madras)

CURGENVEN, J.

Nagappan Konan—Petitioner.

vs.

Ramaram Padayachi and others—Respondents.

Criminal Revn. Case No. 159 of 1929 and Criminal Revn. Petn. No. 138 of 1929, Decided on 18th July 1929, from order of Addl. Dist. Magistrate, Tanjore, in Criminal Revn. Petn. No. 71 of 1928.

Criminal P. C., S. 520—Additional District Magistrate being invested with powers of Court of revision, is competent when disposing of case to make consequential order as to disposal of property.

Where an Additional District Magistrate is invested by the Local Government by virtue of the powers conferred upon it by S. 10 (2), Criminal P. C., with the powers of a Court of revision, he is competent when disposing of a case by virtue of those powers to make any consequential order as to the disposal of the property: (1928) *M. W. N.* 557, (F.B.), *Expl.* and *Dist.* and (1928) *M. W. N.* 683, *Dist.*

[P 896 C 1]

S. Nagaraja Iyer—for Petitioner.

A. Narasimha Aiyar—for the Crown.

N. Rajagopalan—for Respondents.

Order.—The Sub-Magistrate of Tiruvadamardur in C. C. No. 202 of 1928 on his file discharged three persons of the offence of theft and subsequently passed an order that the property involved, namely three calves, should be returned to them. A petition praying for the revision of the order of discharge was presented by the complainant to the Additional District Magistrate of Tanjore and shortly afterwards he presented a supplementary petition praying that the property should be handed over to him. The Additional District Magistrate passed an order declining to interfere either with the order of discharge or with the directions of the lower Court regarding the property. The complainant then applied to the High Court to revise both portions of the order. The order of discharge has been disposed of in Cr. R. C. 158 of 1929, the petition having been dismissed and I have now to deal with the order with regard to the property.

The contention raised is that the Additional District Magistrate was not a Court of appeal, confirmation, reference or revision, such as is contemplated in S. 520, Criminal P. C., and accordingly that he was not competent to deal with the order which the Sub-Magistrate had passed under S. 517, disposing of the property whether by confirming it or by reversing it. I have been referred to the Full Bench case reported in *Maria Pillai v. Ramanathan Chettiar* (1), where the construction of S. 520, has been considered. An examination of that case will however show that the learned Judges divided the cases which might arise for consideration into two classes: firstly those in which an order with regard to property comes before a Court which has at the same time under its consideration an appeal, a reference or an application for revision as regards the main case itself, and secondly those in which an application to that Court to modify or reverse the order relating to property is made independently of any such appeal, reference or revision; and the judgments are concerned with the question how the latter class of cases may be dealt with, the view being clearly expressed that no difficulty arises in cases of the first class. The order subsequently passed by Reilly, J. in the

(1) [1928] *M. W. N.* 557 (F.B.).

case reported in *Maria Pillai v. Gopala-krishna Iyer* (2) was upon an application with regard to property filed independently of any appeal or revisional application. These cases accordingly do not support the petitioner's contention, but in fact run contrary to it; and I think there can be no question that, since an Additional District Magistrate is invested by the Local Government by virtue of the powers conferred upon it by S. 10 (2), Criminal P. C., with the powers of a Court of revision, he is competent when disposing of a case by virtue of those powers to make any consequential order as to the disposal of the property. That is to follow the plain terms of S. 520, Criminal P. C., and no authority has been shown me for taking a different view. I can find no reason therefore to interfere with the order of the Additional District Magistrate as contrary to law and I dismiss this criminal revision petition.

P.R.S./S.N. *Revision dismissed.*

(2) [1928] M.W.N. 683.

1930 Cr. Cases 896

(Madras)

JACKSON, J.

Kolandaswami Pillai—Petitioner,

v.

Rajaratna Mudaliar—Respondent.

Criminal Revn. No. 72 of 1929 and Criminal Rev. Petn. No. 58 of 1929, Decided on 17th October 1929, against order of Town Sub-Magistrate, Trichinopoly in Criminal Case No. 585 of 1928.

Criminal P. C., S. 403—Judgment-debtor escaping from Amin who had arrested him—Decree-holder complaining but accused acquitted—This acquittal is an effective bar against subsequent complaint by Amin.

A judgment-debtor escaped from the Amin who had arrested him. The decree-holder then lodged a complaint against him but he was acquitted. Thereupon the Amin lodged another complaint.

Held: that the judgment-debtor's acquittal in the decree-holder's complaint is an effective bar against the subsequent complaint by the Amin under S. 403. *A.I.R. 1928 Bom. 148 and 86 Mad. 808, Ref.* [P 896 Q 2]

K. S. Jayarama Ayyar for *S. R. Dikshit*—for Petitioner.

G. S. Swaminathan for *A. V. Narayanaswami Ayyar*—for Respondent.

**K. Venkataraghavachari*—for the Crown.

Order.—The order of the Town Sub-Magistrate has no merits. A judgment-debtor escaped in the night from the

Amin who had arrested him and the Subordinate Judge ordered the Amin to prosecute. There is no question here of sanction; the Amin could have prosecuted without reference to the Subordinate Judge and the Subordinate Judge simply passed the order departmentally to give the Amin a chance of rehabilitating his character. Meanwhile the decree-holder complained. When his case came up for trial the Court held that his complaint was incompetent and acquitted the accused. He was no doubt acquitted owing to the Sub-Magistrate's total misunderstanding of an *Allahabad* case which is not in Indian Law Reports. That case merely laid down that if a civil Court wishes to complain, the Munsif must lodge a complaint or get one lodged and cannot merely send a report. The case adds nothing to S. 190, Criminal P. C. But none the less he was acquitted.

Then the Amin lodged his complaint and the accused pleaded *autre fois acquit* under S. 403, Criminal P. C. The Magistrate refused to entertain the plea because in *Emperor v. Amboji Dhakya* (1) it has been held that a Court confronted with a complaint which requires sanction under law and is not sanctioned is a Court not competent to try the case as contemplated in S. 403, Criminal P. C. This ruling differs in terms from *In re Ganapathi Bhattu* (2), and it is amazing that the Sub-Magistrate should have gone for his law to Bombay. It is not necessary to discuss here which is the more correct ruling, because neither has any bearing upon the present case, and anyhow the Magistrate was bound by the Madras ruling which he will be well advised to take as a safe guide. In the present case the decree-holder or any other person residing in India was competent to complain, the Court was competent to try, and the acquittal is an effective bar under S. 403, Criminal P. C. The petition is allowed and the order is cancelled.

P.R.S./S.N.

Revision allowed.

[1] *A. I. R. 1928 Bom. 148=52 Bom. 257.*

[2] [1918] 85 Mad. 808=24 M. L. J. 463=19 I.O. 810=14 Cr. L. J. 214.

**** 1930 Cr. Cases 897**
(Lahore)

BROADWAY AND BHIDE, JJ.

Des Raj—Petitioner.

v.

Emperor—Opposite Party.

Criminal Miso. Petn. No. 134 of 1930,
Decided on 16th July 1930.

* (a) Government of India Act (1919),
S. 72—Ordinance, whether is intra vires or
ultra vires can be examined by High Court
—Jurisdiction.

High Court can examine an Act of the
legislature whether enacted by the legislature
itself or by the Governor-General in Council or
by the Governor-General, in order to see whe-
ther the said Act or Ordinance has been made
and promulgated within the scope of the powers
conferred on the legislature, the Governor-
General in Council and the Governor-General
respectively, by the Government of India Act
1919: A. I. R. 1920 P. C. 23 and 4 Cal. 172
(P.C.) Rel. on. [P 898 C 2; P 899 C 1]

** (b) Government of India Act (1919),
S. 72—(Per *Broadway, J.*) Whether emer-
gency exists should be decided by Governor-
General—His decision is final—Courts can,
however, decide whether terms of Ordina-
nce are within the provisions of the Act
(*Bhide, J. Contra*).

. Per *Broadway, J.*—According to S. 72 of the
Act it is the Governor-General, and Governor-
General alone, who is concerned and the in-
tention of the framers of the Act is to leave it
to the Governor-General to decide, as a pure
act of administration, whether a state of emer-
gency exists which calls for an Ordinance and
that his decision on that point is final and not
liable to consideration by the Courts although
it is open to the Courts to decide whether, in
making the Ordinance he has kept his terms
within the provisions of the Act: *De Verteuil*
v. *Knaggs*, (1918) A.C. 657, Rel. on. [P 899 C 1, 2]

Per *Bhide, J.*—The existence of an emer-
gency and the purpose of an Ordinance can be
looked into by a Court of law. If, however,
there are circumstances which are reasonably
capable of being looked upon as giving rise to
an "emergency" the Court will not be justified
in interfering even if it is inclined to take a
different view on the facts, because legislature
has invested the Governor-General with a dis-
cretion in very wide terms to exercise his powers
under S. 72 and hence his decision is entitled
to great weight. [P 903 C 2; P 904 C 1]

** (c) Government of India Act (1919),
S. 72—Ordinance 3 of 1930 though deprives
a person of the right of appeal as given by
the Criminal Procedure Code is, not ultra
vires.

Although the provisions of the Ordinance
have the effect of depriving the accused person
of a right to be tried by a Sessions Judge aided
by assessors and a right of appeal to the High
Court, still as these rights are given by the
Criminal Procedure Code which is only an Act
of the Indian legislature, it can be overridden
by the Indian legislature, the Governor-Gen-
eral-in-Council and the Governor-General acting
by himself. The terms of the Ordinance,

therefore, do not vitiate the provisions of the
Government of India Act and hence the Ordi-
nance is not ultra vires. [P 899 C 2, P 900 C 1]

(d) Interpretation of Statutes—Act must be
construed according to its plain wording—
Intention of legislature cannot be specu-
lated.

Per *Bhide, J.*—It is an elementary rule of
the construction of a statute that the provi-
sions of an enactment must be construed ac-
cording to its plain wording and nothing can
be imported into it merely on the basis of any
speculation as to the intention of the legisla-
ture. [P 901 C 2]

(e) Interpretation of Statutes—Language
ambiguous—Two constructions possible—
Construction beneficial to subject is pre-
ferred.

Per *Bhide, J.*—Where the language of an
enactment is somewhat ambiguous and two
constructions are possible, the construction
most beneficial to the subject will have to be
preferred according to the canon of interpre-
tation. [P 901 C 2]

(f) Interpretation of Statutes—Discretion
allowed to authority—It must be exercised
in proper manner—If given in wide terms
scope of interference is narrowed—Juris-
diction.

Per *Bhide, J.*—When the law vests discre-
tion in a certain authority, the Courts are en-
titled to see that the discretion is exercised in
a proper manner but when the discretion is
conferred in wide terms the scope for inter-
ference of the discretion is narrowed to a con-
siderable extent. [P 903 C 1]

(g) Words—"Emergency" meaning ex-
plained.

Per *Bhide, J.*—An "emergency" may re-
sult from an unforeseen combination of circum-
stances. This combination may not take place
all at once but gradually. An immediate ac-
tion may be rendered necessary when the cul-
minating point is reached. [P 904 C 2]

*Moti Sagar, J. N. Aggarwal, G. C. Na-
rang, M. Saleem, Barkat Ali and M. C.
Mahajan*—for Petitioner.

N. N. Sarkar and Carden Noad—for
the Crown.

Broadway, J.—This is an applica-
tion made on behalf of *Des Raj* son of
Ram Kishen who is one of several per-
sons being tried under S. 302 and other
sections of the Indian Penal Code before
a tribunal constituted under the Lahore
Conspiracy Case Ordinance 1930, which
Ordinance was made and promulgated
by the Governor-General on 1st May
1930 under the powers conferred on
him by S. 72, Government of India Act,
1919.

The application purports to be made
under Ss. 491 and 561-A, Criminal P. C.,
and sets out that the petitioner and
eighteen others were placed before a
Magistrate of the First Class at Lahore
charged with having committed, and

having been concerned in the commission of various offences under the Penal Code; that the Magistrate commenced the committal proceedings on 11th July 1929 which continued, with occasional adjournments, up to 8th February 1930 on which date some of the persons, described as accused, went on hunger strike which necessitated an adjournment till 8th March 1930. From that date it was averred that the committal proceedings went on harmoniously up to the end of April after which, as a result of the promulgation of the Lahore Conspiracy Case Ordinance, 1930, the petitioner and his companions were placed before a tribunal constituted under the said Ordinance for trial. It was also averred that the custody in which the petitioner was kept was unlawful, as was also the trial inasmuch as the Ordinance in question was invalid and ultra vires.

The validity of the Ordinance is attacked on various grounds. It is contended: (1) that no emergency such as is contemplated by S. 72, Government of India Act, 1919, had been shown to exist; (2) that the statement issued by the Governor-General did not show a state of emergency; (3) that the provisions of the Ordinance "are not calculated to promote the peace and good government of British India or any part thereof"; (4) that the Ordinance goes beyond the letter and spirit of S. 72 in that it deprives a person under trial of a right to appeal to the High Court; and (5) that it is against the fundamental principles of the constitution and transgresses the unwritten law or constitution of the United Kingdom of Great Britain and Ireland whereon depends in a large degree the allegiance of His Majesty's subjects to the Crown.

The application is signed by a number of learned counsel and the case was argued before us by Mr. Jagan Nath Aggarwal. What we are asked to do is to hold that the Ordinance is not covered by the terms of S. 72, Government of India Act, and that the custody, in which the petitioner is, is unlawful, as also are the proceedings now being taken by the tribunal which is an illegal body.

From the arguments advanced by Mr. Jagan Nath four broad questions arise:

Firstly, has this Court jurisdiction to

examine the Ordinance in order to decide whether it was lawfully made and promulgated?

Secondly, has this Court jurisdiction to consider the question of emergency or is it bound by the Governor-General's declaration of its existence?

Thirdly, whether the Governor-General has the power under the Government of India Act, 1919, to deprive the petitioner and his companions of the right of appeal to this Court as given by the laws in force in India.

Fourthly, whether there was in fact a state of emergency.

I have very carefully examined the authorities cited at the Bar, namely *Empress v. Burah* (1); *Secy. of State v. Moment* (2); (1867) L. R. 2 H. L. 175; *Henrietta Muir Edwards v. Attorney-General, Canada*; A. I. R. 1930 P. C. 120; *Puran Mal v. Emperor* (3); *Sudodh Chandra Roy v. Emperor* (4); *Emperor v. Bhola Bhagat* (5); *Chandra Nath v. E. I. Ry. Co.* (6); *Vedappan Servai v. Perianan Servai* (7); *De Verteuil v. Knaggs* (8); (1920) 1 K. B. 829; 86 L. J. R. 1119 and *Bugga v. Emperor* (9). It is not, however, necessary to discuss these authorities inasmuch as they were mainly cited in support of the contention that this Court had jurisdiction to examine the Ordinance in order to decide whether it had been lawfully promulgated. Mr. Sircar, Advocate-General, Bengal, conceded that this Court had jurisdiction to do so and this clearly emanated from the authorities themselves. In my judgment it is clear that this High Court can examine an Act of the Legislature whether enacted by the Legislature itself or by the Governor-General in Council or by the Governor-General, in order to see whether the said Act or Ordinance has been made and promulgated within the scope of

(1) [1877] 4 Cal. 172=5 I. A. 178=3 Sar. 834 (P. C.).

(2) [1913] 40 Cal. 891=18 I. C. 22=40 I. A. 48.

(3) [1905] 26 P. R. 1905=2 Cr. L. J. 371=92 P. L. R. 1905.

(4) A. I. R. 1925 Cal. 278=85 I. C. 913=52 Cal. 319.

(5) A. I. R. 1923 Pat. 547=72 I. C. 375=24 Cr. L. J. 875=2 Pat. 879.

(6) [1919] 19 Cr. L. J. 951=47 I. C. 808.

(7) A. I. R. 1928 Mad. 1108=113 I. C. 279=52 Mad. 69.

(8) [1918] A. C. 557.

(9) A. I. R. 1920 P. C. 28=56 I. C. 440=31 Cr. L. J. 456=47 I. A. 128=1 Lah. 323.

the powers conferred on the Legislature, the Governor-General in Council and the Governor-General respectively by the Government of India Act, 1919.

The second question, however, is more difficult. If this Court has power to go behind the Governor-General's definite assertion that a state of emergency exists, it should be within its power to call for and examine the evidence or other material on which the Governor-General based his conclusion. It is, however, abundantly clear that S. 110, Government of India Act, 1919, places the Governor-General beyond the jurisdiction of this Court. It follows, therefore, that this Court could neither compel nor invite him to lay before us the evidence or other material upon which he came to his conclusion that a state of emergency existed. It has been urged by the counsel for the petitioner that this circumstance did not affect the situation inasmuch as it was open to the Governor-General to lay before the Court the material on which he acted, and that if he did not choose to do so this Court should proceed on the material placed before it. On the other hand it was urged by Mr. Sircar that the act of the Governor-General in coming to the conclusion that a state of emergency existed was purely an administrative act and as such was beyond the cognizance of this Court although the result, namely, the Ordinance, might be open to our examination with a view to ascertaining whether the Ordinance itself was in excess of the powers given to the Governor-General in that behalf by the Government of India Act, 1919. It seems to me that there is considerable force in the learned Advocate-General's contention, and as pointed out in *De Verteuil v. Knaggs* (8) :

"It is no part of the duty of a Court to review the discretion exercised by the Acting Governor."

It seems to me that it would be impossible for this Court to say that the Governor-General had arrived at an erroneous opinion or that his opinion was incorrect or unwarranted without our being possessed of the information, evidence or other material on which he based his conclusions.

Now S. 72, Government of India Act runs as follows :

"The Governor-General may in cases of emergency make and promulgate Ordinances

for the peace and good government of British India or any part thereof etc."

and it has been urged by Mr. Jagan Nath that these words do not imply that the Governor-General's declaration to the effect that a state of emergency exists is to be treated as conclusive.

In support of this contention our attention was drawn to Ss. 41 (2), 45-A (3), 50(2), 52-B (2), 67-A (4), 67-B (2) proviso and S. 72-E (2) proviso in order to show that where it was intended to give finality to the Governor-General's opinion or view the fact was clearly stated. A reference to these sections shows, however, that in each case they provide for the contingency of a difference of opinion arising between the Governor-General and other authority.

Section 41 (2) deals with a difference of opinion between the Governor-General and members of his council, while S. 50 (2) lays down a similar rule for Governors and their councils. Ss. 45-A (3), 52-B (2), 67-A (4), 67-B (2) proviso and S. 72-E (2) proviso make provision for differences of opinion between the Governor-General and the legislative bodies, etc.

In these circumstances I am unable to accept the contention, for in S. 72 it is the Governor-General and the Governor-General alone, who is concerned, and it seems to me that it was the intention of the framers of the Act to leave it to the Governor-General to decide, as a pure act of administration, whether a state of emergency existed which called for an Ordinance and that his decision on that point is, and was intended to be, final and not liable to consideration by the Courts, although it was still open to the Courts to decide whether, in making the Ordinance, he had kept its terms within the provisions of the Government of India Act.

Turning now to the provisions of the Ordinance, it was urged that the petitioner had been deprived of : (1) a right to be tried by a Sessions Judge aided by assessors ; and (2) a right of appeal to this Court. These are rights given to the subjects of this country by the Criminal Procedure Code and, as emphasized by Mr. Jagan Nath himself, the Criminal Procedure Code is an Act of the Indian Legislature enacted in accordance with the powers conferred on that body by the Government of India

Act. There is nothing, therefore, to prevent the legislature from amending the Code so as to lay down a different procedure. That the Indian Legislature, the Governor-General in Council and the Governor-General acting by himself can even override on occasions the Letters Patent of this Court is apparent from Ol. 37 and I am, therefore, of opinion that there is no force in this contention and hold that the terms of the Ordinance in question do not violate the provisions of the Government of India Act, 1919.

The question as to whether this Ordinance goes beyond the letter and spirit of S. 72 is concluded by *Bugga v. Emperor* (9) and *Parmeshwar Ahir v. Emperor* (10) and needs no further discussion.

Finally, assuming that it is open to us to decide whether there was or was not a state of emergency it seems to me that the application itself, and the facts stated before us by Mr. Jagan Nath, sufficiently establish the existence of an emergency. We have been told that the magisterial enquiry commenced on 11th July 1929 and that before 26th July 1929 the prosecution had found it necessary to move this Court for assistance owing to the obstructive attitude adopted by some of the petitioner's companions. When it was found that it was not possible to obtain the required assistance (whatever the reasons may have been) it was said that steps were taken to introduce a Bill before the Assembly in order to meet the situation. What happened to this Bill was not stated, but again in January 1930 the prosecution attempted to expedite matters by moving this Court. On 31st January 1930 it was found that this Court could not render the assistance asked for, and on 8th February 1930 a hunger strike was commenced which held up the proceedings up to 8th March 1930. It is evident that the attitude adopted by the defence in this case was calculated to render the administration of criminal justice in the Courts not only ridiculous but impossible. This attitude was also a menace and a danger for it, by the adoption of such methods, a person accused of an offence could defy the authorities and prevent his being brought to trial under the ordinary rules of procedure, it is manifest the

Courts would practically cease to function. In these circumstances I am of opinion that the situation created by the action of the accused persons themselves brought about a state of emergency which enabled the Governor-General to exercise the powers vested in him by S. 72.

I would, therefore, dismiss the petition.

Bhide, J. — The petitioner Des Raj and other persons were prosecuted last year on serious charges of criminal conspiracy and murder. The commitment proceedings commenced in July 1929 but owing to unprecedented delay and obstruction caused by the conduct of the accused persons the proceedings had made but little progress by 1st May 1930. On the latter date an Ordinance (No. 3 of 1930) was promulgated by the Governor-General constituting a special tribunal for the trial of these persons, so as to expedite the proceedings and bring the trial to a speedy conclusion. The case is being accordingly tried by a tribunal constituted under the Ordinance.

The petitioner has applied for his release under S. 491, Criminal P. C., on the ground that the Ordinance under which the tribunal referred to above has been constituted is ultra vires and that the custody in which he is being detained at present is, therefore, illegal.

The two main points which arise for decision in this case are :

(1) Whether the validity of an Ordinance promulgated by the Governor-General under S. 72, Government of India Act, 1919 can be questioned in a Court of law in this country.

(2) If so whether the Ordinance in question is ultra vires.

A considerable portion of the argument of the learned counsel for the petitioner was devoted to the first point, but it is unnecessary to dilate on it as it was practically conceded by the learned Advocate-General of Bengal who appeared for the Crown, that the Courts in India have power to adjudicate upon the validity of an enactment of the Indian Legislature, when the point is raised before them in a proper proceeding, was decided by a Full Bench of the Calcutta High Court in *Empress v. Burah* (11) as long ago as the year 1877. The case went up to the Privy

(9) [1928] 10 Cr. L. J. 251 = 44 I. O. 155.

(11) [1877] 3 Cal. 62 = 1 C.L.R. 161 (F.B.).

Council, and although the decision of the Full Bench was reversed on merits the power of the Indian Courts to adjudicate on the validity of a legislative enactment was not questioned: *Empress v. Burah* (11). An Ordinance promulgated by the Governor-General under S. 72, Government of India Act, stands on no higher footing than an enactment of the Indian Legislature and the same rule would naturally apply to it. In fact there is a reported case from this very province in which the question of the validity of an Ordinance was raised. This case also went up to the Privy Council and although their Lordships held the Ordinance in question in that case to be valid, it shows clearly that the validity of an Ordinance can be challenged in a Court of law.

The second question is, however, much more difficult. It would appear from S. 72, Government of India Act, that the power of legislation by Ordinance conferred by that section on the Governor-General is subject to threefold restriction. In the first place there must be an "emergency" to justify the exercise of the power. Secondly, the power can be exercised only for the peace and good government of British India or any part thereof. Lastly, the Ordinance must not go beyond the power of the Indian Legislature to make laws. In the present instance it was not seriously contended that the Ordinance in question goes beyond the powers of the Indian Legislature. It was, indeed, urged in Cl. (e) of para. 10 of the petition that the Ordinance was invalid inasmuch as it transgresses :

"the unwritten law or constitution of the United Kingdom of Great Britain and Ireland whereon depends in a large degree the allegiance of His Majesty's subjects to the Crown." of S. 65, Government of India Act.

But in view of the interpretation placed upon these words by their Lordships of the Privy Council in *Bugga v. Emperor* (9) the point was not pressed. The main points on which the learned counsel for the petitioner laid stress were that there was no "emergency" justifying the promulgation of the Ordinance and it was not required for the :

"peace and good government of British India or any part thereof."

On behalf of the Crown, it was

contended that this Court has no jurisdiction at all to go into the above questions as it was for the Governor-General to decide whether there was any emergency and whether the Ordinance in question was required for the peace and good government of British India or any part thereof. Now, it is an elementary rule of the construction of statutes that the provisions of an enactment must be construed according to its plain wording and nothing can be imported into it merely on the basis of any speculation as to the intention of the Legislature. There is nothing in the language of S. 72 to indicate that the Governor-General's opinion on the points referred to above is to be taken as final. There are other sections in the Government of India Act where finality is expressly conferred upon the acts of executive authorities and in some cases it is specifically laid down that their acts are not liable to be challenged in a Court of law : see e.g. S. 52-B, Cl. 2 ; S. 72 D-(3). In the absence of any such provision the initial presumption is that a Court of law will have jurisdiction to go into these matters if it becomes necessary to do so in order to determine any question properly coming before it for decision. Even if it be supposed for the sake of argument that the language is somewhat ambiguous and both constructions are possible, the construction most beneficial to the subject will have to be preferred, according to another well-known canon of interpretation : of Maxwell on Interpretation of Statutes, 6th Edn, p. 501 and the construction giving jurisdiction to Courts is obviously the one beneficial to the subject.

It was next urged that the decision as to the existence of an emergency and the necessity of the Ordinance is of an "administrative" character but even if this be so, that by itself would not, I think, necessarily bar the jurisdiction of Courts if the matter comes before them for decision in a proper proceeding. For the administrative act assumes a quasi-judicial character when it is a condition precedent to the exercise of certain powers under the law. The case *De Verteuil v. Knaggs* (8), which was cited on behalf of the petitioner deserves notice in this connexion. In that case the owner of an estate in Trinidad sued

the Governor of Trinidad and the Protector of Immigrants for a declaration that an order under S. 203 of the Immigration Ordinance for the transfer of the immigrants' indentures on the estate was ultra vires. S. 203 of the Immigration Ordinance empowered the Governor to transfer the indentures of the immigrants :

"on sufficient grounds shown to his satisfaction that all or many of the immigrants' indentured should be removed therefrom."

This power was essentially of an executive character and all that the section required was that "sufficient grounds should have been shown to the satisfaction of the Governor." Yet the Judicial Committee went into the question and held that the Governor could not exercise power without an enquiry and without giving a fair opportunity to the person concerned to be heard. Another contention raised on behalf of the Crown was that the Governor-General was not subject to the jurisdiction of this Court and hence he could not be compelled to disclose the facts on which his decision is based. But this fact cannot, I think, affect the petitioner's case. The petitioner alleges that he is being detained in illegal custody and if he is able to make out a prima facie case it will be for the Crown to show "legal justification" for the custody. The writ of Habeas Corpus is considered to be the greatest safeguard of the personal liberty of a subject in England and is available against the acts of the highest officers of the Crown. The same remark would apply to the powers conferred by S. 491, Criminal P. C., on the High Courts and the mere fact that the Ordinance was promulgated by the Governor-General, who is not personally subject to the jurisdiction of the Court would, in my opinion, be no justification for the petitioner's detention in custody, if the Ordinance were, in fact, found to be ultra vires as alleged.

Lastly, it was urged that it would create a very inconvenient situation if the Governor-General's decision on the question of emergency and necessity of a particular measure for the peace and good government of the country were held to be open to scrutiny by Courts. But this argument cannot, by itself, be considered to be a sufficient ground for holding that the jurisdiction of the

Courts to enquire into these questions is barred.

As pointed out already, the existence of an "emergency" is a condition precedent to the exercise of the power of promulgating Ordinances conferred upon the Governor-General. Similarly, the section requires the power to be exercised only for the peace and good government of British India or any part thereof. It follows, therefore, that unless these conditions are fulfilled no Ordinance promulgated under S. 72 will be valid. If, then, a Court of law has power to enquire into the validity of an Ordinance, it must necessarily have power to see whether these conditions are fulfilled. If, for instance, it is found that an Ordinance was promulgated in the absence of an emergency whatever or for a purpose wholly unconnected with the peace or good government of the country (a contingency which is, of course, not very likely to arise in practice, but is not inconceivable) can it be maintained that a Court of law has no power to declare the Ordinance to be invalid? I think the answer to this question must clearly be in the negative. In *Puran Mal v. Emperor* (3) the question arose whether certain extraordinary powers which were conferred on the President of a Municipality by the Punjab Municipal Act had been properly exercised and it was held that the exercise of the said powers was illegal as there was no emergency. This was, no doubt, a decision by a single Judge of the Punjab Chief Court, but it does not appear to have been dissented from or overruled in any subsequent case. The person concerned was, of course, a much humbler individual than the Governor-General, but I do not see how the case can be distinguished in principle. The learned counsel for the Crown conceded that Courts have power to enquire into the third condition laid down in S. 72 viz., that the Ordinance must not go beyond the law-making power of the Indian legislature and his contention that the first two contentions cannot be inquired into seems inconsistent. Of course, it was open to the legislature to lay down that the declaration of the Governor-General as to the fulfilment of these conditions should be taken as conclusive evidence but it has not chosen to do so.

The position as regards Ordinances issued in an emergency in this country seems to be analogous to that as regards regulations, framed in the interest of public safety under the Defence of the Realm Act in England during the Great War. But the Courts in England do not appear to have considered themselves debarred from going into the question whether a particular regulation was reasonably necessary for the public safety on the ground that the executive authorities were the sole judges of the matter. In *Rex v. Halliday* (12) (at p. 1127), in dealing with a Regulation framed in the interest of public safety, Lord Atkinson remarked as follows:

"It by no means follows, however, that if on the face of a regulation, it enjoined or required something to be done which could not in any reasonable way aid in securing the public safety and the defence of the realm, it would not be ultra vires and void."

In *Chester v. Bateson* (13) Darling, J., adopted this position and went on to consider whether it was a "necessary or even reasonable way to aid in securing the public safety and the defence of the realm to give power to a minister to forbid any person to institute any proceedings to recover possession of a house so long as a war worker is living in it."

Similarly, Avory, J., another Judge who sat on the Bench in that case, stated the question in the following terms:

"And the only question for decision is whether this portion of the regulation is ultra vires the statute under which it purports to be made, that is to say the Defence of the Realm Consolidation Act, 1914. This depends upon whether it can be said, on any reasonable construction of the statute to be a regulation for securing the public safety and the defence of the realm and particularly under S. 1, sub-S. 1 (c), whether it can be said to be a regulation to prevent the successful prosecution of the war being endangered."

Eventually the regulation in question in that case was held to be ultra vires, the Judges (apparently) holding that the regulation as it stood was not required for public safety and that the infringement of the right of the subjects to have access to the Courts of justice, which it involved was not warranted by the statute under which it was framed. A similar view was taken in *Newcastle Breweries Co. v. The*

King (14). In *Rex v. Halliday* (12) on the other hand, the regulation in question in that case was held to be not ultra vires because it was covered by the express language of the statute. But even then Lord Atkinson thought it necessary to make the observation quoted above and reserve his decision thereon. After giving my anxious and careful consideration to the arguments advanced by the learned counsel for the Crown, I am unable to find any valid ground for holding that the jurisdiction of Courts to enquire into the above-mentioned conditions is absolutely barred.

But though the decision of the Governor-General on the aforesaid conditions cannot, in my opinion be held to be final, it will naturally be entitled to very great weight. The legislature has invested him with a discretion in very wide terms to exercise his power under S. 72. No rigid definition of the term "emergency" has been attempted and the words

"peace and good government of British India or any part thereof,"

are also obviously of the widest import. When the law vests discretion in a certain authority, the Courts are entitled to see that the discretion is exercised in a proper manner: see Maxwell's Interpretation of Statutes, Edn. 6, p. 226, but when the discretion is conferred in wide terms the scope for interference with the discretion is of course narrowed to a considerable extent. A Court of law will, therefore, I think, not be justified in questioning or interfering with the wide discretion conferred upon the Governor-General in the present instance unless it is clear that there were no circumstances which could reasonably be considered to constitute an "emergency" that the Ordinance in question could not possibly be required for the peace and good government of the country.

None of the authorities cited seemed to throw much light on this point, but the following test laid down by Salter, J., in *New Castle Breweries Ltd. v. The King* (14), in which the validity of a regulation framed under the Defence of the Realm Act was challenged seems to me to be a suitable guide in the circumstances of the present case. "The test

(12) [1917] 86 L.J.K.B. 1119=33 T.L.R. 336=61 S.J. 443=(1917) A.C. 260=25 Cox. C.O. 850=81 J. P. 337=118 L. T. 417.
(13) [1920] 1 K. B. 829.

(14) [1920] 1 K. B. 854.

to be applied" remarked the learned Judge :

"Is whether this part of the regulation is reasonable for securing the public safety and the defence of the realm. If it is, it is valid and the Crown-in-Council is the sole judge of its expediency."

So in the present case, if the ordinance is reasonably capable of being required for the peace and good government of British India or any part thereof this condition must, I think, be held to be fulfilled. Similarly, if there are circumstances which are reasonably capable of being 'looked upon as giving rise to an "emergency," the Court will not, in my opinion, be justified in interfering even it was 'inclined to take a different view on facts.

I am, therefore, of opinion that the existence of an emergency and the purpose of the Ordinance can be looked into by a Court of law to the extent stated above.

I now proceed to consider whether there are any good grounds for holding that the Ordinance which is sought to be attacked in the present case is invalid. It is the petitioner who comes to Court to challenge the validity of the Ordinance. The onus obviously lies on him in the first instance to make out a *prima facie* case. The petitioner's case is that there was no emergency to justify the Ordinance and that it was not needed in the interest of peace or good government. The petitioner has filed an affidavit that the proceedings in the committing Magistrate's Court were going on in a regular manner when the Ordinance was promulgated and it has been contended on his behalf that even the statement issued by the Governor-General along with the Ordinance does not make out any case of "emergency." The learned counsel for the petitioner drew our attention in this connexion to the meaning of the word "emergency" as given in Webster's Dictionary which is as follows :

"An unforeseen occurrence or combination of circumstances which calls for immediate action or remedy."

It was urged that the proceedings in the Magistrate's Court were going on for some nine months and no unforeseen event had occurred immediately before the Ordinance to justify its promulgation. But I do not think that is the right way of looking at the matter. An

emergency may result according to the very definition relied on by the learned counsel from an unforeseen "combination of circumstances." This combination may not take place all at once but gradually, and immediate action may be rendered necessary when the culminating point is reached. The statement issued along with the Ordinance does not purport to be a complete statement of facts constituting the "emergency," but even from that statement (the correctness of the facts in which was not challenged before us) it is clear that the proceedings in the Magistrate's Court had been delayed by the wilful absence of the prisoners who had gone on a hunger strike on two occasions and that the administration of justice was being brought into contempt by their disorderly conduct and revolutionary demonstrations. It was brought out in the course of the arguments of the petitioner's counsel himself that this Court was unsuccessfully approached on two occasions with a view to find a remedy for the situation under the existing law and a Bill introduced for the same purpose had also for some reason or other proved abortive. It is also common knowledge that conditions in India had been disturbed for some time before the promulgation of the Ordinance. It cannot, therefore, be said that there were no circumstances at all, which could reasonably be held to constitute an emergency or call for immediate action in the interests of peace and good government of the country.

Finally, it was urged that the Ordinance was *ultra vires*, at any rate in so far as it made provisions for matters wholly lacking in the essentials of emergency as it has deprived the accused of their right of appeal and the High Court of its power of superintendence over the tribunal. But these provisions not being in excess of the powers conferred upon the Indian Legislature by S. 65, Government of India Act, the Ordinance cannot be held to be *ultra vires* on this ground. Under S. 65, Government of India Act, the Indian Legislature has power to make laws affecting the jurisdiction of the High Court and under S. 72, Government of India Act, the Governor-General has the sole power in this respect as the Indian Legislature itself. This is also made clear in Cl. 87,

Letters Patent of this Court. The expediency or propriety of the provisions of the Ordinance cannot be called in question in these proceedings, if the ordinance, as a whole, is within the provisions of S. 72, Government of India Act, as I hold it to be. It may, however, be pointed out that an appeal to this Court was probably considered unnecessary as the tribunal consists of three Judges of this Court. It must also be remembered that the deprivation of the right of appeal in such circumstances cannot be said to be wholly repugnant to the existing law. For under S. 526, Criminal P. C., the High Court has power to transfer a case to itself for trial, and if this is done the right of appeal is automatically taken away.

In my judgment the petitioner has failed to establish that Ordinance No. 3 of 1930 is ultra vires and I, therefore, concur with my learned brother in dismissing this petition.

R.K. *Petition dismissed.*

1930 Cr. Cases 905

(Oudh)

PULLAN, J.

Lala and others—Accused — Appellants.

v.

Emperor—Opposite Party.

Criminal Ref. No. 15 of 1930, Decided on 24th April 1930, made by Second Addl. Sess. Judge, Lucknow.

Public Gambling Act (18 of 1867), S. 13 — "Public place" — Meaning explained.

A public place is one which is in full view of the public and one to which the public has access: *White v. Cabitt*, 1 K. B. 443, Ref.; A. I. R. 1922 Oudh 275; 51 I. C. 971 and A. I. R. 1922 Oudh 196, Dist. [P 905 C 2]

Jagannath Prasad Kapur — for Appellants.

H. K. Ghose—for the Crown.

Judgment.—This is a reference by the Second Additional Sessions Judge of Lucknow at Unao in a case of gambling under S. 13, Public Gambling Act 18 of 1867. The first objection made to the trial was that one of the accused was only 13 years of age. The Magistrate pointed out that he himself recorded his age as 17, and he was therefore quite entitled to proceed with the case as no plea was raised that the accused was a minor. The second point raised by the learned Additional Ses-

sions Judge is that the place where the gambling took place was not a public place. He describes it as a verandah of a shop and he does not controvert the statement of the Magistrate that it is on a public road. A public place for the purposes of the Gambling Act is a place to which the public have a right of access and the question of ownership is immaterial. The same is the view taken by the Courts in England in interpreting various special acts and I have before me a very recent decision of the King's Bench, *White v. Cabitt* (1) in which reference is made to the standard case of *Queen v. Wellard* (2) which shows that the view taken in England still is that a plot of ground privately owned to which the public have no right of access but are allowed to pass over may be a public place.

The learned Additional Sessions Judge refers me to two cases: one reported in *Emperor v. Bashir* (3) and another reported in an unauthorized report of the Lahore High Court *Badraduddin v. Emperor* (4) in which cases it was held that certain places, namely, land forming an angle between two roads in the one case and lands situated near a temple in the premises of the railway station in the other case were not public places. I have been referred on the part of the Crown to another ruling of the Judicial Commissioner's Court reported in *Emperor v. Lalji* (5), in which it was held that a footpath running from a public way through a private grove and used by the public as of right is a public place. None of these cases is exactly parallel to that before me. In my opinion a public place is one which is in full view of the public and one to which the public has access. But in this case there is no evidence that the public had a right of access to the verandah. For all I know the owner of the shop may have refused to allow the public to go on his verandah. If the public had no right of access even though the shop is

(1) [1930] 1 K. B. 443.

(2) [1885] 14 Q. B. D. 63=54 L. J. M. C. 14=49 J. P. 296=15 Cox. C. C. 559=33 W. R. 156=51 L. T. 604.

(3) A. I. R. 1922 Oudh 275=68 I. C. 613=23 Cr. L. J. 581=28 O. C. 41.

(4) [1920] 57 I. C. 931.

(5) A. I. R. 1922 Oudh 196=33 I. C. 611=23 Cr. L. J. 579=25 O. C. 114.

in a public situation it is not a public place within the meaning of the Gambling Act. I accept the reference, set aside the order of conviction, but in the circumstances it is not necessary to return the 184 kowris and two annas which were confiscated. The fine if paid will be returned.

V.B./R.K. *Conviction set aside.*

1930 Cr. Cases 906

(Rangoon)

CARR, J.

Emperor—Appellant.

v.

Nga Po Win—Accused—Respondent.

Criminal Appeals Nos. 1504 and 1505 of 1929, Decided on 6th January 1930.

(a) Burma Village Act, S. 28—S. 28 does not apply where Magistrate takes cognizance of offence of his own motion under Criminal P. C., S. 190 (1) (c).

The terms of S. 28, Burma Village Act, must be strictly construed. The section applies only to the entertainment of a complaint and does not impose any restriction upon the prosecution of a headman if the prosecution is instituted otherwise than on complaint. It does not, therefore, apply to a case in which a Magistrate of his own motion takes cognizance of an offence under the provisions of S. 190 (1) (a), Criminal P. C. [P 906 C 2]

(b) Criminal P. C., S. 190 — Proceedings of enquiry into certain unauthorized horse-races submitted to Deputy Commissioner — Latter can take cognizance of offences in his capacity of District Magistrate.

Where the Township and Subdivisional Officers enquire into certain unauthorized horse races and submit the proceedings to the Deputy Commissioner who on considering the report records an order in his capacity as District Magistrate, taking cognizance of offences, the latter has jurisdiction to take cognizance of offences in a manner he did : 43 *Mad. 709, Rel. on*; 37 *Cal. 221, Cons.* [P 907 C 1]

Lambert—for the Crown.

Paul—for Respondent.

Judgment.—On two different days in February and March last unauthorized horse races were held at a village in the Henzada District. This matter was enquired into by the Township and Subdivisional Officers whose proceedings were submitted to the Deputy Commissioner. On considering their reports the Deputy Commissioner recorded an order in his capacity as District Magistrate taking cognizance of the two offences and sending them to another Magistrate for trial. The present respondent was one of the persons thus prosecuted and in both cases he was con-

victed by the trying Magistrate. On appeal to the Sessions Court the convictions of the respondent were set aside and he was acquitted on the ground that the prosecution of the respondent, who was a village headman, could not be instituted except with the sanction of the Deputy Commissioner under S. 28, Burma Village Act. The Sessions Judge held that the procedure adopted by the Deputy Commissioner and District Magistrate was incorrect, and that the proper course would have been for the Deputy Commissioner to sanction the prosecution of the Headman. The Local Government now appeals against these orders of acquittal.

In the circumstances above described I should be inclined to hold that, if S. 28, Village Act, were applicable in the present case, the procedure adopted by the Deputy Commissioner in his dual capacity as Deputy Commissioner and District Magistrate was a sufficient compliance with the requirements of that section. But I do not think it necessary to go into this question more fully, for, in my opinion, from the terms of S. 28, that section is not applicable at all in the present case.

The section reads:

No complaint against a headman or member of a village committee or rural policeman of any act or omission punishable under this Act shall be entertained by any Court unless the prosecution is instituted by order of, or under authority from the Deputy Commissioner.

The terms of this section must be strictly construed, and on such a construction it is clear that the section applies only to the entertainment of a complaint and does not impose any restriction upon the prosecution of a headman if the prosecution is instituted otherwise than on complaint. It does not, therefore, apply to a case in which a Magistrate of his own motion takes cognizance of an offence under the provisions of S. 190 (1) (c), Criminal P. C. The Sessions Judge was, therefore, clearly wrong in allowing the appeals of the respondent on the ground given by him.

For the respondent it has been urged: firstly, that on the evidence the conviction of the respondent was not justified; and, secondly, that the District Magistrate has no power under S. 190 (1) (c) Criminal P. C., to take cognizance of an offence on information received by him

in a different official capacity. In support of this second proposition I have been referred to the case of *Lakhi Narayan Ghose v. Emperor* (1). In that case it was held by one Judge of the Calcutta High Court that a Magistrate who has received information in another public capacity cannot act on it in his capacity of a Magistrate and initiate criminal proceedings under S. 190 (1) (c), Criminal P. C. The learned Judge came to this finding following the case of *Thakur Pershad Singh v. Emperor* (2), in which he himself and another learned Judge had come to a similar decision. It may be noted that in this latter case the Judges said that by his action in that particular case the Magistrate was practically making himself a Judge in his own case. But in the case of *Lakhi Narayan Ghose v. Emperor* (1), the other Judge Carnduff, J. was not prepared to accept this decision. He pointed out that the decision clearly went beyond the terms of the Criminal Procedure Code. This view has also been taken by the Madras High Court in the case of *Sundarasan v. Emperor* (3).

I agree with the view taken by the learned Judges in this last case that the effect of the earlier Calcutta decision would be to add to the terms of S. 190, Criminal P. C., provisions which cannot be found therein. In my view, the District Magistrate had jurisdiction to take cognizance of the offences disclosed in the present cases. As regards the facts, it is true that the Sessions Judge has not come to any definite finding as to whether it was or was not proved that the respondent committed the offences of which he had been convicted. The case should now, I think, go back to the Sessions Judge in order that he may decide the appeals on the fact. I allow these appeals, set aside the orders of acquittal passed in favour of the respondent, Nga Po Win, and remand the appeals of the respondent to the Sessions Court for determination on their merits,

P.N./R.K.

Case remanded.

(1) [1910] 37 Cal. 221=11 Cr. L. J. 305=6 I. C. 276.

(2) [1906] 10 C. W. N. 775=3 Cr. L. J. 473.

(3) [1920] 48 Mad. 709=55 I. C. 684=21 Cr. L. J. 348.

1930 Cr. Cases 907

(Allahabad)

DALAL, J.

Rozan and others — Accused—Applicants.

v.

Emperor and others — Opposite Parties.

Criminal Reference No. 794 of 1929, Decided on 16th January 1930, made by Addl. Sess.-Judge, Basti, on 11th November 1929.

Criminal P. C., Ss. 139 (2) and 140 (1)—Magistrate cannot compel a party to go to civil Court and specially party in whose favour he is inclined.

The provisions of S. 140 (1) do not apply to a stay under S. 139 (2) and the Magistrate cannot compel either party to go to the civil Court. If the defendant denies the claim and the denial is proved, the criminal Court holds its hand and it will be the business of the plaintiff to bring a civil suit if he likes. If he does not, the denial is maintained. If he does bring a suit and succeeds, the Magistrate may proceed to pass an order absolute under S. 140 (1) Under no circumstances when the opinion of the Magistrate is in favour of one party can he direct that party to go to the civil Court. [F 907 C 2]

S. Mohammad Amin—for Applicants.

M. Waliullah and L. M. Roy—for Opposite Parties.

Judgment.—I am not surprised at the Magistrate being confused by the in-artistic provisions of Ch. 10, Criminal P. C. What is meant by the provisions of S. 139 (2) is that when a Magistrate finds that there is reliable evidence in support of the denial by the defendant of the plaintiff's claim of public right, all he has to do is merely to stay the proceedings until the matter of the existence of such right has been decided by a competent civil Court. The provisions of S. 140 (1) do not apply to such stay and the Magistrate cannot compel either party to go to the civil Court. The purpose of this new section introduced in 1923 is clear. The plaintiff in the criminal Court makes a claim and a defendant denies it. If the denial is proved the criminal Court holds its hand and it will be the business of the plaintiff to bring a civil suit if he likes. If he does not, the denial is maintained. If he does bring a suit and succeeds the Magistrate may proceed to pass an order absolute under S. 140 (1). When the opinion of the Magistrate was in favour of the applicants, Rozan and others, the Magistrate had no jurisdiction to direct Rozan and others to go to

the civil Court. The Magistrate's order of 20th July 1929, subsequent to the sentence:

"I stay the proceedings till the matter of the existence of such right has been decided by a competent civil Court"

is cancelled.

V.B./R.K.

order accordingly.

1930 Cr. Cases 908

(Calcutta)

PEARSON AND JACK, JJ.

Meher Sardar and another — Accused
— Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Nos. 1 and 2 of 1930,
Decided on 22nd May 1930.

Forests Act, S. 59—Interpretation—Words "any person claiming to be interested in the property" in S. 59 are not limited to case contemplated by S. 57—Words "so seized" refer to seizure under S. 52.

The first canon of construction of a statute is that you must take the language as it stands and if it is clear, give effect to it. There is no possible ground for saying that the phrase "any person claiming to be interested in the property so seized" occurring in S. 59 could be construed as limited to the case contemplated by S. 57 when no mention is made of any such limitation, the language of the section is perfectly clear and unrestricted in its terms and must be given effect to accordingly. Apart from that, the words "so seized" logically and grammatically refer to the seizure under S. 52, which includes seizure of tools, boats and etc.

[P 908 C 2]

Suresh Chandra Taluqdar and Hari Das Gupta—for Petitioners.

Anil Chandra Roy Chowdhury — for the Crown.

Judgment.—In this case an order has been made by the Sub-Divisional Magistrate of Khulna confiscating a boat said to belong to the petitioner, under the provisions of Chap. 9, Forests Act. The boat has been confiscated under the provisions of S. 55. On appeal to the learned Judge he has dismissed the appeal holding apparently *inter alia* that the applicant was no party to the proceedings in the original Court and no investigation as to his claim for relief from confiscation was made in that Court, and that under the provisions of S. 59, Forests Act, he is not entitled to a determination of that question on appeal.

The language of S. 59 is this:

"The officer who made the seizure under S. 52 or any of his official superiors, or any person claiming to be interested in the property so seized may appeal from the order of confiscation."

The contention before us has been that the phrase "or any person interested in the property so seized" has reference only to the circumstances previously contemplated and provided for in S. 57. S. 57 provides a special procedure when the offender is not known or cannot be found and it relates to the forest produce and provides that no order of confiscation is to be made in that case amongst other things without hearing the person if any claiming any right thereto and the evidence if any which he may produce in support of his claim. We are unable to give effect to the contention that the clause already quoted from S. 59 is to be confined in its scope to the conditions contemplated in S. 57. The first canon of construction of a statute is that you must take the language as it stands and if it is clear give effect to it. There is no possible ground for saying that the phrase "any person claiming to be interested in the property so seized" should be construed as limited to the case contemplated by S. 57 when no mention is made of any such limitation; the language of the section is perfectly clear and unrestricted in its terms and must be given effect to accordingly. Apart from that, the words "so seized" logically and grammatically refer to the seizure under S. 52, which includes seizure of tools, boats and etc.

The only other argument placed before us was that even if it was conceded that the present applicant had any *locus standi* before the appellate Court it should be laid down that his contention there must be limited to this a that the order for confiscation will not stand because the boat was not used in the commission of the offence; and that once it is shown that it was in fact used the order for confiscation must stand as a matter of course. To any such proposition laid down in such broad terms we are unable to assent. It need only be said that the matter is one to be determined upon such evidence as there may be in the particular circumstances of each case. The Rules accordingly are made absolute in these terms and the matters must go back to the learned Judge for determination of the question according to law.

M.R./R.K.

Rules made absolute.

1930 Cr. Cases 909

(Lahore)

ADDISON, J.

Devi Dayal—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 370 of 1930, Decided on 21st May 1930, reported by Sess. Judge, Karnal, on 1st March 1930.

Motor Vehicles Act, S. 16—Owner is guilty of offence even though not present in case of breach of road certificate—Punjab Motor Vehicles Plying for Hire Rules (1922), S. 3.

Where the driver of a motor lorry does not use the lorry in conformity with the conditions specified in the road certificate, the owner of the lorry is guilty of an offence under S. 16, Motor Vehicles Act read with R. 3, Punjab Motor Vehicles Plying for Hire Rules, 1922, even though he is not present when the breach of the condition takes place.

Where, therefore, a driver was found carrying 47 (when only ten could be carried under the road certificate) and one passenger was sitting on mudguard, which was prohibited.

Held: that there being clear breach of the road certificate, the owner was liable under R. 3, Punjab Motor Vehicles Plying for Hire Rules, 1922, although he was not present: 39 Cal. 415; 45 Cal. 480 and A. I. R. 1924 Cal. 985, Rel. on; 27 P. R. 1918; A. I. R. 1928 Cal. 410 and A. I. R. 1924 Rang. 63, Dist. [P 911 C 1]

S. M. Haq for Government Advocate—
for the Crown.

Report.—The petitioner *Devi Dayal* was the owner of motor lorry No. P. 4969-A plying on hire in Rohtak District and Mumtaz Ali was its driver. On 24th April 1929 the District Engineer, Rohtak, reported that he found the preceding day motor lorry No. P. 4969-A carrying 17 passengers, of whom one was on the mudguard. The driver Mumtaz Ali admitted the above allegations, and as the lorry was licensed to carry ten passengers only, and the carriage of a passenger on the mudguard was prohibited, he was convicted under S. 16 for having contravened the rules of the road certificate, and was sentenced to pay a fine of Rs. 50.

The owner *Devi Dayal* stated that the driver had no authority from him to carry more passengers than allowed by the rules, and denied all knowledge. The learned Magistrate, however, held that the owner was responsible for the breach of the conditions of the road certificate as it was in his name, and he sentenced him as well to fine of Rs. 20.

The proceedings are forwarded for revision on the following grounds.

It was not contended that the owner was present in the lorry when 17 passengers were being carried by the driver, and the report of the District Engineer, the defence of the petitioner as also the trend of the order of the District Magistrate, confirm the conclusion that he was not present. The learned District Magistrate practically gave no reasons for holding the owner liable, but the Public Prosecutor relies on R. 3, Punjab Motor Vehicles Plying for Hire Rules, 1922, which reads as under:

"No person shall let or ply for hire or suffer to be let or plied for hire a motor vehicle in any public place unless a road certificate in Form A, specified in Sch. A hereto has been granted in respect thereof by the controlling authority, and except in conformity with the conditions in such certificate."

He argues that the owner suffered his motor vehicle to be plied for hire in contravention of the conditions of his road certificate and was, therefore, liable. The real question thus was whether in the above circumstances the petitioner can be said to have "suffered," that is, allowed his driver to ply the lorry for hire in contravention of the terms of the road certificate. Now it cannot be said that there was any evidence, either direct or circumstantial, from which any consent, express or implied, can be held to have been established or to be capable of being deduced. That being the case, it cannot by any stretch of interpretation be held that the petitioner allowed the driver to contravene the rules, and he could not, therefore, be held liable: vide A. I. R. 1928 Cal. 410 and A. I. R. 1924 Rang. 63.

An absent owner cannot be held liable if the Act provides for liability for permitting and causing a certain thing, unless it can be shown that the act was done with the master's knowledge and assent, express or implied. The use of the word "suffer" indicates that a particular intent or state of mind is of the essence of an offence, and as that intent or state had not been established, the conviction of the owner could not be said to be justifiable: vide *Sohan Singh v. Emperor* (1).

As a result of the above discussion, I am of opinion that the petitioner *Devi Dayal* was wrongly convicted, and submit the records to the High Court with

(1) [1918] 27 P. R. 1918 Cr.—19 Cr. L. J. 329
=47 I. C. 444.

a recommendation that the conviction may be quashed and the sentence set aside.

Note.—The fine has already been paid.

Order.—Dev Dayal, the owner of a motor lorry plying for hire in the Rohtak District, was convicted under S.16, Motor Vehicles Act, by a Magistrate, First Class, for a breach of R. 3, Punjab Motor Vehicles Plying for Hire Rules, 1922, and was sentenced to pay a fine of Rs. 20. The learned Sessions Judge has forwarded the proceedings with a recommendation that the conviction be quashed on the ground that an absent owner cannot be held liable unless it can be shown that the act was done with his knowledge and assent, express or implied. He relied upon *Sohan Singh v. Emperor* (1), A. I. R. 1928 Cal. 410 and A. I. R. 1924 Rang. 63.

None of the authorities referred to by the learned Sessions Judge are in point. In *Sohan Singh v. Emperor* (1) it was held that an absent owner cannot be fined because his servant drove his motor car without lights after lighting up time. The breach in that case was of Rr. 10 and 17, Punjab Motor Vehicles Rules, 1915. The effect of these rules is that no person should drive a motor vehicle at night without lights. There is nothing in them about suffering another person to do so. It follows that *Sohan Singh v. Emperor* (1) was properly decided and only the person driving the car was liable under the rules.

Similarly A. I. R. 1928 Cal. 410 is not an authority for the proposition advanced by the Sessions Judge. That was a breach of R. 6 of the Act which provides that no owner shall allow any person, who is not licensed, to drive his car. In the case before Mukherji, J., the driver, who was licensed, in the absence of the owner, allowed a third person, who was not licensed, to drive it and clearly the owner was properly held not guilty.

The Rangoon case, A. I. R. 1924 Rang. 63, is also not in favour of the view taken by the Sessions Judge. In that case the owner of a motor car was held not criminally liable for negligence of the driver in driving the car without a properly illuminated rear-light, if the owner had made provision for such illumination. Under R. 26 (3), Burma Motor Vehicles Rules provision has to

be made in every motor vehicle for the illumination of the registered number on the rear number plate in such a manner as to render the number legible at a reasonable distance. This was done by the owner and the negligence of the driver in not having the lamp lit was clearly not within his power. Further, it was pointed out in that judgment that it did not come within the mischief of any of the rules. *Edward Thorton v. Emperor* (2) was distinguished as the rule in that case was as to permitting a motor car to be used in a particular way. The learned Judge who decided the Burma case has clearly shown that there was no provision like that in the Burma rules and it was on that ground that the decision was based. On the authorities before the learned Sessions Judge, therefore, he should not have made the present reference.

There are, however, three Division Bench decisions of the Calcutta High Court on this question. The first is *Edward Thorton v. Emperor* (2). It was held in it that the owner of a motor car who expressly or impliedly permitted his car to be used or driven by his servant was liable under R. 4 and S. 4 of the Act, for causing a breach of R. 20 of the rules framed in Bengal though he was not in the car at the time and had given his servant general directions to observe the regulation speed. It was pointed out, however, that this principle was not to be applied when the chauffeur was improperly using the car for his own purposes without the permission of the owner. R. 4 referred to in the above judgment is as follows :

"No person shall drive, or * * * permit to be used any motor car * * * which does not in all respects conform to these rules, or which is so driven or used as to contravene any of these rules."

Rule 20 provided against dangerous driving and the owner was held guilty under R. 4. This decision was followed by another Division Bench in *Baiyanath Bose v. Emperor* (3). It is true that *Edward Thorton v. Emperor* (2) was not followed in *Varaj Lal v.*

(2) [1917] 88 Cal. 415=12 Cr. L. J. 89=9 I. G. 480.

(3) [1918] 45 Cal. 430=18 Cr. L. J. 985=42 I. C. 601.

Emperor (4) but the first two decisions have equal authority with the last.

Coming now to the case referred to, the driver was caught with 17 passengers in his lorry of whom one was on the mudguard. Under the road certificate only ten passengers could be carried and the carriage of a passenger on the mudguard was prohibited. There was, therefore, a clear breach of the road certificate, and the only question is: Was the owner liable. Now under the Punjab Motor Vehicles Plying for Hire Rules, 1922, it is the owner who has to get a road certificate and put it in his lorry. S. 3 of those rules runs:

"No person shall let or ply for hire or suffer to be let or plied for hire a motor vehicle in any public place unless a road certificate in form A, specified in Sch. A hereto, has been granted in respect thereof by the controlling authority and, except in conformity with the conditions specified in such certificate."

This rule is in two parts. It is clear that under the first part if the owner suffered his lorry to be plied for hire without a road certificate even though he was not present, he would be guilty of an offence under S. 16 read with this rule. It follows logically that he would also be guilty of an offence if the lorry was being used not in conformity with the conditions specified in the certificate as provided for in the second part of the rule. I am quite clear that the owner is liable under R. 3 of the rules referred to. It is impossible to hold that he will be liable under the first part of the rule and not under the second. Such an absurd interpretation has to be avoided at all costs.

In my judgment the owner was properly held guilty of suffering his motor lorry to be plied for hire not in conformity with the conditions specified in his road certificate even though he was not present. His driver in this particular case had been twice convicted of a breach of the rule and the owner had kept him on. This shows that the owner knew what his driver was in the habit of doing and accepted this. Apart from this consideration, however, the owner is in my judgment clearly guilty.

I, therefore, decline to interfere and direct that the record be returned.

R.M./R.K.

Order accordingly.

(4) A. I. R. 1921 Cal. 935=92 I. C. 137=25 Cr. L. J. 1209=51 Cal. 948.

1930 Cr. Cases 911

(Lahore)

TAPP, J.

Om Parkash—Convict—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 134 of 1930, Decided on 5th May 1930, against order of Dist. Magistrate, Jhang, D/- 20th December 1929.

(a) Evidence Act, S. 14—Prosecution based on speech—Previous speech, though made about six months before, is admissible as evidence of intention of speaker if both speeches form part of series of speeches on one topic—Penal Code, S. 124-A.

* Where certain speeches form part of a series of speeches or lectures on one topic delivered within a short period of time, any of such speeches or lectures are admissible under S. 14, as evidence of the intention of the speaker in respect of the speech which forms part of the prosecution in the present case. And a period of six months cannot be described as long for this purpose. [P 918 C 1]

(b) Evidence Act, S. 159—Scope.

Section 159 does not render the notes of a speech inadmissible in evidence. [P 918 C 2]

(c) Criminal Trial—Measure of punishment varies with circumstances—Criminal P. C., S. 35.

The principal object of punishment is the prevention of crime and the measure of punishment must consequently vary from time to time according to the prevalence of a particular form of crime and other circumstances. [P 914 C 1]

J. L. Kapur for Muhammad Alam—
for Appellant.

Abdul Rashid—for the Crown.

Judgment.—The appellant *Om Parkash*, 27, a Brahmin of Dera Ismail Khan, and described as an itinerant preacher of the Punjab Provincial Congress Committee, has been convicted of sedition under S. 124-A, I. P. C., in respect of a speech delivered by him on 13th June 1929 at a public meeting held at the Sabzi Mandi at Maghiana town in the district of Jhang. He has been sentenced to one year's rigorous imprisonment and a fine of Rs. 500 or in default six months' further rigorous imprisonment.

Notes of the speech, which was delivered in Urdu, were taken down by constable Nazar Hussain (P.W. 3) and these notes were later elaborated and a fair copy made of them by head constable Ladh Ram who was also present at the meeting. The notes of the speech are marked as Ex. P. D. and the fair copy prepared by Ladh Ram as Ex. P. C. The notes do not purport to be a verba-

tim report of the speech made by the appellant, but I entertain no doubt that these notes and the fair copy Ex. P. C. correctly represent what the appellant said. Appellant, when asked whether he had delivered the speech as contained in Ex. P. C., denied having done so and also disclaimed having attempted on that occasion to bring into hatred or contempt, or to excite disaffection against, the Government. In the written statement filed by him he denied having made any seditious speech at a public meeting on 13th June 1929, and stated that he never intended to bring or attempt to bring into hatred or contempt the Government, nor did he incite or attempt to incite disaffection towards Government; that the report alleged to have been made by the police official of his speech is distorted, mutilated and several sentences have been interpolated into the speech which appellant never uttered, and that the creed of the appellant was to strive for Swaraj by non-violent, peaceful and legitimate means on which lines he had always been working.

Appellant has not shown in what particular aspect the speech as contained in Exs. P. C. and P. D. does not correctly represent what he said at the meeting. The notes made by constable Nazar Hussain certainly contain many gaps, but these have not been filled in such a way as to materially affect the speech as a whole. Further, as pointed out by the learned District Magistrate, the evidence of two of the defence witnesses supports, to some extent, the correctness of the version as taken down and reported by the two police officers mentioned above. I have read the original notes of the speech made by constable Nazar Hussain and also the fair copy prepared by head constable Latha Ram and find it established that the intention of the appellant by the speech was to bring or attempt to bring into hatred or contempt or excite or attempt to excite disaffection towards the Government established by law in British India.

The appellant commenced his speech by a laudatory reference to Bhagat Singh and Datt, and quoted, with approval, certain utterances by them in connexion with their act in throwing a bomb into the Assembly at Delhi. The

appellant then proceeded to refer to the late Lala Lajpat Rai having been beaten with lathis on the occasion of the visit of the Simon Commission to Lahore, and remarked that this was the act of a civilized Government. He then, by way of contrast or comparison, referred to the Saunders murder and to seven youths having been taken into custody without discrimination as to their guilt or innocence in this affair. He wound up this portion of his speech by stating that Lala Lajpat Rai had been killed and nobody, presumably Government, cared. He then went on to point out that the Government was creating discord between Hindus and Mussalmans over kine-killing and music before mosques, while, at the same time 70,000 kine were being daily killed for the purpose of supplying meat for the British Army. The Hindus suffered this on account of the soldiers being armed with pistols, guns and bombs, whereas if the Muslim sacrificed a cow a riot or fight resulted and money was wasted in the Courts.

Thus it was the policy of Government to pit one community against the other and obtain the benefit, or in other words, to divide and rule. Government itself was preaching them to practise violence and, though, at present, the speaker and those who thought like him were non-violent, their future attitude would be decided at the end of December, and if it became necessary they would become violent. Ireland was held up as an example and Government was, enjoined to arrive at an understanding of the situation. The speaker then pointed out to his audience that in the Great War the Indians had rendered great help and that the reward for this was the Rowlatt Act, Jalianwala Bagh and the hanging of innocent leaders. He concluded his speech by stating that in the eyes of the Government Indians were of much less value than a mule or an ass and mentioned a remark alleged to have been made by a certain General that while a mule was worth Rs. 500 a sepoy was worth Rs. 10. It may be that the actual words used by the appellant are not in themselves seditious but the whole purport and tenor of his speech undoubtedly shows in my opinion, that he was holding up the Government to execration by his

reference to the various acts attributed by him to Government and the attitude taken by Government in certain matters.

In order to show the intention of the appellant the prosecution led evidence as to two speeches delivered by the appellant at Garh Shanker in the Hoshiarpur District on 7th December 1928 and Jahman in the Lahore District on 11th December 1928. It is contended on behalf of the appellant that these speeches were not relevant and admissible but, in my judgment, they are clearly so under S. 14, Evidence Act, as illustrated by illustrations (e), (f) and (j) to that section. Mr. Kapoor conceded that, where certain speeches formed part of a series of speeches or lectures on one topic delivered within short period of time any of such speeches or lectures were admissible, under S. 14, as evidence of the intention of the speaker in respect of the speech which formed the subject of prosecution in the present case. But the latter had not been delivered within a short period of time owing to more than six months having elapsed between the speeches delivered in December and the speech in the present case. I do not think it is possible to exclude the two speeches delivered at Garh Shanker and Jahman simply on this ground as the intervening period cannot be described as long. These two speeches clearly indicate the intention of the appellant when he made the speech in the present case. Mr. Kapoor referring to *Satyaranjan Bakshi v. Emperor* (1) urged that the speech should be read as a whole in a fair, free and liberal spirit and that isolated and selected sentences should not be taken into account. He further submitted that the speech read in this manner was incapable of producing disaffection and the reference to the beating of the late Lala Lajpat Rai did not bring the Government into contempt. The learned counsel by his reference to this particular matter is himself doing what he has asked the Court not to do. It is clear from the judgment of the learned District Magistrate that he has read the speech as a whole and has not based the conviction on isolated or selected

utterances. I, too, have read and construed the speech in the sense in which the learned counsel would have me do, and my opinion of its nature and character has been arrived at after having so read the speech.

It was then contended on behalf of the appellant that the notes of the speech were not admissible in evidence as Nazar Hussain should have testified orally as to the speech and under S. 159, Evidence Act, refreshed his memory from those notes. I fail to see how S. 159, relied upon by the learned counsel and as urged by him, can render the notes of the speech inadmissible in evidence. This provision of law merely provides for a witness, while under examination, refreshing his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory. Instead of deposing orally as to the speech made by the appellant constable Nazar Hussain put in the notes made by him of that speech, and I confess I can see no difference between this procedure and Nazar Hussain deposing orally after reference to those notes. For all practical purposes this would be one and the same thing.

Finally, it was urged by Mr. Kapoor that even if the speech did offend against the provisions of S. 124-A, which it did not either piecemeal or collectively, the sentence imposed was severe, and in this connexion he referred to three similar cases which recently came before this Court, namely *Sant Ram v. Emperor*, *Anand Kishore v. Emperor* and *Satya Pal v. Emperor* reported in *A. I. R. 1930 Lah.* pp. 86, 306 and 309, respectively. In the first case the sentences of one year's and 18 months' rigorous imprisonment in respect of two charges were reduced to two concurrent sentences of nine months' rigorous imprisonment. In the second case a sentence of 12 months' rigorous imprisonment and a fine of Rs. 500 was reduced to the period of imprisonment already undergone, five weeks' imprisonment, the fine being maintained. In the third case a sentence of two years' rigorous imprisonment and a fine of Rs. 500 was reduced to the period of impi-

(1) *A. I. R. 1927 Cal.* 699=108 *I. C.* 771=29
O. L. J. 723.

document already undergone, four months, the fine being remitted.

The question of sentence in such cases is certainly not free from difficulty, but at the same time it must be remembered that undue leniency far from having a deterrent effect, which is the end and aim of all punishment, tends to result in offences of this nature being repeated or more widely committed. The principal object of punishment is the prevention of crime and the measure of punishment must consequently vary from time to time according to the prevalence of a particular form of crime and other circumstances. An amount of severity may be very appropriate at one time which would be quite uncalled for at another, and the converse of this holds equally good namely where at one time leniency may be appropriate such would be quite uncalled for later. In determining the appropriate sentence it is also necessary to bear in mind the time, place and circumstances existing at or about the period during which the speech in the present case was made. Bearing all these points in mind, I have, after mature consideration, arrived at the conclusion that the sentence of imprisonment in the present case is by no means severe, but is, on the other hand appropriate, and should not be reduced. The fine imposed, however, seems to be somewhat excessive and I reduce this to Rs. 200, or in default four months' rigorous imprisonment. The appeal is otherwise dismissed.

S.N./R.K.

Appeal dismissed.

* 1930 Cr. Cases 914

(Lahore)

JAI LAL, J.

Professor Indra — Accused — Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 436 of 1930, Decided on 14th June 1930, from order of Addl. Dist. Mag., Delhi, D/- 5th April 1930.

* (a) Penal Code, S. 124-A—Admission of evidence regarding speeches other than those for which accused is prosecuted is illegal.

It is not open to a Magistrate to admit any

evidence with regard to speeches other than those for which an accused is prosecuted, or to consider them in determining the guilt or otherwise of the accused for having made the speeches for which he is prosecuted, nor even for the purpose of determining the sentence to be awarded to the accused. [P 917 C 9]

(b) Penal Code, S. 124-A—Intention is necessary ingredient but is gathered from expressions used by accused.

Intention is necessary in the offence punishable under S. 124-A, I. P. C. But the intention is to be gathered from expression used by the accused. [P 916 C 1]

G. C. Narang—for Appellant.

Abdul Rashid—for the Crown.

Judgment. — Professor Indra of Delhi has been convicted by the Additional District Magistrate of Delhi of sedition, as defined in S. 124-A, I. P. C., and has been sentenced to rigorous imprisonment for nine months. He was tried for having made two speeches on 25th January 1930 and 23rd February 1930, respectively. With the complaint two documents, marked Exs. B and C, were filed which were alleged to be transliterations of the speeches, and it was alleged that by those speeches the accused created or attempted to create feelings of disaffection, contempt and hatred against His Majesty's Government established by law in British India. There is no controversy as to the subject-matter of the speeches made by the appellant.

The only contention of the learned counsel for the appellant before me is that the speeches do not offend against the provisions of S. 124-A, I. P. C. It is in my opinion desirable to copy in extenso the two Exs B and C:

Exhibit B.—"Abstract from a meeting report held on 25th January 1930, under the auspices of District Congress Committee, Delhi, in the Queen's Gardens.

"Professor Indra moves the following resolution:

"That this public meeting of the citizens of Delhi heartily congratulates Mr. Subhas Chandra Bose and other Bengal leaders on their convictions and assures them that the country would not now rest until it has achieved complete independence'. In support of the above resolution the speaker made a short speech in which he remarked that Subhas Chandra Bose was the advocate of the complete independence along with Pandit Jowahir Lal Nehru who had not been yet arrested being President of the Lahore Congress. The Government therefore gave the same position to Subhas Chandra Bose which it would have given to Pandit Jowahir Lal Nehru if he had not been the President of the Congress. When the warrant of Mr. Bose was out in Calcutta it was then intimated

that he would not be convicted. Mr. Bose was the Bengal lion, hence the Government did not think it proper to leave him outside the jail. He said that in fact the Government wanted that until the parliamentary enactment which would be the outcome of the Simon Commission's report such people who made agitation should not be left free. The speaker criticized His Excellency the Viceroy's speech delivered yesterday in the Assembly and said that the personnel of the Conference will be composed of Rajas of States, Hindus, Muslims and other parties of India, who would oppose one another with the result that the English papers would send out the report that the Indians fought amongst themselves in the Round Table Conference. The second thing that the Viceroy had declared in his speech was that he had reminded those who wanted to assert complete independence through unlawful means and by breaking laws, that he being the Viceroy of India he realized his responsibility and powers and up till now the policy of the Government had been not to punish those who merely expressed an opinion, but henceforth such men would also be punished whose utterances may bring about unpleasant results. He further said that Subhas Chandra Bose has been sentenced for the offence of participating in a procession where shouts of "long live revolutions and down with imperialism" were raised. He remarked that the conspiracy meant thinking and consulting secretly, but mere shouts could not constitute a conspiracy under which they were sentenced. He said that the conviction of Mr. Bose was the first specimen of the hints contained in the Viceroy's speech. They were congratulating the Bengal leaders because they had got what they wanted. Mr. Subhas Chandra Bose would have been congratulated all the more if he had died for the sake of the motherland. He further said that those leaders who characterized Lord Irwin's policy towards India as peaceful should read his recent speech. He said that Subhas' conviction was not due to the police and magistracy of Calcutta, but it was the reflection of the policy of the Government of India which had been hinted in the Viceroy's speech. He said that by celebrating the Independence Day they were putting their hands into the lion's den and were giving a challenge to the Government. If they were frightened by such arrests they should sit quiet or else they should prepare hundreds of men like Subhas Chandra Bose. The speaker strongly appealed to the audience to participate in the Independence Day celebration in large numbers and not to give an impression to the Government that in Delhi these functions were unsuccessful. He said that the statement of the Viceroy and such punishment could not crush the movement for freedom.

Exhibit C.—"Abstract from the meeting report held on 28rd February 1930, at Najafgarh in connexion with the Naujawan Bharat Sabha rural propaganda: "Professor Indra in moving the resolution for the remission of land revenue and tanjawi tried to instigate the peasants for the preparation of non-payment of land revenue. One Jhande, Lambardar of Dinapore, interrupted and said that Mahatma Gandhi had once before advised the Indians

and thousands died in consequence, he would like to know what they got at that time. To this the speaker replied that as the people did not act properly on the instructions of the Mahatma, therefore they failed. He further said that the leaders were true messengers of Mahatma and they were undergoing all sorts of trouble for the betterment of the country and the nation whereas the Government messengers were sucking their blood. The speaker further in the course of his speech inviting the peasants to attend the meetings remarked that there could be no peace during the British Raj, the true peace would be restored when there would be a Government of the peasants and labourers. The speaker further instigated the audience for the non-payment of the revenue and at this juncture Diwan, a Banis of Najafgarh, shouted, "The distress warrant comes with the officer commanding the revenue." On this the speaker exemplifying the case of Bardoli exhorted them to become firm and do the same."

Now, taking the speech made on 25th January 1930, first a report whereof is contained in Ex. B, it would be observed that the speech of the petitioner was made in moving a resolution at a meeting held under the auspices of the District Congress Committee of Delhi in the Queen's Garden of Delhi. The resolution was to congratulate Mr. Subhas Chandra Bose and other Bengal leaders on their convictions and contained an assurance to them that the country would not rest until it had achieved complete independence. It is contended by the learned Government Advocate that in the speech made in moving the resolution the appellant suggested that the Government had secured the conviction of Mr. Bose in order to confine him in jail in pursuance of their policy that:

"people who made agitations should not be left free until the parliamentary enactment which would be the outcome of the Simon Commission's Report,"

in other words, that the conviction of Mr. Subhas Chandra Bose was illegal and had been secured for ulterior motives. The appellant is further alleged to have appealed to the audience to participate in the "Independence Day Celebration" which was to be held on the next day and to have warned them that:

"by celebrating the Independence Day they were putting their hands into the lion's den and were giving a challenge to the Government."

The above are the objectionable portions of the appellant's speech selected by the learned Government Advocate in support of the conviction.

It was contended before me that the very fact of congratulating in a public meeting a person who has been convicted of sedition is tantamount to inciting the audience to follow the example of that person, and further that the speech amounted to an exhortation to the audience to observe the Independence Day and to try to achieve complete independence which alone amounts to sedition. Further, it was urged that to suggest that the Government had secured the convictions of Mr. Subhas Chandra Bose and others of his way of thinking for ulterior motives is calculated to bring the Government into hatred and contempt and to excite disaffection towards it in the minds of the audience.

The appellant's counsel on the other hand has strenuously contended that neither the speech nor the resolution offend against the law of sedition, especially having regard to the fact that the real object of the appellant was to congratulate Mr. Subhas Chandra Bose and others and to exhort the audience to attend the Independence Day celebrations and that nothing was said in the speech with the intention of creating disaffection towards the Government. It is true that intention is a necessary ingredient in the offence punishable under S. 124-A, I. P. C. But the intention has to be gathered from the expressions used by the accused.

I have carefully read the whole of the speech more than once and have reached the conclusions that it does offend against the provisions of S. 124-A, I. P. C., though it must be conceded that the speech was couched in a comparatively moderate language and the offence is of a technical character.

The second speech of 23rd February 1930 was made at Najafgarh in connexion with a 'movement started to move the Government to remit land revenue and to grant takawi to the agriculturists owing to the alleged failure of crops. The appellant merely asked those present to submit petitions to the Government and the Chief Commissioner representing that owing to famine all round Delhi caused by hailstorms and locusts remission of the land revenue be granted to them and takawi paid to them. The transliteration Ex. C. is really only an extract from the speech or rather "a precis prepared by some

officials. A copy of the speech in extenso has been proved and is marked Ex. P. W. 3/20 A, and a reference to that document shows that the extract gives distorted, one-sided and prejudiced view of the speech. After telling the people that applications had been made by residents of other villages the appellant stated:

"If the condition here is just the same as elsewhere, you should also submit similar applications."

During the course of the speech a remark was made by one Jhanda Lambardar, of village Dinpore that on a former occasion Mr. Gandhi had advised them to non-co-operate with the Government and that this advice had resulted in disaster. On this the appellant remarked:

"Mahatma Gandhi was a great man. The Mahatma's view point was to stop the payment of taxes all at once and to turn the Government out. But we have not come to preach this. We have not acted according to his views. We use foreign cloth and are afraid of the Government. We do not want you to do as the Mahatma asks you to do. . . . The Lambardar and Zaildar who realized a comparatively large amount of the revenue were rewarded. These are the Government messengers who suck your blood. We are the humble messengers of Mahatma Gandhi and have come to save your money and are prepared for the jails. Tell us, which of the messengers are better."

It would thus be seen that the remark stressed in Ex. C "whereas the Government messengers are sucking their blood" is not a fair representation of what the accused said. He compared himself with the lambardars and zaildars and asked the audience whether they considered the lambardar and the zaildar as their real friends or the men like the speaker. No doubt the lambardars and the zaildars were described as the messengers of Government and as persons who sucked their blood but the attack was not directed against the Government. Then next in Ex. C, the accused is alleged to have stated:

"There could be no peace during the British Raj, the true peace would be restored when there would be a Government of the peasants and labourers."

According to the translation of the full speech what the appellant really stated was:

"There could be no peace in the presence of the British Government and peace will reign when the labourers and peasants' Government is established. But we do not ask it of you

just now. You should first try your parents and see if they give you something or not."

Now this extract puts quite a different complexion on the extract than what was intended to be conveyed by Ex. C. The term "parent" obviously is intended to apply to Government.

Next, reference is made to the instigation by the appellant for the non-payment of the revenue and an exhortation to follow the example of Bardoli. This is what he really said:

"If an attachment order is issued, let it be issued. Unite and let us see how many attachment orders are issued. Who will buy the attached property. Be determined that you cannot pay the revenue. Tell us the reply you receive of your application and it will be seen what to do next. The Government had ordered to enhance the land revenue at Bardoli. The people refused to pay, the Government issued attachment orders but none came forward to bid for the attached property. The Government had at last to appoint a commission which decided that the Bardoli people were justified in their action and the land revenue was not enhanced. You should not be afraid of putting this before the Government and unite like the Bardoli people."

It was not suggested that people should refuse to pay land revenue to the Government, on the other hand the matter was left for decision later.

In my opinion the whole underlying idea of this speech was to induce the people to represent their grievances to the Government. It was not the intention of the speaker to turn them against the Government.

I observe that in his judgment the learned Magistrate has quoted other passages from the two speeches and has held that these passages offend against S. 124-A, I.P.C. In my opinion the only portions of the two speeches for which the appellant could be tried and convicted, if found to be seditious, were the portions mentioned in Exs. B and C and the other portions of the speeches could be utilized by the Magistrate only for the purpose of determining the intention of the accused in using the language mentioned in Exs. B and C, if such language was in his opinion ambiguous or was not capable of being properly construed apart from the context. Indeed, the learned Government advocate did not seek to support the conclusions of the learned Magistrate with regard to any other portions of the two speeches except those mentioned in Exs. C and D. Reading the second speech as a whole and having regard to the ob-

ject with which and the occasion on which it was made, I am of opinion that this speech is not seditious. In any case the dividing line between culpability and an honest desire to obtain redress from the Government is very thin.

With regard to the first speech, I have held that it offended against S. 124-A, I.P.C. At the same time, I am unable to hold that the speech was of a character which called for a severe sentence. About the end of his judgment the learned Magistrate has discussed some other speeches alleged to have been made by the appellant on other occasions which according to him were highly seditious. In my opinion it was not open to him to admit any evidence with regard to those speeches or to consider them in determining the guilt or otherwise of the appellant for having made the two speeches for which he was prosecuted nor even for the purpose of determining the sentence to be awarded to the appellant. I have no doubt that the Magistrate has been much influenced by this inadmissible evidence both in determining the guilt of the appellant and in awarding him the sentence of nine months' rigorous imprisonment which he himself considers to be deterrent. I do not think such a serious sentence was called for in the present case.

I accordingly accept the appeal and reduce the appellant's sentence to the term of imprisonment already undergone by him. He was arrested about 22nd March 1930, and remained in custody during the trial; he was convicted on 5th April since when he has been undergoing rigorous imprisonment so that he has been in jail for more than 2½ months.

G.P./R.K.

Sentence reduced.

* 1930 Cr. Cases 917

(Lahore)

BHIDE, J.

Ram Sarup—Petitioner.

v.

Mohammad Mehr Dil Khan—Respondent.

Criminal Miso. Petn. No. 80 of 1930.
Decided on 30th May 1930.

* Criminal P. C., Ss. 196, 476 and 526 (3).
—Proceedings under S. 476, can be taken only by Court and not by private person.—
Person moving Court to take action is not

interested party within the meaning of S. 526 (3) and has no locus standi to apply for transfer of case.

Since 1923 proceedings under S. 476, Criminal P. C. are taken only by the Court in the interests of justice when it thinks fit to do so. It is not now open to a private person to take proceedings after taking the sanction of the Court under S. 195. A private person may move the Court but it is for the Court to decide whether to take action and initiate the proceedings.

A person moving the Court to take action under S. 476 cannot therefore be considered to be an interested person within the meaning of S. 526 (3) and also has no locus standi to apply for the transfer of a case, the Court being the "complainant."

[P 918 O 1, 2]

N. C. Pandit and Qabul Chand—for Petitioner.

Des Raj Sawhny and Zafarullah Khan—for Respondent.

Order.—This is an application for transfer of a case under S. 193, I. P. C., pending against Mehr Dil Khan, an Inspector of Police, from the Court of the District Magistrate, Karnal.

The case was originally pending in the Court of Pandit Bishen Lal Kichlew, Magistrate, First Class, Karnal, but on an application by the accused Mehr Dil Khan it was transferred by the District Magistrate to his own Court. The petitioner Ram Sarup contends that there was no good ground for transfer of the case from the Court of Pandit Bishen Lal Kichlew and that there is a reasonable apprehension that the case will not be fairly tried by the District Magistrate.

A preliminary objection is raised on behalf of the Crown that Ram Sarup has no locus standi to make this application and after considering the facts of the case, I am of opinion that this objection should prevail. The prosecution in this case proceeded on a complaint made by a Court under S. 476, Criminal P. C. It is true that the Court was moved to take the action by the present petitioner Ram Sarup, but the Court and not Ram Sarup was the "complainant." The learned counsel for the petitioner contends that he is at any rate an "interested party" within the meaning of sub-S. 3, S. 526, Criminal P. C. But I do not think even this contention is sustainable. Proceedings under S. 476, Criminal P. C., are now taken by a Court in the interests of justice when it thinks fit to do so. The legislature made an important change in the proce-

dures in this respect in 1923. Previously it was open to a private person to take proceedings after obtaining sanction of the Court under S. 195, Criminal P. C. But now the matter is left entirely in the hands of the Court. A private person may move the Court but it is for the Court to decide whether to take action and initiate the proceedings. Consequently Ram Sarup cannot, in my opinion, be considered to be an "interested party" within the meaning of sub-S. 3, S. 526, Criminal P. C.

The learned counsel for the petitioner urged in the end that the High Court can transfer the case of its own initiative in the interests of justice and that this is a fit case for taking such action in view of the attitude of the District Magistrate. But I do not think there is sufficient justification for adopting this course. I must say that I am not satisfied that there were good grounds for transferring the case from the Court of Pandit Bishen Lal. But this may be nothing more than an error of judgment. The learned counsel has urged that the District Magistrate was taking interest in the case and asking for explanation of the Magistrate even before an application for transfer was made to him by the accused; but it appears that an application for revision was made to the District Magistrate first, and it was in this connexion that he had called for an explanation from the Magistrate. I do not think there are adequate grounds for apprehending that the District Magistrate will not try this case in a fair and impartial manner and I trust he will do his best to do so. I dismiss the petition.

R.M./R.K.

Petition dismissed.

1930 Cr. Cases 918

(Lahore)

CURRIE, J.

Sham Das—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 375 of 1930, Decided on 13th June 1930.

Penal Code, S. 124-A—Accused is guilty where intention to create disaffection towards Government is clear—But where speech is not in intemperate language and accused is old man severe punishment should not be given.

S made a speech stating that though matters were bad under other kings, who ruled before the British, we were never in worse plight than

now. They have sucked our blood and we do not realise this. Again, whereas in previous days the education was general the present Government has only given education to fit people for clerks and also the handicrafts and trade have been ruined. S also referred to incidents of martial law days.

Held: that the speech exceeded the limits of fair comment and could be held to bring the speaker within the purview of S. 124-A. But in view of the fact that the speech was not couched in very intemperate language and the speaker was an old man, a sentence of one year's rigorous imprisonment was rather severe and a sentence of imprisonment for a term of three months (already undergone) was sufficient. [P 919 C 1]

Mazhar Ali—for Appellant.

R. C. Soni—for the Crown.

Judgment.—The appellant Shram Das has been convicted under S. 124-A, I. P. C., and sentenced to one year's rigorous imprisonment in respect of a speech delivered by him at a meeting at Hoshiarpur on 25th January 1930. His counsel contends that the speech of which Ex. P. E. is the English translation of the report does not come within the mischief of S. 124-A, but is merely a criticism of the existing Government. A perusal of the speech shows that it is one of those speeches which are on the border line. That the intention of the appellant was to attempt to create disaffection towards the Government is I think clear. He states that though matters were bad under other kings who ruled before the British we were never in worse plight than now. They have sucked our blood and we do not realise this. Again he urges that whereas in previous days education was general the present Government has only given education to fit the people for clerks and also the handicrafts and trade have been ruined. He refers also to various incidents of martial law days.

In my opinion the speech exceeds the limits of fair comment and can therefore be held to bring the speaker within the purview of S. 124-A. The conviction, therefore, must be maintained, but in view of the fact that the speech is not couched in very intemperate language and the speaker is apparently an old man, I would reduce the sentence of one year's rigorous imprisonment to the term of imprisonment he has already undergone which, as he was convicted on 21st March, is nearly three months.

R.M./R.K.

Sentence reduced.

* 1930 Cr. Cases 919

(Lahore)

ABDUL QADIR, J.

Khushal Chand Khursand—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 315 of 1930, Decided on 23rd May 1930, from order of Addl. Dist. Magistrate, Lahore, D/ 10th March 1930.

* Penal Code, S. 124-A—The fact that article was not written by editor does not affect question of guilt whatever effect it may have on question of sentence.

If an article constitutes an offence under S. 124-A, the fact that it was not written by the editor does not affect the question of his guilt whatever effect it may have on the question of sentence.

When therefore an editor, though not the author of an article falling under S. 124-A is willing to take the responsibility which is legally his, but adds that he published it at a time of stress when he was not in a position to fully discharge his liability as an editor and publisher, he deserves to be treated leniently, specially when the policy of the newspaper ordinarily is in favour of non-violence.

[P 920 C 1, P 921 C 1]

G. C. Narang and Amin Chand Mehta—for Appellant.

Abdul Rashid—for the Crown.

Judgment.—Khushal Chand Khursand, Editor of a Vernacular daily newspaper in Lahore, called the *Milap* has been prosecuted under S. 124-A, I. P. C., for publishing an article in the special congress number of his paper, headed "Punjab ke khamosh sipahin." It is claimed by the prosecution that the said article is calculated to bring into hatred or contempt the Government established by law in British India and to excite disaffection towards it. Mr. Lewis, Additional District Magistrate, Lahore, has in a carefully written judgment, found him guilty of the offence with which he was charged and has sentenced him to rigorous imprisonment for a period of nine months and to a fine of Rs. 200 or to further rigorous imprisonment for three months in default of payment of fine. He has appealed to this Court against his conviction and sentence through Dr. Narang and Mehta Amin Chand. I have heard Dr. G. C. Narang on his behalf and Mr. Abdul Rashid, Additional Government Advocate, on behalf of the Crown.

The publication of the article is not disputed; in fact the appellant frankly

takes full responsibility for the article, in his capacity as an editor and publisher of the paper, but he states that he is not the author of the article. The learned Magistrate has accepted this statement of Khushal Chand as correct but if the article constitutes an offence under S. 124-A, the fact that it was not written by the editor would not affect the question of his guilt, whatever effect it may have on the question of sentence.

Dr. Gokal Chand contends, in the first place, that the article in question professes to be a brief history of the revolutionary movements in India, from the time of the Mutiny of 1857 up to date and, though it mentions in laudatory terms the deeds of violence committed by some of the heroes of those movements, there are no comments on them, nor is anything said with reference to the doings of those men, which could be construed into an inducement to others to go and do likewise.

His second contention is that even if it is held that the article is covered by the terms of S. 124-A the offence of the appellant is merely technical, that he has never been prosecuted for an offence of this kind before, and that the article appeared at such a time when Khushal Chand was very busy in connexion with the congress week at Lahore and was not in a position personally to scrutinize the contributions that appeared in his paper.

I need not dwell at any length on the first point raised by Dr. Nanang. I have been taken through the relevant portions of the article by counsel on both sides and have also read the resume of it given in the judgment of the learned Additional District Magistrate, and I have no reason to differ from the view taken by him that the article is one calculated to bring the Government established by law in British India into hatred or contempt and to excite disaffection towards it. I need not quote the passages the translation of which is given in the judgment of the Court below. It is sufficient to note that the article begins by quoting with approval the doings of the Kuka leader Ram Singh and his disciples, and the writer of the article adds that the Kukas removed from the face of this province the blot of infamy which had been brought

on it by helping the aliens, i. e., the British Government, in the Mutiny of 1857, which the writer calls the "War of Independence". The learned Government Advocate rightly points out that the last part of this paragraph is in the nature of a comment and is so worded as to give to the readers an idea that they should act in a similar manner. The counsel for the appellant lays stress on the fact that in the article in dispute no incitement against Government is given in so many words. It may be true that there is no direct preaching to that effect, but it is noteworthy that in the short sketches of which the article is composed, every sketch deals with the acts of a revolutionary, who is set up as a hero or a patriot, and at the end of almost every sketch there is a telling sentence, in the nature of indirect commentary, which is clearly calculated to have a pernicious effect on the mind of the reader and to fill him with hatred towards the established Government in India. Next after the Kukas, the person mentioned is Madan Lal Dhingra, who assassinated Sir Curzon Wylie in London in 1909, and was convicted and punished for that offence. A long list of convicts for offences relating to sedition follows and the description of every man taking part in sedition, conspiracy or open violence is given in glowing terms. Reference to the article need not be multiplied, as the trend of the article on the whole is unmistakable and I have no doubt that the author of the article has committed an offence under S. 124-A, I. P. C., and if he had been on his trial before me I would certainly have given him a substantial punishment.

I am dealing, however, with a man who says that, though he is not the author of the article, he is willing to take the responsibility which is legally his for publishing it and adds that he published it at a time of stress, when he was not in a position to fully discharge his responsibility as an editor and publisher. It is also added that the policy of his newspaper ordinarily is in favour of non-violence and the publication of this contribution must be regarded as an accidental lapse. Dr. Narang has drawn my attention to issues of the *Milap*, dated 11th April, 12th April and 18th April 1929, and also to its issue of

26th December 1929, in which the appellant has, in leading articles, unreservedly condemned the cult of violence and stated in express terms that bomb throwing and other deeds of that nature are calculated to do immense harm to the cause of the country and should be denounced by all right thinking citizens. These instances of a rational attitude on the question of violence may not be strictly relevant to the case before me, but they are not without their value, as antecedents of the appellant and a general indication of his attitude against violence. The learned counsel particularly emphasizes the article in the *Milap* of 26th December, condemning the bomb outrage on the train of His Excellency the Viceroy, and urges that this article appeared in the ordinary issue of the newspaper on the very day, on which the special congress number came out. He urges, therefore, that the lapse of his client in allowing the publication of the contribution under consideration must be lightly punished. He refers to *Mehta Anand Kishore v. Emperor*, A. I. R. 1930 Lah. 306, in which Anand Kishore had been sentenced to 12 months' imprisonment and a fine of Rs. 500 for a speech made by him in connexion with the celebration of the Kakori Martyrs' Day, but the sentence was reduced to fine and the imprisonment already undergone, by Fforde, J.

There is considerable force in the last-mentioned plea of the appellant and I think this case is one in which the conviction of the appellant deserves to be upheld, but he deserves to be leniently treated in the matter of the sentence. He has not been previously convicted for any offence of this nature. He has taken up a reasonable and frank attitude in the trial Court and the time of stress in which the article happened to be published is an extenuating circumstance in his favour. Moreover I gather from the plea put forward by his learned counsel as to his general attitude in favour of non-violence in political matters, that a lenient treatment of him on this occasion may have a good effect on him and he may desist, in future, from publishing such pernicious and harmful articles as the one that appeared in the special congress number. I would, therefore, reduce the sentence

of imprisonment passed against him to the imprisonment already undergone by him, but the sentence of fine of Rs. 200 is maintained.

R.M./R.K.

Order accordingly.

1930 Cr. Cases 921

(Lahore)

JAI LAL, J.

Sahib Ram and others—Petitioners.

v.

Emperor—Opposite Party.

Criminal Misc. Petn. No. 87 of 1930, Decided on 14th June 1930.

Criminal P. C., S. 526 (1) (a)—“Reasonable apprehension of not having a fair trial”—Meaning explained.

All that is necessary for the accused under S. 526 (1) (a) to establish is that circumstances have arisen which have afforded a reasonable apprehension in his mind that he would not receive justice in the Court of the Magistrate; it is not necessary to establish that the Magistrate is actually prejudiced. In other words, it is to be established that Magistrate has conducted himself in such a manner that there is a reasonable apprehension in his mind that he would not approach the case with an impartial mind. The apprehension, of course, must be such as a reasonable person would entertain. [P 922 C 2; P 923 C 1]

Gokal Chand Narang—for Petitioners.

Abdul Rashid—for the Crown.

Order.—This is an application by certain residents of Multan for transfer of a criminal case pending against them from the District of Multan or, in the alternative, from the Court of Khan Muhammad Afzal Khan, Magistrate of the First Class. The case apparently has created some local sensation and is connected with the levy of water-tax which is being resisted by a section of the residents of that town. On receipt of the application I issued a notice to the District Magistrate and directed that a copy of the affidavit filed on behalf of the petitioners be sent to the District Magistrate to enable him and the trial Magistrate to submit any explanation which they may desire to submit. The trial Magistrate has submitted no explanation owing to the fact that the District Magistrate did not consider it necessary to send the affidavit to him for explanation. The District Magistrate, however, has submitted no explanation but, on reference to the affidavit, I find that there are some allegations which the District Magistrate is not

competent to meet on personal knowledge, and it is conceded by the learned Government Advocate that the trial Magistrate was the proper person who should have met those allegations if he so desired. In view of the above the learned Government Advocate has suggested that, unless I am prepared to hold that the allegations made in the affidavit are not justified, I should give an opportunity to the Magistrate to give an explanation with reference thereto. I consider this prayer of the Government Advocate is reasonable. I must, therefore, adjourn the hearing of this petition and direct that the trial Magistrate be asked to state what he may desire to do with reference to the allegations made regarding proceedings which took place in his presence.

The accused are apparently respectable men and in view of the delay that would arise in the disposal of this petition and other circumstances, I was prepared to favourably consider the prayer of the learned counsel for the petitioners that they may be released on bail for the time being, but it has been pointed out to me that an application for bail has recently been rejected by a learned Judge of this Court. I do not under the circumstances consider it fair to pass any orders releasing the accused on bail. The only course that I can suggest under the circumstances is that the petitioners should renew their application for bail and this application be placed before Abdul Qadir, J., for disposal in case he is prepared to reconsider the matter in the light of altered circumstances. The case is adjourned.

Order.—This order will be read in continuation of my order of 30th May 1930. The Magistrate has now submitted an explanation with regard to the allegations made by the petitioners, and I have heard the learned Government Advocate and the counsel for the petitioners. From the documents on the record there can be no manner of doubt that this case is directly connected with the agitation against the levy of water-tax by the Municipal Committee of Multan. It also appears that the entire prosecution evidence was closed on 22nd March 1930, and the case was adjourned to 3rd April to decide whether charges should or should not be framed against the accused. On that day no orders were

passed by the Magistrate. On the other hand a desire was expressed that a meeting of the representatives of those who objected to the water-tax and the representatives of the authorities be held in order to find out if there were any reasonable grievances of the objectors which could be redressed; in other words, in order to find out some means of compromising the main dispute. These negotiations broke down. A meeting was held at which the trial Magistrate was present under the orders of the Deputy Commissioner, it is alleged as his representative.

There is a certain amount of conflict between the versions of the Magistrate and the petitioners as to what happened at the meeting with regard to the present case. But there is no difference between the two versions as to the object of the meeting and as to the presence of the Magistrate at it. The only difference is that the accused state that the Magistrate stated that if certain terms suggested by him were accepted the case would be withdrawn or a recommendation would be made that the case be withdrawn. The Magistrate on the other hand says that a suggestion for the withdrawal of the case came from the representatives of the objectors but that he declined to entertain it saying that the withdrawal of the case had no connexion with the negotiations.

It was after the negotiations had broken down that the Magistrate took up the case on 7th April and framed charges against the accused. The dates mentioned above are not without significance, and whether the Magistrate had in his mind or not that if the negotiations resulted in an amicable settlement, the case would be dropped, what transpired might have very well led the petitioners to apprehend that the withdrawal of the case was intimately connected with the result of the negotiations. I am also of opinion that knowing that the criminal case was so closely connected with the agitation against levy of the water-tax by the Municipal Committee, Multan, the trial Magistrate should not have been deputed and should not have taken any part in the negotiations relating to the settlement of the dispute about the levy of the tax. It is not necessary for the petitioners in a case like this to establish that the Magis-

trate is actually prejudiced against them. All that is necessary for them to establish is that circumstances have arisen which have afforded a reasonable apprehension in their minds that they would not receive justice in his Court; in other words that the Magistrate has conducted himself in such a manner that there is a reasonable apprehension in their mind that he would not approach the case with an impartial mind. The apprehension of course must be such as a reasonable person placed in the situation in which the accused persons are placed would entertain. Applying this test I feel no doubt that in the present case the Magistrate's conduct is calculated to cause a reasonable apprehension in the minds of the accused that he would not approach the case with an impartial mind.

The next question, which was very strenuously pressed by the petitioner's counsel is whether the case should be transferred from the district of Multan. It was suggested that the District Magistrate had conducted himself in such a manner that the accused persons have reason to believe that he is taking undue interest in the case against them. It is not suggested that the District Magistrate is actually prejudiced against them but it is alleged that circumstances have arisen which have caused an apprehension in the minds of the accused persons. Now, I have carefully considered the material on the record in this respect, but I am unable to hold that the accused persons should have any reasonable apprehension. The District Magistrate is not directly connected with the administration of the Municipal affairs and as such is not interested in the recovery of the water-tax. He is of course interested in seeing that the peace of the district under his charge is not disturbed and it may be that in order to avoid any disturbance of the peace in the district he deputed some Magistrates to try to effect a compromise between the parties. But beyond that he does not appear, from the present record, to have done anything from which it might appear that he has taken any interest in the case more than what he would have ordinarily done. I cannot believe that he has in any way influenced the mind of the trial Magistrate or of any other Magistrate who may have ultimately to

decide this case or that the Magistrates in the Multan District are not capable of deciding the cases entrusted to them impartially under a wrong, or even a right impression, that the District Magistrate is prejudiced against the accused. I am not therefore prepared to transfer the case from the Multan District. I, however, withdraw it from the Court of Khan Muhammad Afzal and transfer it to the Court of Rai Sahib Lala Nand Lal Manchanda, Magistrate, First Class, with enhanced powers in the Multan District, with direction to try this case in accordance with law.

I hope that nothing that has been stated by either party in these proceedings against each other would in any way affect the ultimate fair trial of the case.

V.B./R.K.

Case transferred.

* 1930 Cr. Cases 923

(Lahore)

BHIDE, J.

Allah Ditta—Accused—Petitioner.

v.

Karam Bakhsh — Complainant—Respondent.

Criminal Revn. Petn. No. 285 of 1930, Decided on 30th May 1930, from order of Sess. Judge, Lahore, D/- 19th February 1930.

* Criminal P. C., S. 203—Previous order of dismissal under S. 203 is no bar to institution of fresh complaint—But second complaint can be entertained only if previous order is passed on incomplete record or is manifestly absurd or foolish.

A second complaint for an alleged offence is entertainable by a Magistrate and is not absolutely necessary to get a previous order of dismissal under S. 203 set aside by a superior Court before lodging such complaint. It is entertainable even when the previous order of dismissal is confirmed by superior Court in revision. [P 924 C 1]

But although a previous dismissal under S. 203 may not be legally a bar to the institution of a fresh complaint it is only in exceptional circumstances that a second complaint can be entertained, e. g., where the previous order was passed on an incomplete record or where the previous order was manifestly absurd or foolish: 10 P. R. 1911 and 26 Cal. 415, *Rel. on.*; 5 I. C. 991, *not foll.* [P 924 C 2]

J. G. Sethi—for Petitioner.

Shujauddin—for Respondent.

Judgment.—The material facts for the purpose of this revision petition are briefly as follows: On 26th July 1928 one Ghulam Muhammad, son of Imam Din

filed a criminal complaint under Ss. 406/109, I. P. C., against the petitioner Allah Ditta. The complaint was dismissed after a summary inquiry on 9th October 1928 on the ground that the dispute was of a civil nature. A petition for revision of this order was lodged but was dismissed by the Additional Sessions Judge, who agreed with the view of the Magistrate that the dispute was of a civil nature.

On 9th December 1929 Karam Bakhsh, brother of Ghulam Muhammad, son of Imam Din (the previous complainant) filed a complaint against the petitioner on the same facts and thereupon fresh proceedings were taken against the petitioner. A petition for revision was filed in the Sessions Court but failed and hence the petitioner has come up to this Court.

The learned counsel for the petitioner has urged that a second complaint was not legally entertainable on the same facts in the circumstances stated above and that in any case it was nothing short of an abuse of the processes of law and hence the proceedings taken thereon should be quashed.

In *Emperor v. Kiri* (1) it was held by a Full Bench of the Punjab Chief Court that a second complaint for an alleged offence is entertainable by a Magistrate and that it is not absolutely necessary to get a previous order of dismissal under S. 203, Criminal P. C., set aside by a superior Court before lodging such a complaint. The learned counsel for the petitioner seeks to distinguish this ruling on the ground that in the present instance the previous order of dismissal was confirmed by a superior Court. He relies in support of this contention on *Mahomed Yaqub v. Emperor* (2), a single Bench decision of the Punjab Chief Court of the year 1910, i. e. prior to the Full Bench decision referred to above. In view of the line of reasoning adopted by the Full Bench, I doubt if the mere fact that a superior Court has dismissed a petition for revision would legally be a bar to the institution of a fresh complaint. The order of the superior Court would only mean an expression of opinion that the order of dismissal was justified on the facts as they stood on the

record at the time when that order was passed. But if the order was passed, for instance on an incomplete record and valuable fresh evidence became subsequently available, I do not see why a second complaint should be incompetent merely because a superior Court had already dismissed a petition for revision of the previous order. A second complaint appears to have been entertained in similar circumstances in *Jyotindra Nath v. Hemchandra* (3).

But although a previous dismissal under S. 203, Criminal P. C., may not be legally a bar to the institution of a fresh complaint, it would be only in exceptional circumstances that a second complaint would be entertained on the same facts as pointed out in *Emperor v. Kiri* (1), e. g. where the previous order was passed on an incomplete record or where the previous order was manifestly absurd or foolish. But nothing of this sort has been alleged here. The previous order was not only not absurd or foolish, but perfectly reasonable, and the view taken by the Magistrate was upheld by a superior Court. The learned Magistrate has not considered this aspect of the question at all and given no reason for reconsidering the case. It has been urged that the complainant in this case was a different person. But when it is admitted that the facts are identical and there are no good grounds for reconsideration of the case, the mere fact that the complainant is not the same person would in my opinion make no difference. If this were not so it would be easy enough for a complainant to harass an accused person with complaints on the same facts by his friends and relations as often as he likes. It is, in my opinion, nothing short of an abuse of the processes of the Court to entertain a fresh complaint in such circumstances. I, therefore, accept this petition for revision and quash the proceedings taken on the second complaint.

R.M./R.K.

Petition accepted.

(1) [1911] 10 P. R. 491=19 Cr. L. J. 864=11 I. C. 182.

(2) [1910] 11 Cr. L. J. 847=5 I. C. 991.

(3) [1909] 86 Cal. 415=9 Cr. L. J. 562=2 I. C. 298.

1930 Cr. Cases 925

(Patna)

JAMES, J.

Sukhan Ahir—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 126 of 1930, Dated on 20th March 1930, against order of Sess. Judge, Saran, D/-23rd January 1930.

(a) Criminal P. C., S. 109 (a)—In order to apply clause (a) it is not necessary to show that accused followed continuous course of conduct in taking precautions to conceal his presence.

Section 109 (a) applies to any person taking precautions to conceal his presence within the local limits of the Magistrate's jurisdiction, and it is not necessary, in order to bring a person within the operation of that clause, to show that he had followed a continuous course of conduct in taking precautions to conceal his presence : 41 I. C. 649, *Ref*; A. I. R. 1923 Cal. 775 and A. I. R. 1927 All. 50, *Rel. on*; A. I. R. 1926 Pat. 563, *Foll.* [P 925 O 2 P 926 C 1]

(b) Criminal P. C. S. 109 (a)—Accused with his companions taking precautions to conceal their presence at mathia—They running away when police arrived—They were taking precautions to commit offence.

The fact that the accused and his companions took precautions to conceal the fact that they were in a mathia, together with the fact of their running away when the police approached, warrants the inference that they were taking the precautions with a view to commit an offence. [P 926 C 1]

G. P. Cammiade—for Petitioner.

B. P. Jamuar—for the Crown.

Judgment.—The petitioner has been required under S. 109, Criminal P. C., to execute a bond for four hundred rupees, with two sureties of two hundred rupees each to be of good behaviour for one year. It appears that in July 1929 the Superintendent of Police of Saran, believing that a gang was about to assemble for the purpose of committing dacoity in an old mathia at Dudhaila in the Sonapur jurisdiction, arranged that the mathia should be watched by a strong party of police including himself. At about 9 p. m. fourteen or fifteen men entered the mathia where they lighted a dhibri and then extinguished it. Half an hour later the signal was given for the raid by the police party. There was some delay on one side of the mathia which enabled the men assembled to escape; but the petitioner was pursued and captured by the Superintendent himself. Afterwards the

mathia was searched and a garasa and a dhibri were found there.

Mr. Cammiade on behalf of the petitioner argues that the order of the learned Magistrate is illegal, because the petitioner is a resident of the Sadr Sub-Division of the Saran District, so that he was not taking precaution to conceal the fact that he was present within the Magistrate's jurisdiction. He cites the decision in *Reshu Kaviraj v. Emperor* (1) in support of his argument that taking precautions to conceal his presence within the jurisdiction means something more than a momentary effort at concealment to avoid detection or arrest, and that it refers to a continuous act. In the case of *Gagon Chandra De v. Emperor* (2) it was pointed out by the learned Chief Justice of the Calcutta High Court that in S. 109 (a) the idea is that some one may be taking precautions to conceal himself within the local limits of the Magistrate's jurisdiction, not to conceal himself as one who hides from a policeman, but to conceal the fact of his infesting the Magistrate's jurisdiction, and that in such case, if there is reason to believe that this is a precaution taken with a view to commit an offence the Magistrate can require him to give security. In *Emperor v. Bhairon* (3), it was pointed out that clause (a), S. 109, should not be read as applying to a person who merely took steps to conceal himself in the sense of concealing his presence in the way in which a criminal conceals his presence from the police when he was about to commit an offence, and that the offence contemplated in S. 109 (a) is that a person, probably though not necessarily coming from outside the Magistrate's jurisdiction for some nefarious purpose and taking precautions to conceal the fact that he is present in that jurisdiction. In the case of *Rambirich Ahir v. Emperor* (4) Sir Dawson Miller held that S. 109 (a), Criminal P. C., applied to any person taking precautions to conceal his presence within the local limits of the Magistrate's jurisdiction, and that it was not necessary

(1) [1918] 18 Cr. L. J. 825=41 I. C. 649.

(2) A. I. R. 1929 Cal. 775=1929 Cr. C. 519.

(3) A. I. R. 1927 All. 50=97 I. C. 428=27 Cr. L. J. 1116=49 All. 240.

(4) A. I. R. 1926 Pat. 569=97 I. C. 648=27 Cr. L. J. 1128=6 Pat. 177.

in order to bring a person within the operation of that clause to show that he had followed a continuous course of conduct in taking precautions to conceal his presence.

The petitioner in the present case lived in Chapra town, twenty or thirty miles from the place of occurrence. He was found hiding in the mathia on this night, twenty or thirty miles away from his home, still within the jurisdiction of the Sub-Divisional Magistrate of Chapra; but manifestly, as the learned Sessions Judge has pointed out, taking precautions to conceal the fact that he was still within the Magistrate's jurisdiction by hiding in the mathia avoiding the use of a light, and by running away as soon as the police came up to the place. It is true that the petitioner endeavoured to prove that he was not taking steps to conceal his presence within the Magistrate's jurisdiction by the examination of a witness, Nathuni Singh, who said that on that evening the petitioner had been making enquiries regarding a missing buffalo, but this witness was not believed by the learned Magistrate.

Mr. Cammiade argues in the second place that the order of the learned Magistrate should be set aside, because there was no evidence to prove that the petitioner was preparing to commit an offence. I consider that the precautions taken by the accused and his companions to conceal the fact that they were present at the mathia, together with their conduct when the police began to approach it, warrant the inference that the petitioner and his companions were taking their precautions with a view to commit an offence. The application is accordingly dismissed.

S.N./B.K.

Revision dismissed.

1930 Cr. Cases 926

(Patna)

COURTNEY-TERRELL, C. J. AND
ROWLAND, J.

Kalu Manjhi—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 85 of 1929, Decided on 24th June 1929, from decision of Sessions Judge, Purnea, D/- 16th March 1929.

Criminal P. C., S. 342 (3) — Although Court should not examine accused to entrap

him into admissions which can fill up gaps in prosecution case, still if questions are straightforward and accused is asked what he has to say, his statements can be considered under S. 342 (3).

Although it is not proper for the Court in examining the accused to seek in any way to entrap him into admissions which may fill gaps in the prosecution case, still where the questions put are straightforward and the accused are asked whether they committed the offence and what they had to say, the statements given by accused can be rightly taken into consideration under S. 342 (3).

[P 227 C 1]

S. M. Gupta—for Appellant.

C. M. Agarwala—for the Crown.

Rowland, J.—This appeal arises out of a trial by the Sessions Judge of Purnea in which Kalu Manjhi and Phurlai Manjhi, Santals, were convicted under S. 398, I. P. C., and sentenced each to be imprisoned rigorously for seven years. Both the accused appealed and the appeal of Kalu was dismissed summarily, that of Phurlai being admitted for hearing.

The occurrence took place on the evening of 2nd November 1928 on the road along which Ram Kumar Marwari, Rameshwar Marwari and Hari Bux Marwari were returning with their ponies and merchandise to their homes from Sonaili hat. On the way they were accosted by three or four men armed with lathis and axes who demanded that they should give up the goods they had with them. Ram Kumar was assaulted with a lathi and received slight injuries. Rameshwar also received some scratches. There was a scuffle in which Ram Kumar took away a lathi from one of the assailants and also bit the arm of one of the assailants and took from him an axe which he was carrying. The principal witnesses Ram Kumar, Rameshwar and Hari Bux were unable to identify any of the robbers. In the course of the police investigation it transpired that Kalu Manjhi had marks on his arm of being bitten by human teeth and it was in consequence of statements made by him and by the other accused, Phurlai, more than through anything that the prosecution witnesses had been able to establish, that they were put on their trial. The eye-witnesses prove nothing as to the identity of the accused but they describe the course of the occurrence as summarized above.

The accused gave a different version, but their statements were to the effect

that they were the persons who had encountered the Marwaris. In the Magistrate's Court, Kalu had said that he and Phurlai were going together and Phurlai also said :

"I was on the right side of Kalu. He was caught hold of. I fled away."

The story was slightly altered when they were examined in the Court of Session where Kalu said that both of the Marwaris caught hold of him with their hands. Phurlai Manjhi went away ahead. Phurlai in his statement said :

"I was ahead and Kalu was following me. I am not an eye-witness."

The examination of an accused person is taken in inquiries before commitment under S. 209, Criminal P. C. and at the trial under S. 342. In both these sections the examination of the accused is stated to be

"for the purpose of enabling him to explain any circumstances appearing in the evidence against him."

In the present case we have the peculiar position that if the accused had not been examined at all the prosecution evidence must have fallen short of being sufficient to prove that these accused persons were the men who committed the offence. I have no doubt that in such a case it is not proper for the Court in examining the accused to seek in any way to entrap him into admissions which may fill gaps in the prosecution case but the Court has not done any such thing in the present inquiry or trial. The questions put were straightforward. The accused were asked whether they had committed the offence and what they had to say. The statements given by Kalu and by the appellant were, therefore, rightly taken into consideration under S. 342 (3), Criminal P. C., and when so considered I have no doubt that they support and justify the conviction of the appellant.

As regards sentence, the trial Court has imposed a sentence of seven years' rigorous imprisonment. We have considered whether this sentence should not be reduced ; but highway robbery, more particularly when it is committed between sunset and sunrise, cannot be regarded as other than a very serious offence and in the district of Purnea from which this case comes, its prevalence seems to make it imperative that a very substantial sentence should be im-

posed when there is a conviction. I would, therefore, dismiss the appeal.

Courtney-Terrell, C. J.—I agree.

* S.N./R.K.

Appeal dismissed.

* 1930 Cr. Cases 927

(Patna)

ADAMI AND SCROOPE, JJ.

Dewal Mahton and another—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 704 of 1929. Decided on 6th February 1930, from order of Deputy Commissioner of Hazaribagh, D/- 20th November 1929.

* Criminal P. C., S. 421 (2)—Pleader heard and record sent for—Appellant need not be heard again after perusal of record

Though in many cases it may be useful to hear the pleader again to elucidate some point raised by a perusal of the record, there is no illegality in summarily dismissing the appeal without hearing the pleader again after the record is called for: *A. I. R. 1927 Bom. 361, Foll.*; *39 I.O. 1007 Diss. from*; *A. I. R. 1926 Cal. 161 and A. I. R. 1926 Cal. 174, Ref.* [F 928 C 2]

B. C. De—for Petitioners.

Assistant Govt. Advocate—for the Crown.

Adami, J.—The petitioners were convicted under S. 379, I. P. C., by a Deputy Magistrate of the 2nd Class and sentenced to pay a fine of Rs. 30 each, or in default rigorous imprisonment for thirty days.

The case for the prosecution was that Churan Gope, the recorded tenant of a holding under the petitioners, who were the landlords of the village, having died, the complainant came into possession of the holding. The petitioners, however, were not ready to recognize him as a tenant and set up two of their servants Puna and Khedua to claim that they were entitled as heirs of Churan in preference to the complainant. Eventually the names of these two persons were entered in the sharrista and the landlords refused the rent from the complainant.

On the day of the occurrence the two petitioners entered the field cultivated by the complainant and looted away his makai crop. The Deputy Magistrate found that, though the petitioners had done their best to influence the prosecution witnesses, the possession of the complainant was proved and also the theft by the petitioners, and he therefore convicted the petitioners, as I have stated above.

An appeal was made before the Deputy Commissioner of Hazaribagh, who, having heard the pleader for the petitioners then sent for the record of the case. After perusal of the record he passed the following order:

"I have gone through the record of this case carefully. I agree with the lower Court in thinking the case a true one, and the evidence is sufficient to support the conviction. The appeal is summarily dismissed."

Against that order this Court was moved. It was contended that the order was not according to law, firstly because the case was one in which there should have been no summary dismissal, and secondly, that, having called for the record, the Deputy Commissioner was bound again to hear the pleader which he failed to do. It is also urged that as there was a bona fide dispute as to title between the parties, the appeal should have been heard in the ordinary way.

The application was heard by a single Judge of this Court, who disagreed with a decision of Chapman, J., in the case of *Jagdeo Rai v. Kali Rai* (1), in which it was held that after perusal of a record the appellate Court is again bound to hear the appellant's pleader. The learned Judge, considering that this was a point which should be decided by a Bench, has referred the case to us.

First, with regard to the question whether the Deputy Commissioner was bound again to hear the pleader, the case which was chiefly relied upon was the case of *Jagdeo Rai v. Kali Rai* (1), above cited. Chapman, J., in that case, decided that where a District Magistrate, on a criminal case coming before him in appeal, sends for the record and on receipt of the record dismisses the appeal without hearing the appellant or any legal practitioner engaged on his behalf, the procedure adopted by him is not in accordance with law and the appellant must be given an opportunity to be heard.

There are two other cases which have also been relied on; they are *Lalit Kumar Sen v. Emperor* (2) and *Suren-dranath Ghose v. Emperor* (3). These two cases were both decided by the same Judges and the decision in both is

(1) [1917] 16 Cr. L. J. 689=89 I. O. 1007.

(2) A. I. B. 1926 Cal. 174=92 I. O. 694=27 Cr. L. J. 322.

(3) A. I. B. 1926 Cal. 161=92 I. O. 76=27 Cr. L. J. 412.

to the effect that after a record has been sent for, the pleader must be heard.

Now in the first of the three cases Chapman, J., remarked that the record was sent for after giving some sort of hearing to the mukhtear at the time of the presentation of the appeal. In the other two cases there is nothing to show that a pleader had been heard before the record was sent for.

In the present case the learned Deputy Commissioner gave a full hearing to the pleader before he decided to send for the record. If we turn to S. 421, Criminal P. C., we find that, though it is provided that no appeal presented under S. 419 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same, the Court has power, before summarily dismissing an appeal, to call for the record but is not bound to do so. There is nothing in that section requiring that the pleader should be heard again if a record is sent for. All that the section requires is that the pleader shall have a reasonable opportunity of being heard in the Court of appeal before there is a summary dismissal.

In the present case the pleader had been fully heard and had the reasonable opportunity which the section demands. It may be that in some cases, after perusing the record, the Court may desire to hear the pleader on a point which the perusal of the record makes it necessary to have explained, but I can find nothing in the law requiring this second hearing of the pleader.

In the case of *Emperor v. Basavaneppa Basava* (4), Fawcett and Patkar, JJ., held that ordinarily, if the Court does send for the record it is preferable to hear the pleader when the record is before the Court, but there is nothing in S. 421 to prevent the Court from hearing the appellant's pleader at the time when he presents the appeal, if the appellant's pleader desires that course, and if the Court desires to send for the record then it is not illegal summarily to dismiss the appeal without giving a further opportunity of the pleader being heard. That decision coincides with my view on the point. If after hearing a pleader and sending

(4) A. I. B. 1927 Bom. 331=101 I. O. 595=28 Cr. L. J. 467.

for the record it is necessary to hear the pleader again with the record before the Court, the dealing with the appeal would hardly be a summary dealing, for the appeal would practically have to be heard fully and there would be no reason for the sub-S. (2), S. 421, allowing for the calling for the record before summarily dismissing an appeal. I would hold that, though in many cases it may be useful to hear the pleader again to elucidate some point raised by a perusal of the record, there is no illegality in summarily dismissing the appeal without hearing the pleader again after the record is called for.

With regard to the reasonableness of the summary dismissal in this case it has to be remembered that there was really no bona fide dispute as to the right to hold the land between the petitioners and the complainant in the case. Any such dispute, if it existed, was between the complainant and Puna and Khedu. The landlords, in no case could claim that they had a right to enter a tenant's holding and cut and take away his crop, so that the contention that this case should have been heard fully as any ordinary appeal and a judgment should have been delivered on the ground that there was a bona fide dispute can have no support. The Deputy Magistrate came to a finding that he believed the complainant and his witnesses on the question of possession and as to the theft of the crop by the petitioners, and the learned Deputy Commissioner states in his order that he has carefully read through the record and finds that the Deputy Magistrate's finding on this point was correct.

The order of the Deputy Commissioner is a proper order under S. 421. It was unnecessary for him to write a judgment if he found that the case was one which could be dismissed summarily.

I can see no reason to interfere in this case and the application should be rejected.

Scroope, J.—I agree. S. 421, Criminal P. C., contemplates that a reasonable opportunity of being heard should be given to the appellant or his pleader in support of the appeal no more and no less; and if after hearing the pleader at the time of presentation of the appeal; as admittedly the Deputy Commissioner did in this case, he then sends for the

record and dismisses the appeal without hearing the pleader for the appellant—then I do not consider that he infringes the section in question. In fact my view entirely coincides with that expressed on this matter in the case of *Emperor v. Basavanappa Basava* (4).

V.B./R.K.

Application rejected.

1930 Cr. Cases 929.

(Patna)

JWALA PRASAD AND JAMES, JJ.

Ram Prasad Guru—Accused—Appellant.

Emperor—Opposite Party.

Criminal Appeal No. 279 of 1928, Decided on 22nd March 1929, from decision of Sess. Judge, Manbhum, D/- 28th September 1928.

Criminal P. C., S. 188 — Sanction is imperative.

The sanction of the Political Agent or the Local Government under S. 188 is imperative and the omission to obtain it vitiates the trial and conviction : 10 Bom. 186; 13 Mad. 423 and 28 All. 372, Ref. [P 981 C 1]

Parsuram Prasad Verma—for Appellant.

Assistant Government Advocate — for the Crown.

Jwala Prasad, J. — Appellant Ram Prasad Guru has been convicted under Ss. 420 and 467, I. P. C., and sentenced to one year's rigorous imprisonment under former section and two years' rigorous imprisonment with a fine of Rs. 500 under the latter; the sentences of imprisonment to run concurrently.

On 16th June 1927, the accused presented a postal cash certificate for Rs. 10, and received Rs. 11-14-0. The certificate was issued on 4th September 1918 in the name of Manindra Nath Sarkar (P. W. No. 2). Both the appellant and Manindra Nath Sarkar were employed as teachers in Sonepur Feudatory State School. Manindra Nath Sarkar had passed the I. Sc. examination of the Calcutta University, and accused Ram Prasad Guru was preparing for the Matriculation examination. He used to receive tuition from Manindra Nath Sarkar and pay him Rs. 15 as his monthly fee. The Feudatory State of Sonepur had required the servants of the State to purchase postal cash certificates, and accordingly on 4th September 1918 both Manindra Nath Sarkar and the accused purchased postal cash certificates

of Rs. 10 each. The accused cashed his certificate the next day, and received Rs. 7.12-0. Manindra Nath Sarkar left the school in December 1918, or in January of the following year, and first he went to Calcutta and then he came to Jamshedpur as a teacher in Perine Memorial English High School. He found that his postal cash certificate was missing from his trunk, and accordingly in November 1919, he applied to the Postal Authorities to issue a duplicate cash certificate. This was issued after enquiry on 8th January 1920, and he encashed it on 6th January 1921, and received Rs. 8.8-9 as value of the certificate on that date. The accused had left Sonepur in 1918, and on 16th January 1927 he presented the original cash certificate to the Sambalpur Post Office and received payment of Rs. 11.14-0 as its value on that date. Payment was made to him on the strength of an endorsement on the back of the certificate, which purported to be in the handwriting of Manindra Nath Sarkar and under his signature. Subsequently it was discovered by the Postal Authorities that the money due under the certificate was already paid in 1921 to Manindra Nath Sarkar on the basis of the duplicate certificate issued to him, and an enquiry was made from the accused.

He admitted having encashed the certificate and received payment. He claimed to have done so under the authority of the endorsement thereon by Manindra Nath Sarkar referred to above, stating that he had purchased the certificate from Manindra Nath Sarkar on the very day 4th September 1918, that the certificate was issued on payment of Rs. 5 to him. The reason stated by him was that Manindra Nath Sarkar and he himself did not in fact want to purchase cash certificates but did so simply on account of the orders of the State and in order to avoid displeasure, and that the accused encashed his own certificate the next day, but Manindra Nath Sarkar, fearing that if he did so the Raj authorities might be displeased and might perhaps dismiss him from service, did not encash his certificate. Therefore he wanted to dispose of it but could not get anyone to pay him more than Rs. 5, and consequently he sold it to the appellant for Rs. 5. Upon enquiries the Postal Department lodged

this prosecution against the accused for having forged the endorsement on the certificate and for having cheated the Postal Department by receiving payment thereunder.

The accused stated that the endorsement was made by Manindra Nath Sarkar on 4th September 1918 at Sonepur and the certificate was made over to him at that place and that he actually did present the certificate for encashment to the Post Office at Sonepur the next day, but he could not receive payment upon the ground that such a transfer was not authorized without the sanction of the Postmaster-General. Consequently he kept the certificate with him, and did not make any further attempt to cash it. Afterwards when he went to Sambalpur he presented it for encashment at the Post Office there, but he was refused payment upon the ground that it should be presented to the Post Office of issue. Some years after he learnt that the rules in the matter had been changed and that the Sambalpur Post Office could make payment. Accordingly, he did present the document in January 1927, and received payment from the Post Office at Sambalpur.

The charge under S. 467 stated that : "on or about 16th June 1927, at Sambalpur the accused forged the endorsement on the certificate with a view to receive the money due thereunder." It is contended on behalf of the appellant that the date and the place of occurrence mentioned in the charge are wrong. There is nothing to show that the endorsement in question upon the certificate was made on 16th January 1927 or that it was made at Sambalpur. Manindra Nath Sarkar left Sonepur in December 1918, and at Jamshedpur he found that the cash certificate was missing. He means that it was lost, stolen or misplaced at Sonepur at or before the time he was leaving that place in December 1918. The endorsement on the back of the document must have been written between that date and 16th January 1927. That is, however, not very material for the purposes of this case. According to the statement of the accused the endorsement was made at Sonepur, and not at Sambalpur. There is nothing to show that it was made at Sambalpur. No doubt, some inference can be drawn

from the fact that it was presented at Sambalpur on 16th January 1927 and the accused did not give any evidence to prove that the endorsement was made at Sonepur. Be that as it may, we have at present only the definite statement of the accused to go upon and it cannot, therefore, be said that the offence of forgery was committed at Sambalpur or any other place in British India. If it was committed at Sonepur, as the statement of the accused shows, then under S. 188, Criminal P. C., the accused could not be tried without the sanction of the Political Agent for that State or the Local Government. Sonepur State is one of the Orissa Feudatory States for which there is a Political Agent : vide Vol. 1 of Treaties, Engagements and Sanads, India, p. 299, and the Bihar and Orissa Civil List for 1929. The obtaining of sanction has been held to be imperative and the omission to do so vitiates the trial and the conviction of an accused of that charge : vide *Queen-Empress v. Abiul Latib* (1), *Queen-Empress v. Kathaperumal* (2) and *Emperor v. Baldeva* (3). At the same time it is very difficult to come to a definite finding in this case that it was the accused who wrote the endorsement on the back of the cash certificate in question (Ex. 4) and thus forged it in the name of Manindra Nath Sarkar. Two handwriting experts have been examined in this case one on behalf of the prosecution Babu Surendra Nath Ghosh, Inspector of Police, C. I. D. and the other the well-known handwriting expert Mr. Hardles Senior, now retired from service, on behalf of the accused. In view of the conflicting opinion of the experts it is very difficult to hold with certainty, upon mere comparison of the specimen handwritings of both Manindra Nath Sarkar and the accused that the endorsement is in accused's handwriting and that the charge of forgery has been brought home to him. Two witnesses on behalf of the accused who have always seen the accused writing have sworn that the endorsement in question is not in the handwriting of the accused. Therefore, the accused is acquitted of the charge under S. 467, I. P. C.

Now as regards the charge of cheating under S. 420, I. P. C., the offence was committed at Sambalpur, inasmuch as the cash certificate with the aforesaid endorsement thereon of Manindra Nath Sarkar was presented at the Post Office of that place. That being within British India the offence was triable in British India. The question is whether the offence of cheating under S. 420 has been proved. There are certain circumstances, no doubt, in favour of the accused. Admittedly he was in a way a student of Manindra Nath Sarkar who had been employed by him as his private tutor on Rs. 15 or Rs. 20 per month. At times he used to advance him petty loans of a rupee or so whenever he required, for Manindra Nath Sarkar was getting only Rs. 50 a month from the school and was not very well off financially. The father of the accused is a Tahsildar in the Sonepur State and has property. Both the accused and Manindra Nath Sarkar were teachers in the same school and their relationship was, therefore, cordial until they parted with each other, Manindra Nath Sarkar leaving Sonepur in December 1918, and going to Calcutta and ultimately to Jamshedpur.

On the other hand, it seems very unlikely that Manindra Nath Sarkar, a year after he left Sonepur, would venture to ask the Postal Department to issue a duplicate cash certificate to him upon the ground that the original cash certificate granted to him had been lost if in fact he had sold it to the accused by making an endorsement thereon in his own handwriting. Had he sold it certainly he would not have made the application for issue of a duplicate certificate, without having ascertained that the original certificate had not been already cashed by the accused, for it would have endangered not only himself but also the accused with whom he was intimate during his stay at Sonepur. Manindra Nath Sarkar's case that he had not sold the certificate in question to the accused finds support from the aforesaid circumstances, and it seems that the accused having got the certificate in question somehow and finding that it was not asked for or demanded by Manindra Nath Sarkar for about nine years thought of converting it into money. There is

(1) [1886] 10 Bom. 186.

(2) [1890] 13 M. & D. 429.

(3) [1906] 28 All. 372 = 3 A. L. J. 146 = (1906) A. W. N. 52.

nothing to show, and the Court below has also so held, that the accused came to be in possession of the cash certificate dishonestly. This would also seem to be so because the accused would not then have waited for nine years to convert it into money. The amount covered by this postal certificate was also not so large as to induce the accused to make any appreciable profit thereby. His antecedents were not bad, but he committed the offence of cheating under S. 420, I. P. C. by presenting the certificate to the Post Office at Sambalpur and inducing it to pay the value thereof.

In the circumstances the finding and the conviction under S. 420, I. P. C. are maintained, but the sentence of imprisonment is reduced to six month's rigorous imprisonment. The sentence of imprisonment and fine of Rs. 500 under S. 467 are set aside, and the fine, if already realized, must be refunded to the accused.

James, J.—I agree.

V.B./R.K.

Order accordingly.

1930 Cr. Cases 932

(Patna)

WORT AND SCROOPE, JJ.

Jamadar Rai and others—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 196, of 1930, Decided on 11th June 1930, from order of Sess. Judge, Shahabad, D/-25th February 1930.

Penal Code: Ss. 415 and 420—Arrangement to marry girl to particular person—Refusal to marry the girl later on amounts to mere breach of contract and cannot give rise to criminal prosecution under S. 420.

Mere breach of contract cannot give rise to a criminal prosecution.

A arranged the marriage of his brother with the daughter of the accused B, the transaction being more or less a sale of the young girl. Some earnest money was paid and one of the ceremonies connected with the marriage was performed. Later on A went to B's village to have the marriage performed but found the girl being married to another person and was told that his brother was to be married to a daughter of D and the earnest money was not repaid. B was tried under S. 420.

Held that the criminal offence under S. 420 had not been disclosed. There was nothing more in the circumstance of the case than a breach of contract that is refusal to marry the girl to A's brother giving cause of action in a civil Court. [P. 933 C. 1, 2]

S. P. Verma and G. Sahay—for Petitioners.

H. N. Sinha—for the Crown.

Wort, J.—This rule is directed against the conviction of two persons Jamadar Rai and Kuber Rai of an offence under S. 420 I. P. C., the second applicant Kuber Rai being found guilty of abetting the commission of the offence. The learned Magistrate sentenced them to 18 months' rigorous imprisonment and to pay a fine of Rs. 300, the fine if realized to be paid to the complainant in this case.

The facts so far as it is necessary to mention them are these: The complainant had a brother whom he desired to marry, the first applicant having a daughter and on or about the 3rd July 1929 the second applicant who was the brother-in-law of the first applicant proceeded to the village of the complainant and there it is stated arranged the marriage between the daughter of the accused and the brother of the complainant. The actual transaction was nothing more or less than a sale of this young girl to the complainant or to his brother for a sum of Rs. 1,400; and the learned Sessions Judge before whom an appeal was preferred points that out. The term was as I have stated that Rs. 1,400 was to be paid to the father of the young girl to be given in marriage; it was also one of the terms that Rs. 500 should be paid in cash and that payment was in fact made. One of the ceremonies connected with the marriage was performed some eight days after this alleged agreement and in due course the complainant went to the village of the accused for the purpose of having the marriage ceremony performed. When he arrived there with some other persons, he discovered that another marriage ceremony was being performed at the house of the accused. Explanations were asked for and then it was stated that the brother of the complainant was to be married to the daughter of one Deonarain; and it was also alleged that he refused to make the repayment of Rs. 500 which had been paid to him as earnest money. One of the witnesses for the defence had stated that no such arrangement as was alleged by the complainant had ever been made, the reason being that an

arrangement had already been made for the marriage of complainant's brother with the child of one Deonarain and it was in his evidence it appeared that it was stated that this arrangement with Deonarain preceded the arrangement between the accused and the complainant.

Now it is contended that on the facts which I have stated no criminal offence is disclosed. The learned Sessions Judge when he comes to deal with this point states that it was urged before him that the prosecution had failed to show that any deception had been practised on the complainant; but states that the evidence clearly showed that Jamadar Rai one of the accused represented to the complainant that he would marry his daughter to his brother and it was on this representation which was apparently false that the transaction was entered into and the payment was made. That perfectly obviously cannot be the basis of a criminal prosecution. If it can be in this case, then it is quite clear that any breach of contract must inevitably give rise to a criminal prosecution. It is as I have stated under S. 420 I. P. C. that these persons have been convicted. The section reads that whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person . . . shall be punished with imprisonment therein provided. The section which defines cheating is S. 413 and it provides that whoever by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property is cheating.

Now the cheating or the representation if any in this case, was either the direct or implied representation that the daughter was marriageable, if I may use the expression. Now assuming for the moment that an agreement had already been entered into with another person to marry this young girl, even so her status had not been altered and there was nothing to prevent the father of the girl from marrying her to the brother of the complainant. If on the other hand the girl had already been married when the agreement with the appellant was entered into, the express or implied representation that the girl could be

married to the complainant's brother would have been false and could have been the basis of a criminal prosecution. In my judgment this was nothing more in the circumstances of the case than a breach of contract, that is a refusal to marry the girl to the brother of the complainant giving cause of action in a civil Court and the remedy of the complainant can be obtained only in that way. In the circumstances of this case no offence under S. 420, I. P. C. has been disclosed. The conviction will be set aside and the rule made absolute.

Scroope, J.—I agree.

R.M./R.K. Conviction set aside.

1930 Cr. Cases 933

(Patna)

JAMES, J.

Gonour Singh—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 131 of 1930, Decided on 17th March 1930, from order of Dist. Magistrate, Muzaffarpur, D/- 24th January 1930.

(a) Criminal P. C., S. 4 (b)—Information to police found false—Complaint under S. 182 to Magistrate—Process issued—Accused filed petition stating information to be correct—Held petition was not complaint but cause against conviction.

G lodged an information at the police station to the effect that some money and documents had been stolen from a box in his house. The Sub-Inspector after investigating the matter found the information to be false and he complained to the Sub-Divisional Magistrate that G had committed an offence punishable under S. 192, I. P. C. The Magistrate issued process under S. 182 and on the date fixed G filed a petition stating that the information which he had given was true and that he could prove it to be true.

Held: that under the circumstances the petition could not be properly treated as complaint but was a petition showing cause against conviction: A. I. R. 1929 Pat. 70 and 110 I. C. 212, Dist. [P 984 O 2]

(b) Criminal P. C., S. 195—If Magistrate once takes cognizance of offence subsequent events must bring S. 195 (1) (b) into operation.

When a Magistrate has once properly taken cognizance of an offence, anything that may happen subsequently cannot bring into operation S. 195 (1) (b) so as to deprive him of jurisdiction to dispose of the matter in accordance with law. [P 984 O 2]

G. P. Das and P. Misra—for Petitioner.

B. P. Jangar—for the Crown.

James, J.—On 26th September 1929, Gonour Singh lodged an information at the Paroo police station to the effect

that some money and documents had been stolen from a box in his house. The Sub-Inspector after investigating the matter found the information to be false; and he complained to the Sub-Divisional Magistrate that Gonour Singh had committed an offence punishable under S. 182, I. P. C. The Magistrate issued process under S. 182; and on the date fixed Gonour Singh filed a petition stating that the information which he had given was true and that he could prove it to be true. The trial proceeded, with the result that Gonour Singh was convicted of the offence charged and sentenced to one month's rigorous imprisonment. I am asked to revise this order on two grounds.

The first ground taken is that the Sub-Divisional Magistrate ought to have treated Gonour Singh's petition of 9th November as a complaint, and that the prosecution could not proceed until that complaint had been formally disposed of. The learned advocate for the petitioner cites the decision in the case of *Ramdhar Gope v. Emperor* (1), but in that case the person who was accused of an offence under S. 211, I. P. C., preferred his petition of protest before the date fixed for his appearance to answer the charge before the Magistrate; and the petition of protest actually was a formal complaint, since he definitely prayed that the case against the accused person whom he charged might proceed. Reference is made to an obiter dictum of this Court in the case of *Maguni Padhan v. Emperor* (2) wherein it was remarked that a Court is bound to treat the informant's petition as a complaint, when being dissatisfied with the police investigation he comes to the Court and asks that the case may be re-investigated or makes allegation against the police.

Mr. B. P. Jamuar on behalf of the Crown points out that even where the petition would be ordinarily treated as a petition of complaint it should be made before a Magistrate has actually taken cognizance of an offence under S. 182 on the complaint of a police officer. I agree with the view expressed by Macpherson, J., in *Chhakari Chamar v. Emperor* (3) and in the case of *Parma-*

nand Brahmachari v. Emperor (4), that when a Magistrate has once properly taken cognizance of an offence, anything that may happen subsequently cannot bring into operation S. 195 (1) (b), Criminal P. C., so as to deprive him of jurisdiction to dispose of the matter in accordance with law. Moreover I do not consider that in the present case the petition which was filed on 9th November could in any circumstance be properly treated as a complaint. Gonour Singh was summoned under S. 182, I. P. C. to appear on 9th November. On that date if he did not plead guilty to the charge it was necessary for him to show cause why he should not be convicted. He showed cause by his petition; and after he had filed this petition it would have been superfluous for the Magistrate to examine him again under S. 342, Criminal P. C. But the petition did not (any more than the original information had done) name any person as guilty of the offence charged. It merely said that Gonour Singh was not guilty of the offence under S. 182. The Sub-Divisional Magistrate properly treated this as a petition showing cause against conviction; and he proceeded to summon the witnesses for the prosecution who were named in the Sub-Inspector's complaint.

It is argued in the second place that the Courts below have erred in treating as substantive evidence the recitals in a document (Ex. 2) which showed that two mukarrari pattas said by Gonour Singh to have been stolen from him had been made over to one Debi Prasad at the time when a certain zar-peshgi deed was executed. The learned trying Magistrate points out that the witness Jagarnath Prasad stated that the two pattas were made over to Debi Prasad in his presence; while a pleader said that it was settled in his presence that these pattas should be made over to Debi Prasad by way of security. The deed itself recited that these pattas had been made over to Debi Prasad, a fact which does not of course in itself prove that the pattas were made over, but which is not irrelevant, since it is at least not inconsistent with the story told by the prosecution witnesses. The learned Deputy Magistrate who heard the appeal says that apart from the oral evidence the

(1) [1928] 110 I. C. 212=29 Cr. L. J. 660.

(2) A. I. R. 1929 Pat. 70=117 I. C. 647=80 Cr. L. J. 642=7 Pat. 408.

(3) Cr. Revn. No. 692 of 1929.

(4) A. I. R. 1930 Pat. 60=1930 Cr. L. J. 516 I. C. 46=30 Cr. L. J. 534.

zarpeshgi deed proved that these documents were made over to Debi Prasad as security in 1917. If the learned Deputy Magistrate had said no more than this, his decision might well have been criticized on the ground that the zarpeshgi deed to which Gonour Singh was not a party cannot in itself be held to prove the truth of any recital contained in it. But the learned Deputy Magistrate has not relied exclusively on this zarpeshgi deed. He remarks that there is overwhelming evidence which cannot for a moment be distrusted that the two mukarrari deeds had been in possession of Debi Prasad Singh for a long time and that they could not possibly have been in possession of Gonour Singh. I am satisfied that the learned Deputy Magistrate gave proper weight to the evidence on this point; and if he attached too much importance to the corroboration of that evidence which is afforded by the fact that the recitals in the deed Ex. 2 are not inconsistent with it, I do not consider that his decision can be regarded as vitiated on that ground. I accordingly maintain the finding and order of the lower Court and dismiss this application.

V.B./R.K. *Application dismissed.*

1930 Cr. Cases 935

(Patna)

ROWLAND, J.

Mulraj Dhir—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 240 of 1930, Decided on 21st May 1930.

Penal Code, S. 287—Standard of security required stated.

Section 287 does not say "any possible danger" and so, the owner is not required to provide perfect security against every possibility of danger, however remote. All that he ought to do is to take reasonable precautions and so much care as is sufficient to guard against such danger as can be expected within the bounds of probability. [P 986 C 1]

D. N. Sircar and S. P. Asthana—for Petitioner.

Cammiade for Asst. Govt. Advocate—for the Crown.

Judgment.—The petitioner Mulraj Dhir has been convicted, under S. 287, I. P. O., for negligent conduct with respect to machinery and sentenced to a fine of Rs. 60 and his appeal has been dismissed by the Sessions Judge.

The facts leading up to the prosecu-

tion were that a boy Ainul went with a companion taking some wheat to be ground into flour at a mill of which the petitioner is the owner. The petitioner was absent; his servants in charge of the mill began to grind the wheat and the lid and hopper fell from the top of the mill on to the foot of the boy who was sitting on the platform; his foot was broken.

The Magistrate held that the accident was due to something being wrong with the machinery of the mill by which some parts of the machinery were thrown off, and fell on the foot of the boy. In face of this he said the machinery cannot have been in order.

Now the Sessions Judge in his judgment said:

"It seems clear that the accident itself was due to the carelessness of the man operating the machinery, who might have been prosecuted if his identity was known. But I do not see how the appellant himself can be convicted under S. 287, I. P. C., on that particular score either as having himself done any negligent act or having negligently omitted to take proper order with his machinery, seeing that the actual falling of the cover was not due to any defect in the mill."

Having regard to this finding the logical conclusion would appear to be that the accused should be acquitted; but the Sessions Judge says that there were other defects discovered by the Inspector. He then refers to the evidence that there was a bamboo fence along the platform; he points out that there was an opening in it to give access and says that the appellant is still liable for failing to take proper steps to fence off the platform and the machinery; the result being that the boy was able to get up on to the platform and was injured which would not have happened had the machinery been properly railed off. I do not think the facts found can amount to criminal negligence on the part of accused. The machinery was fenced, and that should have been sufficient warning to outsiders to keep outside the fencing. To require it to be so fenced that approach to it should be impossible would be setting up a standard of security beyond what is laid down in the law. Admittedly the Factory Act is not applicable. The standard which was to be applied was according to S. 287, I. P. C., to take such order with the machinery as was sufficient to guard against any probable

danger. The section does not say "any possible danger;" the owner is not required to provide perfect security against every possibility of danger, however remote. As I understand the section he ought to take reasonable precautions and so much care as is sufficient to guard against such danger as can be expected within the bounds of probability.

In the result I find myself unable to uphold the conviction. It is, therefore, set aside. The fine if paid will be refunded. I note that in the Sessions Court the petitioner offered in any case to compensate the boy to the extent of the compensation awarded by the Magistrate. I hope he will carry out that offer.

V.B./R.K. *Conviction set aside.*

1930 Cr. Cases 936

(Patna)

JAMES, J.

Ramji Rai and others—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 94 of 1930, Decided on 8th March 1930.

Penal Code, S. 379—Occupancy tenant in Behar and Orissa and specially in Champaran District commits no offence in seizing fishes from trespasser collecting same on his land.

In Behar and Orissa and specially in Champaran District, provided the tenant has not made a re-grant of the right of fishery, or the landlord has not acquired such a right by custom or by adverse possession for a period of 12 years, a raiyat of an occupancy holding has a right to fish that may come on his land when it is flooded and can not only prevent any other person from entering on his land for the purpose of catching fish, but can seize the same from the trespasser who has taken them without himself committing any offence. *A. I. R. 1922 Pat. 9 and A. I. R. 1924 Pat. 534, Rel. on.* [P 936 C 2, P 937 C 1]

*B. C. De—*for Petitioners.

*S. N. Sahay—*for the Crown.

Judgment.—The petitioners are occupancy raiyats in Sangrampur village in Champaran District. On 27th September 1929, when their fields were under water, certain persons acting with the permission of a man who had taken a lease of the fishery in Sangrampur from the proprietor of the village caught about a maund of fish from the water which covered the petitioners' land. The nine petitioners came in a body and took the fish away by force from the men who had

caught them. They were accordingly prosecuted for the theft of the fish. They took the defence that they were themselves entitled to the fish which had been caught on their own land, that the person who caught the fish on this land committed theft and that the petitioners were merely recovering stolen property. The Deputy Magistrate found that for some years past the fish on uncultivated land had been appropriated by the thikadar who had been in possession of the jalkar right on behalf of the proprietor. He accordingly convicted the petitioners of an offence under S. 147, I. P.C., and sentenced them each to pay a fine of thirty-five rupees.

Mr. B. C. De on behalf of the petitioners argues that it has not been proved in this case that the proprietor or his thikadar had any right to take the fish from water which was standing on occupancy holdings. It is suggested by the learned Assistant Government Advocate that all that need be proved in a criminal case of this nature is that the proprietor has within recent years been in possession of the fishery, and if that is proved the tenant cannot be held to have any right to resist an act asserting possession on behalf of the proprietor. The law of the right of fishery over flooded fields of occupancy raiyats in this province, and particularly in Champaran district, was laid down by this Court in *Henry Hill and Co. v. Sheoraj Rai* (1) at p. 56 of (3 P.L.T). Prima facie the raiyat of an occupancy holding has a right to fish that may come on his land when it is flooded; but as Sir B. K. Mullick pointed out, the tenant may at the time of taking his lease make a re-grant of the right of fishery to the landlord, or the landlord may have acquired such a right by custom or by adverse possession for a period of over twelve years. In the present case no re-grant by the tenant has been proved, no local custom has been proved limiting the ordinary right of the raiyat to use the land of his occupancy holding in any manner he pleases subject to the provisions of S. 23, Ben. Ten. Act; and it has not been proved that the landlord has acquired an exclusive right of fishery by adverse possession for twelve years. Therefore the raiyats had a right to catch any fish which

A. I. R. 1922 Pat. 9=54 I. O. 346.

might be found in water standing on their occupancy holding; and they had also a right to prevent any other person from entering on their land for the purpose of catching fish. That being so the rule laid down in *King-Emperor v. Artu Rautra* (2) will apply. The tenants were entitled to seize the fish from the trespassers who had taken them, and they committed no offence in doing so, since there was no exercise of undue violence. The application is accordingly allowed. I set aside the finding and order of the lower Court, and acquit the petitioners of the offence charged. The fines if paid will be refunded.

V.B./R.K. *Order set aside.*

(2) A. I. B. 1924 Pat. 564=60 I. C. 83=25 Cr. L. J. 594=3 Pat. 549.

1930 Cr. Cases 937

(Patna)

ROWLAND, J.

Gurudas Mandal—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 229 of 1930, Decided on 27th May 1930.

(a) Evidence Act, S. 7—Defence founded on alibi—Reasoning from probabilities is not evidence.

Where an accused takes the defence founded on an alibi, reasoning from probabilities cannot take the place of evidence. [P 988 C 1]

(b) Criminal P. C., S. 439—High Court declined to reopen finding of Sessions Judge favourable to accused and based on evidence.

In revision High Court declined to reopen a finding favourable to the accused at which Sessions Judge had arrived on the evidence.

[P 988 C 1]

P. K. Sen, S. C. Mozamdar and S. P. Das—*for* Petitioner.

Assistant Govt. Advocate — *for* the Crown.

Judgment.—The petitioner has been convicted under S. 193, I. P. C., and sentenced to one month's simple imprisonment and a fine of Rs. 300. His appeal has been dismissed by the Sessions Judge.

The petitioner was Sub-Assistant Surgeon at Baghmundi hospital in Manbhum District. On the afternoon of 3rd December 1928 a riot occurred which led to criminal proceedings and one of the accused was Wasi Ahmad Khan. His defence was an alibi, that is to say, he asserted that at about 5 p. m. on the date in question he was in bed at his house suffering from dysen-

tery and was professionally visited by Dr. Gurudas Mandal, the present petitioner. His house is close to the Baghmundi hospital and is about four miles from the place of occurrence. The time of occurrence according to the prosecution was about 5 p. m. The petitioner was a witness for the prosecution to depose regarding certain injuries on persons whom he had examined after the riot. In cross examination he stated that on 3rd December 1928 at about 5 p. m. he had visited Wasi Ahmad Khan as a patient to treat him for dysentery and found him to have slight fever. This deposition was given on two dates, 16th February 1929 and 1st March 1929. He brought his register of private patients which was taken in evidence. The riot case ended in conviction of Wasi Ahmad Khan, among others, the Court not believing the alibi set up in face of the direct evidence. The prosecution of the petitioner was ordered with the result as stated above.

The Magistrate was of opinion that accused could not have paid a visit to Wasi Ahmad Khan at 5 p. m. because Wasi Ahmad Khan was at that time elsewhere committing a riot. He also held that the accused paid a visit to Wasi Ahmad Khan, but the time of this visit was 8 or 8-30 p. m., the Writer Head Constable of Baghmundi having deposed that he had seen accused at 8 or 8-30 p. m. who told the witness that he was going to see Wasi Ahmad Khan on a professional call.

The Sessions Judge found that the evidence regarding the time of riot was not exact and that the riot might have taken place at 3 p. m. or at any time between that and 5 p. m. and that it was possible for Wasi Ahmad Khan after taking part in the riot to get home by 5 p. m. The Sessions Judge says clearly:

"there can be no doubt, as far as all this evidence is concerned, that Wasi Ahmed could have got back by 5 p. m."

But the Sessions Judge upheld the conviction on a consideration of the evidence of the Writer Head Constable holding that the time of the accused's visit to Wasi was 8 or 8-30 p. m. and that there was only one visit; therefore, the alleged visit at 5 p. m. was false.

Substantially the defect in the decision is that there is no evidence that

there was only one visit. The reasoning of the Sessions Judge by which he comes to the view that there was only one visit is a reasoning from probabilities. In a case like this reasoning from probabilities cannot take the place of evidence.

The Sessions Judge has said that it is improbable that accused paid two visits and that he has not said anywhere that he did pay two visits. It may be improbable; but if the paying of two visits was a possibility it was for the prosecution to prove by evidence that it was not a fact. The prosecution had sought to prove that it could not be a fact in as much as Wasi was four miles away at 5 p. m. and this evidence was accepted by the Magistrate; but the Sessions Judge had not accepted this evidence and has held that it is not proved that Wasi Ahmad was elsewhere at 5 p. m.

The learned Assistant Government Advocate has suggested that the Sessions Judge has not taken a correct view of the evidence of the prosecution witnesses as to the time of riot and that it ought to have been held that the riot was at 5 p. m. and that Wasi Ahmad's participation in it definitely disproves his medical examination at 5 p. m. I do not, however, think that in revision I ought to reopen a finding favourable to the accused at which the Sessions Judge has arrived on the evidence.

The view that I take of the case as a whole is that if the prosecution could prove that at 5 p. m. Wasi was four miles away and could not at that hour have been examined by the accused that evidence and finding would have supported the conviction. And the probabilities set out in the judgment of the Sessions Judge would have been relevant considerations in aid of that evidence and finding. But when the Sessions Judge had held against the prosecution of that point the materials that were left are not sufficient in law to exclude the possibility of the deposition of the accused having been substantially true.

The result is that the rule is made absolute and the conviction and sentence are set aside and the fine if paid is to be refunded.

V.B.G.K.

Rule made absolute.

1930 Cr. Cases 938

(Patna)

WORT, J.

Manmohan Rai—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 362 of 1929, Decided on 1st July 1929.

Criminal P. C.; S. 162—Approver's statement to police during investigation—Defence is entitled to copy.

Where a person accused of an offence which is under investigation makes a statement to the police during investigation, and such person assists the prosecution and is about to give evidence on its behalf, the statement is by "any person" within the meaning of S. 162 and the defence is entitled to copy of the same: 7 *Mad.* 274; 27 *Cal.* 295; *A. I. R.* 1925 *Mad.* 579 and *A. I. R.* 1926 *Pat.* 282, *Dist.*; *A. I. R.* 1926 *Rang.* 116, *Ref.* [P 240 C 2]

S. Sinha. and D. L. Nandkeolyar—for Petitioner.

Sultan Ahmad—for the Crown.

Judgment.—This rule was granted with regard to a trial which is now proceeding against certain persons, being 42 in number, for an offence punishable under S. 400, I.P.C.

Two of the accused persons had made statements to the police and it appears that they are now about to give evidence under the provisions of S. 337, I. P. C., that is to say, they are assisting the prosecution and giving evidence on behalf of the prosecution.

Mr. Sinha on behalf of the applicant contends that the other accused are entitled to copies of the statements made by these persons to the police in the course of the investigation. I have used the expression "in the course of the investigation," but, according to the argument of the learned advocate, one of the questions to be determined in this case is whether those statements were made in the course of an investigation under Chap. 14, Criminal P. C. It is contended by Mr. Sinha on behalf of the applicant that under the provisions of S. 162, Criminal P. C., the accused are entitled to be furnished with copies of these statements, so that any part of such statements, if duly proved, may be used to contradict such witnesses in the manner provided by S. 145, Evidence Act. The argument is based on Ss. 160, 161 and 162 which I have already mentioned. Chap. 14, Criminal P. C., commences with S. 154, and, briefly stated, provides that every information relating to the commission of cognizable

offences shall be reduced to writing, and then the latter section makes provision for an investigation into that information by the police. We can pass over Ss. 154, 155 and 156 up to S. 160 which, I say, together with Ss. 161 and 162, are the important sections to be considered.

Most of the argument by the Crown is based on the contention that neither under S. 160, nor under S. 161 can an accused person (as these statements were made by persons who were in custody and were accused persons) be forced to attend, nor is the police officer entitled to question such accused person under either of those sections, S. 160 or S. 161. S. 161 provides:

"Any police officer making an investigation under this chapter or any police officer not below such rank as the Local Government may, by general or special order, prescribe in this behalf acting on the requisition of such officer may examine orally any person supposed to be acquainted with the facts and circumstances of the case."

The earlier section, that is S. 160, provides that the police officer may order in writing the attendance of a person who can give information and it also provides that such person shall attend as so required.

It is argued that quite clearly S. 162 cannot apply to the facts of this case for the reason that neither under S. 160 nor under S. 161 is an accused person contemplated, and that, in any event, under S. 160 no accused person can be required to attend.

The case which was relied upon for its contention by the learned Sessions Judge is the case of *Queen Empress v. Saminada Chetti* (1). That was a case, as the Chief Justice of the Madras High Court points out, in which the accused person was charged for disobeying a summons under S. 160 requiring him to attend and to answer a charge of kidnapping. The Court decided that S. 160 did not authorize a police officer to require the attendance of any accused person with a view to his answering the charge, and then it goes on to add the provisions which are contained in S. 161, Criminal P. C.

The learned Sessions Judge quite clearly was wrong in coming to the conclusion that in the case quoted above it was held that an accused person could

not be compelled under S. 160 to attend after being ordered to do so by a police officer. What the case decided and decided alone was that under S. 160 an accused person could not be called upon by a police officer to attend and answer a charge. It is equally clear that the case does not assist this Court either one way or the other as regards this argument.

Another case was relied upon, the case of *Emperor v. Maung Tha Din* (2). That was a case which related to a statement which was made by the accused and the question was whether S. 162, Criminal P. C., overrode in any way S. 27, Evidence Act. It is unnecessary to set out the details but the real question can be shortly stated as being whether this particular statement was admissible in evidence. It is not contended on behalf of the Crown that this case was an authority on the point which is before me, but it is referred to because of the reasoning which was adopted by the Court in coming to the conclusion on the question then before it. In the course of the judgment in that case Rattledge, C. J. stated:

"It has, in my opinion, been rightly held that a police officer has no power to require the attendance of, or to examine under Ss. 160 and 161, a person accused of the offence under investigation;"

and certain cases were relied upon in favour of that view, one of which is the case of *Queen-Empress v. Jadub Das* (3). The question there also was whether a certain statement made was admissible under the Evidence Act and the comment which I have made on the *Rangoon* case (1) equally applies to this case, that is to say, that only the reasoning adopted by the learned Judges can be used to throw any light upon the matter which is before us.

It was faintly contended, as I understood the argument on behalf of the Crown, that if the statement could be used in evidence under the Evidence Act, it would necessarily follow that it could not be a statement which is contemplated by S. 162, Criminal P. C., that is to say, a statement taken in pursuance of an investigation as contemplated by that section. The argument seems to be this that S. 162 makes provision of the manner in which such

(2) A. I. R. 1926 Rang. 116=56 I. C. 145=4 Rang. 74 (F. B.).

(3) [1900] 27 Cal. 293.

(1) [1884] 7 Mad. 274.

a statement can be used, and it is contended that it can be used only in that way. However, if that argument is still adhered to, it seems to me to be sufficiently answered both by the provisions of S. 162, that is to say, the proviso thereto and by the decision in the case of *Venkatasubbiah v. Emperor* (4). But in my judgment, neither of the cases which are quoted nor the proposition which is put forward really deal with the point which is before me.

Before I come to state my view of the matter, I should add that there is another authority which is relied upon, an authority of this Court in the case of *Jagwa Dhanuk v. Emperor* (5). But although the value of that decision may be great as regards the point therein decided, it seems to me that the comment which I have already made as regards the other cases is one which holds as regards this. The question before the Bench of this Court in that case was whether a certain statement was admissible in evidence or not, and the questions which we have to construe in this case were only incidentally referred to, as I have already stated, as a part of the reasoning in coming to a decision on the main question. The argument by the Crown seems to me to depend upon this consideration, that S. 160 and 161 are necessarily bound up with the provisions of S. 162, that is to say, when a statement referred to in S. 162 is mentioned, it is a statement which is taken by reason of the powers given to the police under either S. 160 or under S. 161. In my judgment that does not necessarily follow. Chap. 14 deals with the investigation of the police; it makes certain provisions relating thereto, and it states that the police have certain powers in an investigation, notably the powers under Ss. 160 and 161. It is quite clear that the provisions of S. 161 are not relevant to the facts of this case. There was no such order, as far as I am aware, under S. 161, nor was there an order contemplated by S. 160. But the question that must be asked is, assuming that to be so, that is to say, the statement was not made to the

police by reason of their exercise of the powers under Ss. 160 and 161, is the statement which was made to the police, a copy of which is required by the accused, any less a statement made by any person to a police officer in the course of an investigation under this chapter? It is admitted, and of course it must be so, that as regards the police powers of investigation, and they are statutory powers be it noted, there are no provisions in the Criminal Procedure Code other than the chapter referred to. I am not unmindful of the provisions of the Police Act. I do not suggest for a moment that the cases referred to are not rightly decided, but to my mind the question of whether an accused can be summoned to attend under Chap. 14 is beside the point. The police may and do investigate cases and take statements and put them in writing otherwise than by reason of their powers under Ss. 160 and 161 (a person may be present of his own accord and make a statement.) The question, therefore, comes to this: Are the statements (in this case the statements made to the police in the course of an investigation), have they been made "by any person" using the expression in the section, and have they been reduced to writing? There appears to be one answer and one alone to those questions, and that answer must, in my judgment, be in the affirmative. If the police had statements made to them by accused persons and those accused persons were not to be witnesses, then of course S. 162 would not apply. This reminds me that a further question should be asked in this case. Is the person making the statement to be a witness in the case? That also must be answered in the affirmative and it makes no difference that it so happens that that person at one time was an accused. If these questions, each and every one, have to be answered in the manner in which I have stated, then there can only be one answer to the contention which is placed before this Court by Mr. Sinha on behalf of the accused that they are entitled to copies of these statements, that answer also being answered in the affirmative. There will be an order accordingly.

V.B./R.K.

Order accordingly.

(4) A. I. B. 1925 Mad. 579=85 I. C. 209=26 Cr. L. J. 721=48 Mad. 640.

(5) A. I. B. 1926 Pat. 272=93 I. C. 884=5 Pat. 68.

1930 Cr. Cases 941

(Oudh)

PULLAN, J.

Shah Naim Ata—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. 46 of 1930, Decided on 7th May 1930, from order of Sess. Judge, Lucknow, D/- 31st July 1929.

(a) Limitation Act, Art. 181—Art. 181, Lim. Act, does not apply to application in revision—No time limit is placed on High Court's power of revision—Criminal P. C., S. 439—Civil P. C., S. 115.

Article 181 has no application to an application made to High Court in revision of an order of a criminal Court of inferior jurisdiction. It does not appear that the legislature ever intended that there should be a time limit placed upon the power of the High Court to interfere by way of revision in a criminal case. There is no reason also why the same principle should not be applied to civil revisions. These powers are exercised by High Court quite irrespective of any right on the part of the aggrieved party to move the Court. 43 Cal. 1029, Ref. [P 941 G 2]

(b) Criminal P. C., S. 439—Admission or non-admission of application is in discretion of Court—Applications must be made within reasonable time.

The admission or non-admission of applications for revision is entirely discretionary and it is not necessary for the Court to prescribe any hard and fast rule, but the Court should not as matter of practice admit applications for revision unless it is satisfied that they are made within a reasonable time, and the reasonable time would appear to be the time granted by statute for admitting appeals. When an application for revision has been made after the expiry of the period allowed for an appeal it is proper that the Court should ask the applicant to give reasons for the delay and if those reasons are not sufficient to dismiss the application: 8 All. 514; 27 All. 468 and A. I. R. 1923 Oudh. 272, Ref. [P 942 G 1, 2]

(c) Penal Code, S. 405—S. 405 covers any person who is in any manner entrusted with any property.

Section 405 does not limit the offence to the case of persons who are entitled to be called trustees in the technical sense. The section is couched in broad terms and covers any person who is in any manner entrusted with any property. Where a person manages a large property under a definite agreement that he should get 3/5ths for his own use and spend 2/5ths on certain religious and educational objects, if it can be proved that he has converted to his own use some portion of the 2/5ths share of the profits which he should devote to these objects, he may be properly convicted of an offence of breach of trust; A. I. R. 1927 Oudh 112, Dist. [P 943 G 1]

St. George Jackson—for Applicant.

H. K. Ghosh—for the Crown.

Judgment.—This is an application in revision of an order passed on appeal

1930 Cr. C. 118b/4; 119 & 120a/4

by the learned Sessions Judge of Lucknow on 31st July 1929. When the application was admitted the office reported according to the practice of this Court that it was within time up to 31st July 1932, but an objection has now been raised by the learned Assistant Government Advocate that this application should be held to have been made too late and that in accordance with the practice of this Court it should not be entertained. The practice of the office is based on the belief that Art. 181, Lim. Act, applies to applications for revision. It is true that that article is provided for applications

"for which no period of limitation is provided elsewhere in this schedule or by S. 48, Civil P. C., 1908."

and the time from which the period begins to run is "when the right to apply accrues." In my opinion this article has no application to an application made to this Court in revision of an order of a criminal Court of inferior jurisdiction. It does not appear that the legislature ever intended that there should be a time limit placed upon the power of a High Court to interfere by way of revision in a criminal case. I say "a criminal case" because the case before me is a criminal case, but I know of no reason why the same principle should not be applied to civil revisions also. These powers are exercised by a High Court quite irrespective of any right on the part of aggrieved persons to move the Court. As a matter of fact no one has any right to move the Court in revision. All that can be done by the aggrieved person is to ask the Court to exercise the power conferred upon it by S. 435, Criminal P. C. I therefore find a further reason for my view that Art. 181, Lim. Act, has no application to this case in the fact that no "right to apply" has accrued to the person making it. A similar case came before a Bench of the Calcutta High Court in the matter of *Khetra Mohan Giri v. Darpa Narayan Giri* (1). In rejecting the application the learned Chief Justice observed:

"This is not a question of limitation but a rule of the practice of the Court to the effect

(1) [1916] 49 Cal. 1029=17 Cr. L. J. 419=35 I. C. 979.

that an application for revision must be made within a reasonable time."

Moreover justice demands that there should be no limitation for righting a miscarriage of justice for such a miscarriage may be discovered many years after it has been committed, and in many cases it can only be put right by moving the High Court in revision.

On the other hand it has never been the practice of this Court, or, as far as I know, any High Court, to admit applications for revision if in the opinion of the Court they have been made after unreasonable delay. The Calcutta High Court has laid down in the case to which I have referred that their practice is to admit no applications after a period of 60 days together with such period as may have been necessary for obtaining copies; but they observe that this is not an inflexible rule and in exceptional circumstances might be departed from. I have been referred to two cases decided by the Allahabad High Court : *Queen-Empress v. Ram Narain* (2) and *Emperor v. Jagan Nath* (3) in which applications for revision were rejected on the ground that they were made too late. The first was made nine months after the order of which revision was sought and the second was made 5 months and 23 days after the order. In Oudh there is no reported case on the criminal side though I am informed that the practice of the Court has always been to reject applications made more than 90 days after the order complained against unless special reason was shown for the delay. In a reported case on the civil side the Judicial Commissioner rejected an application for revision on the ground that it was filed after an inordinate delay, that is to say, a year after the order complained of : *Binda Prasad v. Banarsi Das* (4). In my opinion the admission or non-admission of such applications is entirely discretionary and it is not necessary for the Court to prescribe any hard and fast rule; but the Court should not as a matter of practice admit applications for revision unless it is satisfied that they are made within a reasonable time, and the reasonable time would

appear to be the time granted by statute for admitting appeals. When an application for revision has been made after the expiry of the period allowed for an appeal it appears to me proper that the Court should ask the applicant to give reasons for the delay, and if those reasons are not sufficient to dismiss the application.

In the present case the judgment was dated 31st July 1929. The applicant applied for a copy of the judgment on 21st October 1929 and obtained it on 22nd October, and he did not file any application in revision until the 12th April 1930. The learned counsel who appears for the applicant has given no reasons for the delay and in my opinion I should be fully justified in the circumstances in rejecting the application. As however the application was admitted by a learned Judge of this Court owing to what I consider to be an incorrect office report on the point of limitation I think it right to decide the case also on the merits. The applicant was found guilty of the offence of breach of trust under S. 406, I. P. C., and sentenced to one day's simple imprisonment and to pay a fine of Rs. 1,000. He is a hereditary Sajjadanashin of a Mahomedan religious institution in the Rae Bareilly District.

"The property was made wakf in the time of the Kings of Oudh and after the annexation the British Government restored to the Sajjadanashin the same tenure which he was in possession of prior to confiscation."

These words are quoted from a judgment of this Court in an appeal in a civil suit in which the present applicant was the defendant *Shah Mohammad Naim Ata v. Mohammad Shamsuddin* (5). I have been asked to hold that in view of that judgment the applicant is not a trustee and cannot be guilty of the offence of breach of trust. Apart from the fact that this judgment was delivered on 20th December 1926 long before the offence, if any was committed for which the applicant has been convicted, I can find nothing in the judgment to show that the applicant holds a position in which it is impossible for him to commit a breach of trust. On the contrary it appears that he manages a large property under a definite agreement that

(2) [1886] 8 All. 514=(1886) A. W. N. 177.

(3) [1905] 27 All. 498=(1905) A. W. N. 65.

(4) A. I. R. 1929 Oudh 272=77 I. O. 115.

(5) A. I. R. 1927 Oudh 118=100 I. O. 241=2 Luck 109.

he should get 3/5ths for his own use and spend 2/5ths on certain religious and educational objects. If it can be proved that he has converted to his own use some portion of the 2/5ths share of the profits which he should devote to these objects it appears to me that he may be properly convicted of an offence of breach of trust. S. 405, I. P. C., does not limit the offence which is there defined to the case of persons who are entitled to be called trustees in the technical sense. The section is couched in broad terms and covers any person who is in any manner entrusted with any property. A perusal of the judgments of the Courts below show that they have found the applicant guilty of converting to his own use a portion of the funds which he was legally bound to spend on the objects on trust. I can find no reason to doubt the correctness, legality or propriety of the finding, sentence or order of the lower Court. I therefore see no reason to interfere in revision on the merits of the case. The application is accordingly dismissed.

P.N./R.K. *Application dismissed.*

*** 1930 Cr. Cases 943**
(Oudh)

PULLAN, J.

Lachhman and others—Accused—Applicants.

v.

Emperor—Complainant—Opposite Party.

Criminal Ref. No. 22 of 1930, Decided on 19th May 1930, reported by Sess. Judge, Unao.

* (a) Public Gambling Act, Ss. 3 and 4—Dewali gambling is not an offence unless it is in contravention of Gambling Act.

Gambling in Dewali should not be considered to be an offence; but the law will not countenance gambling even at Dewali if it is in contravention of the Gambling Act.

Where the only evidence that anything was done in contravention of the Gambling Act was that the owner of the house had in front of him a small pot containing As. 15 and there was no reason to suppose that the sum represented his profits or that it was what is known as "nal" and the sums staked were quite trifling.

Held: that it was only a case of Dewali gambling in private house and no offence was committed under the Gambling Act: 20 O. C. 4 and A. J. R. 1929 Oudh 224, *Rel. on.*

[P 943 C 2]

* (b) Public Gambling Act, S. 5—To issue gambling warrant to raid houses where govt on in Dewali is undesirable.

To issue warrant to raid houses where gam-

bling goes on at the time of Dewali is highly undesirable as the police are merely encouraged to run in numbers of perfectly innocent persons in order to get a reward.

[P 944 C 1]

J. N. Prasad Kapur—for Applicants.
H. K. Ghose—for the Crown.

Judgment.—These references were made by the learned Sessions Judge of Unao. They arise out of the same case. The Kotwal of Unao obtained a warrant from the Superintendent of Police in order to raid a house where gambling was going on at the time of Dewali. He found a number of people gambling with cowries. The total amount of money found on the premises was Rs. 24-12-9 and the number of persons playing was twenty-eight. The Magistrate fined all except two whom he held to be minors and whom he discharged with an admonition. The total amount of fines realized was Rs. 29. In his judgment the Magistrate observed:

"The festival of Dewali does not give a free permit to persons to gamble in contravention of the provisions of the Gambling Act."

The last words are important. The festival of Dewali is recognized by all Hindus as a time when gambling is not only permissible but praiseworthy, and the law has never yet interfered with this practice as such. It is, however, true to say that the law will not countenance gambling even at Dewali if it is in contravention of the Gambling Act. If, therefore, this gambling took place in a public place, or if the owner of the premises was making a profit out of the gamblers, the conviction might not be illegal although the raid and the prosecution would still in my opinion be deplorable. The only evidence in this case that anything was being done in contravention of the Gambling Act is that the owner of the house had in front of him a small pot containing As. 15. There is no reason whatever for supposing that this represented his profits or that it was what is known as "nal." It may very well have been the small sum which he had won or which he proposed to stake. In my opinion this was an ordinary case of Dewali gambling in a private house. The sums staked were trifling and in my opinion no offence was committed under the Gambling Act. On previous occasions the Judicial Commissioners of Oudh have had occasion to point out that Dewali gambling was

not to be considered an offence. I refer to *Ram Shanker v. Emperor* (1) and *Emperor v. Shankar Dayal* (2). In his explanation the learned Magistrate has attempted to differentiate both cases but he has not succeeded. I regret to say that I have recently seen several cases in which warrants have been issued to the police in order that they may interfere with persons engaged in Dewali gambling. In my opinion to issue such warrants is highly undesirable as the police are merely encouraged to run in numbers of perfectly innocent persons in order to get a reward. As I have already shown in this case no less than Rs. 290 have been collected from 26 persons and the Magistrate has expressed his intention of giving a reward to the police. I can only hope that no reward has been given. I accordingly accept this reference, set aside the convictions and direct that all the fines shall be returned. It is not, in these circumstances, necessary to consider the mind law point raised as to the applicability of S. 562 (1-A) to cases under the Gambling Act.

R.M./R.K. Reference accepted.

- (1) [1917] 20 O. C. 4=18 Cr. L. J. 494=39 I. C. 384.
 (2) A. I. R. 1922 Oudh 224=71 I. C. 62=24 Cr. L. J. 14=25 O. C. 111.

1930 Cr. Cases 944

(Oudh)

PULLAN, J.

Shankar Sahai—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 191 of 1930, Decided on 29th April 1930, from order of Sess. Judge, Hardoi, D/- 6th March 1930.

(a) Criminal P. C., Ss. 476 and 476-B—Proceedings.

Proceedings under S. 476 should not be undertaken on the application of private persons unless the prosecution is clearly in the interests of the State and is reasonably certain to result in conviction. [P 944 O 2]

(b) Criminal P. C., S. 476—Proceedings under S. 476 cannot be taken against person not party to proceeding.

Court cannot take proceedings under S. 476 against a person who is not a party to a proceeding in any Court. [P 945 O 2]

(c) Criminal P. C., S. 476—Officer making complaint under S. 476 should state evidence on which he relies.

When complaints under S. 476 are made, the officer making them, must state the evidence on which he relies otherwise the Magis-

trate to whom the case is referred for decision has no means of ascertaining what the evidence is on which the prosecution case is based. [P 945 O 2; P 946 O 1]

R. F. Bahadurji and *Moti Lal Sak-sena*—for Appellant.

B. K. Dhaon and *H. K. Ghose*—for the Crown.

Judgment.—This is an appeal under S. 476-B, Criminal P. C., against an order of the Sessions Judge of Hardoi in which he makes a complaint to the District Magistrate under S. 476, Criminal P. C., requiring one B. Shankar Sahai, who is a practising lawyer in the Hardoi District, to be prosecuted under Ss. 193 and 465, I. P. C. The case which gave rise to the proceedings was a criminal case brought by one Shambhu Nath against Tula and others which resulted in the conviction of the accused for offences under Ss. 147, 323 and 324, I. P. C., and the conviction and sentences were upheld on appeal by the learned Sessions Judge. Neither he nor the Magistrate elected to prosecute B. Shankar Sahai at that time and the present order has been passed on the application of Shambhu Nath. It cannot be too strongly impressed upon the Courts that such proceedings should not be undertaken on the application of private persons unless the prosecution is clearly in the interest of the State and is reasonably certain to result in a conviction. I have been very carefully through the facts of this case. The Judge was under the impression that the assault took place in a certain field which is No. 440 and that it arose out of a dispute as to tenancy rights in that field between Tula on the one side and Shambhu Nath on the other. I find on the contrary that in the report made by Shambhu Nath no particular field is mentioned. It is only stated that Shambhu Nath heard that his jundhri crop had been cut, that he went to verify the fact and that he was waylaid by Tula and others, but the scene of the occurrence is not placed on this field. Tula made a counter complaint and he also stated that he was attacked when on his way back from his field. The evidence was recorded in Court on 8th November. The complainant examined himself and six other witnesses; none of them mentioned the number of the field and it is very clear from the evidence that the matter in dispute was

the assault not the field. On 25th November Shambhu Nath was cross-examined by B. Shankar Sahai who was counsel for the accused. He was tied down in cross-examination to a description of the field which could be verified, but even on that day no number was assigned to the field. On the following day, 26th November, the village patwari was examined. He located the field from Shambhu Nath's description as No. 440, and he stated that this field was partly cultivated by B. Shankar Sahai, who is the lambardar of the village, and was partly fallow. He did not beat out Shambhu Nath's assertion that he (Shambhu Nath) had obtained this field by relinquishment from a former tenant Badlay. It is at this stage of the proceedings that B. Shankar Sahai, who had withdrawn from the case on the previous day, was examined as a witness, and he said that Badlay's field No. 440 had been relinquished in his own favour and he had himself given it on lease to Tula accused on 25th June 1929, and he verified the lease which was produced. The view taken by the learned Sessions Judge is that B. Shankar Sahai got this lease prepared during the trial of the case in order to establish the defence of Tula and it is on this belief that he has instituted proceedings against him. From the facts which I have stated it is evident that the field was not the matter of dispute until the 25th November. Shambhu Nath had up till then made vague statements only about the cutting of his crops and it was not until he was forced to give the boundaries and description of the field which he alleged to have been cut that the other side had any opportunity to prove their possession over that field. Thus the production of the lease was not an after thought as stated in his judgment in appeal by the learned Sessions Judge. It could not have been produced any earlier and his reason for supposing that the lease is antedated falls to the ground. I cannot myself see any other reason for supposing the lease to be antedated.

When proceedings were taken under S. 476 Babu Shankar Sahai asked to produce witnesses to prove the lease, but he was not allowed to do so. He had also offered in Court to produce the deed of relinquishment said to have been executed in his own favour by

Badlay, but the deed of relinquishment produced by Shambhu Nath was produced and not that said to have been executed in favour of Shankar Sahai. It is therefore a matter still open to question whether this field was relinquished by Badlay in favour of B. Shankar Sahai who is the lambardar or Shambhu Nath who had purchased some land in the village and is apparently disliked by the former zamindars. In my opinion there is no presumption that the lease produced by B. Shankar Sahai was a forgery and there is certainly no evidence to prove that it was not executed as stated on 25th June 1929. Thus in my opinion the prosecution for forgery was bound to fail. There is nothing on which the Court could base a conviction. Apart from that the learned Sessions Judge acted without jurisdiction. Under S. 476, Criminal P. C., he could take action by way of complaint where in his opinion an offence referred to in S. 195, sub-S. (1), Cl. (b), or (c)

"appears to have been committed in relation to a proceeding in that Court."

But S. 196 (c), which is the relevant clause, forbids any Court from inquiring into an offence described in S. 463, where such an offence is alleged to have been committed "by a party to a proceeding in any Court," except on the complaint in writing of the Court. I find no clause under which the Court can take proceedings against a person who is not a party, and B. Shankar Sahai was not a party to the proceedings in the Court of the Magistrate on which action has been taken by the Sessions Judge. No doubt the learned Judge was empowered to take proceedings in respect of an alleged offence under S. 193, but the only statement which he considers to constitute perjury was the following:

"Main ne No. 440 ka patta 25th June 1929 ko Tula Ram mulzim ko dia."

The Judge himself describes the perjury charge as a mere corollary to the charge of forgery. In my opinion the complaint of the offence of forgery was without jurisdiction and neither a charge of forgery nor a charge of perjury can possibly be made out on the materials given by the learned Sessions Judge. When such complaints are made under S. 476 the officer making

them must state the evidence on which he relies, otherwise the Magistrate to whom the case is referred for decision has no means of ascertaining what the evidence is on which the prosecution case is based. 'As far as I can see the Magistrate, who is required to act on the complaint in the present case, would start and end with the opinion of the Sessions Judge that this lease was antedated and that B. Shankar Sahai had made a false statement about it. I am at a loss to see how either opinion of the learned Sessions Judge was to be established by legal evidence. I consider that the whole order was misconceived. There was no justification for the prosecution of Babu Shankar Sahai either under S. 193 or S. 465; I. P. C; and under S. 476-B, Criminal P. C., I direct the withdrawal of the complaint.

R.M./R.K.

Order accordingly.

*** 1930 Cr. Cases 946**

(Oudh)

RAZA AND PULLAN, JJ.

Manni—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No 244 of 1930, Decided on 10th July 1930, from order of Addl. Sess-Judge, Bahraich, D/- 8th May 1930.

* (a) Evidence Act, S. 118—Evidence by child should be accepted with caution.

There is no more dangerous witness than young children. Any mistakes or discrepancies in their statements are ascribed to innocence or failure to understand, and undue weight is often given to what is merely a well taught lesson. Children have good memories and no conscience. They are easily taught stories and live in a world of make-believe so that they often become convinced that they have really seen the imaginary incident which they have been taught to relate. The evidence of a child should therefore be accepted with great caution.

[P 947 C 1]

(b) Criminal P. C., S. 164—Statement made under S. 164 behind back of accused cannot be used against him, its only object being to get hold over witness.

A statement made under S. 164 behind the back of the accused cannot be properly used as evidence against him. The only object in recording such statement is to obtain a hold over the witness: 17 O. C. 838, *Foll.*

[P 947 C 2]

B. B. Chandra—for Appellant.

H. K. Ghose—for the Crown.

Judgment.—*Manni* Ahir a man of thirty years of age has been convicted of the murder of his wife and sentenced

to death. The sentence is before us for confirmation and *Manni* has appealed against his conviction.

The girl *Jugra* who died was stated by her mother to be about fourteen years of age. It is in evidence that she had been married for about a year, that she was not on good terms with her husband and that she had run away from him more than once. Her body was found in the river *Khurpehwa* on the afternoon of 16th October by Mr. *Surja*. The *chaukidar* *Surja* was told about the recovery of the body and he went to the place and found the body of *Jugra* lying naked on the bank of the river tied by a rope to a short bamboo stick. He found her mother *Mt. Surja* with it. The *chaukidar* went to the police station and made a report. Admittedly this report is based on the statement made by *Mt. Surja*. In that report he gave the gist of the evidence which has subsequently been produced in Court. He said that on his inquiry *Khemai's* wife (*Surja*) said :

“that she (the corpse) was her daughter named *Jugra* who was married to *Manni* Ahir of *Gurpurwa*, that she used to live little at the place of her husband and used to run away to her parents' house, that therefore she had been killed by her husband, that the girl was at the place of her husband, that her granddaughter, the daughter of *Baldi*, had gone along with her to her husband's place, that she returned in the evening on the day previous saying that her aunt had been killed by her uncle, that she and her people began to search for her from early morning that day and that they found the dead body in the river at that time.”

This fixes the time of the alleged murder on the night of 14th and 15th October and naturally the most important evidence in the case is that of the granddaughter, the daughter of *Baldi*, whose name is *Shukhrania*, and who is said to have given the first information to her grandmother *Surja* of the commission of the crime. *Sukhrania* has been believed by the learned Sessions Judge. This child is six years of age. Her statement in Court is that she and her grandmother *Surja* went to the house of the accused and that she (*Sukhrania*) was sleeping with *Jugra* and woke up on receiving a kick from her. She states that she saw the accused throttling his wife. He was sitting on her chest, and when the child began to cry he told her to go to sleep. She says that she went to sleep. When she

woke up in the morning she did not find Mt. Jugra. She found another woman who had been sleeping in the same house behind a partition of cornbins and she asked her what had happened. This woman told her that Jugra had been beaten and had run away, and this is the story which she told to her grandmother on the same evening. She said nothing about the throttling, and although the learned Judge thinks it not unnatural that a child should describe throttling by the word beating we are not of that opinion. We do not believe that anybody would describe the incident which the child now says she saw as a beating. The learned Judge is clearly impressed by the child's statement. He says she did not give him the impression of having been tutored and there is no reason why anyone should tutor her. Now Surja in her statement in Court admitted that she suspected the accused from the first because there was no one else possible. She obviously believes in his guilt and her whole conduct throughout shows that she wishes that he should be convicted. The child is completely under her influence and could very easily be taught by her what she was to say in Court. The Judge was impressed by the fact that Sukhrania caught her own throat with her hands and set her teeth to illustrate what she saw the accused doing. We are not impressed by this piece of acting which had previously been performed in the Court of the Committing Magistrate. It does not appear to us to have been spontaneous, but rather to have been tutored along with the rest of her statement. There is no more dangerous witness than a young child. Any mistakes or discrepancies in their statements are ascribed to innocence or failure to understand, and undue weight is often given to what is merely a well-taught lesson. Children have good memories and no conscience. They are easily taught stories and live in a world of make-believe so that they often become convinced that they have really seen the imaginary incident which they have been taught to relate.

We find in this case that there is no evidence to corroborate the statement made by the child. There is no evidence that the woman was throttled.

The cause of her death is entirely unknown. There is no evidence that her husband was present on the night on which she died, and it is uncertain that she died on the night which is stated to have been the date of her death. The Civil Surgeon who conducted the post-mortem examination on the morning of 18th October found that the woman had been dead for five or six days, that is to say, according to his opinion she died on the night of 12th and 13th October and not on the night of 14th and 15th. Doctors are frequently wrong on the difficult question of post-mortem appearances, but as this body was in water, it would be expected that decomposition would be delayed and not accelerated, and it is surprising that if the woman really died on the night of 14th and 15th October, the doctor should have placed her death some 48 hours earlier.

We have been asked to consider a statement made under S. 164, Criminal P. C., by another woman Mt. Sarjudei who is said to have been actually present in the house on the night in question. This statement was excluded by the learned Sessions Judge and in our opinion he was right in so doing. A statement made under S. 164 behind the back of the accused cannot be properly used as evidence against him. The only object in recording such statement is to obtain a hold over the witness. This was the view expressed by Lindsay, J. C., in the case of *Puttu v. Emperor* (1) and we believe it to be a correct statement of law.

Another point used by the learned Judge against the accused is that he ran away and remained in hiding for over two months. We should be most reluctant to use this fact in any way against the accused. The man is an ignorant villager, and according to his own statement he returned to his village from a short absence of seven days to hear that his wife had been drowned, that members of the family were shut up in the thana, and that a report was made against him. If this statement is true, and there is no evidence to rebut it as the man was not seen anywhere either on the day when his wife is said to have been killed or later until he was

(1) [1914] 17 O. C. 368=27 I. C. 198=16 Cr. L. J. 182.

arrested, we can only say that his conduct can easily be explained on the ground of fear, and fear is not necessarily caused by a guilty conscience.

The last point which we need consider is the alleged identification of danda or stick which was found tied to the body. Certainly three witnesses say that the danda belonged to the accused. It has no particular marks of identification and in our opinion it is very difficult for anyone to say that this is the accused's danda. But even if it were so, it does not provide important evidence against its owner. Nor can we say how the danda was used. We cannot accept the explanation given by the learned Judge that it was fixed in the sand in the bed of the river in order to prevent the body from being washed away because we cannot imagine anyone doing anything so foolish. A short stick like this could not retain its hold in a river bed even for a few minutes let alone for three or four days. Moreover all that we know from the chaukidar who may be considered to be an impartial witness is that when the body was lying on the bank it was tied by the rope to the stick. We are far from certain that when the body was in the water it was tied to the stick and we cannot understand the object with which any murderer could have so tied the body. It is at least probable that the stick and the rope were merely used to bring the body to the shore.

Viewing the case as a whole we are of opinion that there is no sufficient evidence to justify the conviction of the appellant of the offence of murder. We are not even certain that the woman was murdered. We, therefore, allow this appeal, set aside the conviction and sentence and declare the accused Manni to be acquitted.

R.M./R.K. *Conviction set aside.*

— 1930 Cr. Cases 948
(Oudh)

RAZA AND NANAVUTTY, JJ.

Mahabir and another—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 298 of 1930,
Decided on 21st July 1930, from order
of Sess. Judge, Fyzabad, D/- 6th June
1930.

Penal Code, Ss. 99, 103, 302 and 304—
Right of killing offender found committing burglary given by S. 103 is subject to provisions of S. 99—Deceased beaten to death by lathi blow while found coming out of hole in wall after committing burglary—Accused held guilty of offence under S. 304—S. 300, Excep. (2) held applicable but accused held to have exceeded right of private defence of property.

The right in exercise of right of private defence of property of killing of offender who is found committing burglary given by S. 103 is subject to the provisions of S. 99.

Where the deceased was found committing housebreaking and was set upon by the owner of the house and his son when he was coming out of the hole and was beaten to death with lathi blows.

Held: that the accused were guilty of an offence under S. 304. The Exception (2) to S. 300 applied to their case: The accused had no intention of committing more harm than was necessary for the purpose of their defence of private defence of property, but without premeditation they in fact exceeded their right of private defence of property as the deceased was at their mercy while coming out of the hole and he could have been easily overpowered and secured. It was not necessary to beat him to death with lathi blows.

But as the accused were villagers who hardly realized that in killing a thief caught flagrante delicto they were committing any serious offence, severe punishment was not called for: *A. I. R. 1925 Oudh 425*; *A. I. R. 1926 Lah. 28* and *A. I. R. 1923 All. 194, Dist.*
[P 951 C 1, 2; P 952 C 1]

J. Jackson and S. N. Tankha—for Appellants.

H. K. Ghose—for the Crown.

Judgment.—Mahabir Tewari, aged 70, and Tarpai, his son aged 24 of Pura Beni Ram, a hamlet of village Ghatauli, police station Milkipur, in the district of Fyzabad, have been both convicted of an offence under S. 302, I. P. C., and sentenced to death by the Sessions Judge of Fyzabad. They have appealed against their conviction and sentence. The reference in confirmation of the sentence of death is also before us.

The facts out of which this charge of murder arises are briefly as follows:

On 1st February 1930 at 6-30 a. m. Mahabir, appellant, accompanied by the village chaukidar made a report at Thana Milkipur that on the previous night at about midnight four thieves entered his house by making a hole in the back wall of his house, that three of them ran away when a cry of "thief, thief" was raised but that the fourth one as he was coming out of the hole in the wall of the house was attacked

by Mahabir and his son Narpat with their lathis, that this thief who was coming out of the hole in the wall was Mulhar Singh a resident of Narsara and that he died shortly afterwards as a result of the injuries inflicted on him by Mahabir and Narpat, that having seated Sital Brahman and Narpat to keep watch over the dead body of the thief Mulhar Singh, Mahabir along with the village chaukidar hurried to the thana to make his report. His report was entered in a cheque receipt or first information report and the offence of burglary was registered at the Milkpur police station as Crime No. 19. Upon this very same report of Mahabir there and then, without any further enquiry, a case of culpable homicide under S. 304, I. P. C., was registered against this unfortunate Mahabir and his son Narpat by the Station Officer of Thana Milkpur and Mahabir who had come to make a report concerning the burglary at his own house found himself all of a sudden a prisoner in police custody. Subsequently the charge under S. 304, I. P. C., became magnified into one of wilful murder under S. 302, I. P. C. The original case under S. 457, I. P. C., was dropped by the police as an empty worthless husk and a very laboured, halting and lame story was set up on behalf of the prosecution to explain the manner in which the deceased Mulhar Singh met with his death. It is said that Mulhar Singh who was a notorious house-breaker and thief and who was bound over under S. 110, Criminal P. C., in August 1926 came with Karia Bhat to the house of Aharwadin (P. W. 19) of Deora Kotra. Aharwadin is a history-sheeter and with him was seated his associate Raghubans Rai (P. W. 9). This meeting of bad characters took place after night fall, and then Mulhar Singh asked his friends Aharwadin and Raghubans Rai to accompany him through the jungle as he was afraid of the people of Pura Beni Ram and apprehended danger at their hands. Thereupon Aharwadin and Raghubans Rai accompanied Mulhar Singh through the jungle and when they were about 2½ furlongs from the hamlet of Pura Beni Ram they turned home leaving Mulhar Singh to go his way alone. When they had gone about 165 paces

towards their own village Deora Katra they heard a cry of Mulhar Singh, and they turned back and saw 15 or 16 men beating Mulhar Singh with lathis. How these men, amongst whom presumably were the two appellants, came to be there is a matter upon which the prosecution witnesses do not throw any light. There is also no evidence adduced by the prosecution to explain how Mulhar Singh came to be found at the house of Mahabir, appellant, and as to who carried Mulhar Singh from the imaginary spot where the 15 or 16 men are said to have beaten him to the house of Mahabir. A story so truncated and formless and so absolutely devoid of the sap of reason and of common sense it is hard to imagine, and it is therefore a matter of surprise, to us that it found such ready credence with the learned trial Judge. The learned Sessions Judge himself characterizes the evidence of Ram Bakhsh (P. W. 13), Bhawani Pher (P. W. 16) Ribai Pasi (P. W. 17) Bhabhute (P. W. 18) and Ram Nath (P. W. 20) unreliable and unworthy of belief. We entirely agree with the learned Sessions Judge in his estimate of the evidence of these witnesses and we, therefore, will not discuss their testimony. The only witnesses upon whose evidence the learned Sessions Judge convicts the appellants are Aharwadin P. W. 19 and Raghubans Rai (P. W. 9). A part from the fact that these witnesses did state before the police that Mulhar Singh was accompanied by Karia Bhat and that Karia Bhat suddenly disappears from the scene and is not produced as a witness in the case, the story told by these witnesses is in our opinion very discrepant and inherently improbable. There was no pressing necessity which compelled Mulhar Singh a notorious bad character to go at night time to Pura Beni Ram where he suspected treachery and trouble. It is also not understood why, if Aharwadin and Raghubans Rai were willing to be friendly with Mulhar Singh they did not see him safely to his place of destination that night. They left Mulhar Singh in the lurch after going a short distance with him. They did not run and raise an alarm nor attempt to rescue Mulhar Singh when they saw him being beaten by a dozen men or more. The cry of dacoity which these witnesses say they

heard in Pura Beni Ram is not explained. They did not state whose house was being decoited or what connexion this alleged dacoity had with the beating and the death of Mulhar Singh. All these matters the prosecution has left in the dark and there is no clear answer given in the evidence of the Crown witnesses to the many doubts that arise in our mind as to the truth of the story told by these two witnesses. Aharwadin admits that he and the deceased Mulhar Singh were suspected in the theft committed at Kandhai Kurmi's house. He is a thoroughly unreliable and dishonest witness and his evidence in our opinion is quite unbelievable. The evidence of Raghubans Rai (P. W. 9) about his seeing Mulhar Singh being beaten by 15. or 16 men is not believed even by the learned Sessions Judge because this very witness told the investigating police officer when he was first examined (vide Ex. A.) that on hearing the cry of Mulhar Singh, he and Charwa Din did not go to the scene of the occurrence but returned straight home to their village.

We are in entire agreement with the learned Sessions Judge on this point and we consider that the evidence of Aharwadin and Raghubans Rai as to the circumstances in which the deceased came to Pura Beni Ram and met with his death is entirely false. The entire case for the prosecution as presented in Court is in our opinion a pure unadulterated fabrication and the investigating police officer would have been well advised if he had accepted the first information report of Mahabir and left it to the latter to prove that the death of Mulhar Singh was justifiable homicide.

The learned Sessions Judge has attempted to argue that the story of house breaking set up by the appellants "(the Sindh theory," as he calls it) is highly improbable. We find ourselves absolutely unable to accept his reasoning on this point. His argument is that because the northern and southern walls of the appellant's house are very low so there was no necessity for making a hole (sindh) in the back wall of the house. The fact that a hole in the back wall of the house had been actually dug is proved beyond any shadow of doubt. Sub-Inspector Mohammad Ishaq and chaukidar Sajjan who is a defence witness

prove this fact, and it is idle to argue that because in the opinion of the trial Court there was no necessity for making a hole in the wall, that therefore the story of housebreaking set up by the appellants is improbable. Even the investigating police officer Sub-Inspector Mohammad Ishaq, though he has coolly ignored the commission of the offence of housebreaking by the deceased, does not venture to assert that no burglary was committed by the deceased. The fact that a burglary was committed and a hole made in the back wall of the appellants' house is as definitely and clearly proved as the fact that the thief Mulhar Singh was killed while coming out of the hole in the wall of that house. We see no reason to disbelieve the evidence of chaukidar Sajjan Singh and of the other defence witnesses. The evidence of these defence witnesses strikes us as far more reasonable and intelligible than the remarkable and imaginary story put into the mouths of the prosecution witnesses. The medical evidence in our opinion does not in any way conflict with the defence version of the occurrence. The Civil Surgeon of Fyzabad nowhere deposes that the bruises on the left and right thighs of the deceased were caused by lathi blows. He merely deposes that the fracture of the skull was caused by blows from a blunt weapon like a lathi. This evidence of the Civil Surgeon of Fyzabad is entirely consistent with the story told by the appellant.

The fact that articles were not lying in a confused state inside the house of the appellants would not per se prove that no thieves had come on the night of the occurrence to that house. In fact the chaukidar Sajjan deposes that when he reached Mahabir's house that very night immediately after the occurrence he found the body of Mulhar Singh lying inside the hole and a lota and a thali and a lathi were found outside the house near the hole. This evidence clearly proves that the deceased was committing house-breaking when he was set upon by the owner of the house and his son and unfortunately killed. The mere absence of any loss of property by the appellants because their women-folk woke-up in good time and raised an alarm will not prove that no offence of burglary or house-breaking took place. The

refusal of Mahabir after he had been charged with murder to produce the thali and lots which the thieves had taken out of his house is easily intelligible. We can fully sympathize with the bitter feelings of the outraged Mahabir and his son Narpat who found Sub-Inspector Mohammad Ishaq had put the halter round their necks instead of helping them to discover the thieves who had broken into their house. Is it to be wondered at if in these circumstances they did not trouble to comply with the thanadar's request to produce the stolen property even if we are to suppose that that officer did ask them to produce the stolen utensils?

Upon a careful consideration of the entire evidence on the record and after giving the facts and circumstances of this case our best consideration we have unhesitatingly come to the conclusion that the case for the prosecution fails and that the defence version of the occurrence is satisfactorily proved.

The learned counsel for the appellants, Mr. John Jackson, who has argued this appeal with remarkable frankness and brevity, has conceded that the burden of proving that the death of Mulhar Singh brought about by the appellants was justifiable homicide lay upon his clients: S. 105, Evidence Act. Under S. 103, I. P. C., the appellants had the right, in the exercise of the right of private defence of property, of causing even the death of the offender who committed burglary or house-breaking in their house, but this right of killing of an offender who committed burglary is subject to the provisions of S. 99, I. P. C., which lays down very clearly that the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence. In the present case, accepting the version of the appellants themselves we find that when they had the thief at their mercy as he was coming out of the hole in the wall it was not necessary for either of them to beat him to death with lathi blows. They could have overpowered and secured him in a 100 different ways short of causing his death by fracture of his skull. We therefore hold that the appellants on their own showing exceeded the right of private defence of property. It may be noted here that no right of private

defence of person has been pleaded by the appellants. Upon the legal view of the appellants' conduct that we take in this case we hold that exception (2) to S. 300, I. P. C., applies to their case. The appellants had no intention of committing more harm than was necessary for the purpose of their defence, but without premeditation they in fact exceeded their right of private defence of property. They are therefore guilty of an offence under S. 304, I. P. C.

The learned counsel for the appellants invited our attention to a ruling of the Lahore High Court reported in *Ishmail v. Emperor* (1), in which it was held by a single learned Judge of that Court that the accused not knowing in the dark whether the burglar was armed or not did not exceed his right of self defence under Cl. (4), S. 103, I. P. C., by striking him three times and causing his death and that his conviction under S. 304, I. P. C., must be set aside. The facts of that case are entirely different from the facts of the present case. In the present case the appellants themselves admit that the burglar was entirely at their mercy as he was coming out of the hole made in the wall. At that time the burglar was unarmed and not in a position to attack them and they could have easily overcome him and arrested him without inflicting such injuries on his head as inevitably and immediately led to his death. He has also invited our attention to a ruling of the Allahabad High Court reported in *Emperor v. Hira* (2), in which the late Ryves, J., made the following notable pronouncement:

"If a man is entitled to protect his own life by using a lathi, it is impossible to weigh the force of the blows which he uses for that purpose, as it is said, in 'golden scales'; and to adjudicate with great nicety as to the exact amount of force which would be justified."

This observation of the learned Judge has however no applicability to the facts and circumstances of the present case. The appellants were not exercising the right of private defence of person. They were in no fear of their lives when they caused the death of the burglar. Equally inapplicable to the

(1) A.I.R. 1926 Lah. 28=91 I.C. 70=27 Cr. L.J. 83=6 Lah. 463.

(2) A.I.R. 1928 All. 194=71 I.C. 605=24 Cr. L.J. 189=45 All. 250.

facts of the present case is the ruling reported in *Baij Nath v. Emperor* (3).

In our opinion the appellants are clearly guilty of the offence of culpable homicide not amounting to murder under S. 304, I. P. C. We find ourselves unable under the proved circumstances of this case to hold that the acts of the appellants were committed in the exercise of the right of private defence of property and that the death of Mulhar Singh was justifiable homicide.

For the reasons given above we allow this appeal, set aside the conviction and sentence passed upon the appellants for an offence under S. 302, I. P. C., and acquit them of that charge, but we convict each of them of an offence under S. 304, I. P. C. It now remains for us to consider the question of punishment. The appellant Mahabir is an old man of 70 and his son Narpal is a young man of 24 years of age. They are villagers who hardly realized that in killing a thief caught "flagrante delicto" they were committing any serious offence. Taking all the facts and circumstances of the case into consideration we sentence Mahabir for an offence under S. 304, I. P. C., to undergo six months' rigorous imprisonment and Narpal for the same offence to undergo one year's rigorous imprisonment. The commencement of the sentence in each case will take effect from the date of the judgment of the learned Sessions Judge of Fyzabad.

R.M./R.K. *Order accordingly.*

(8) A.I.R. 1925 Oudh 425=85 I.C. 353=26
Cr.L.J. 513=27 O.C. 292.

1930 Cr. Cases 952 (Oudh)

RAZA AND NANAVUTTY, JJ.

Wajid and another—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 315 of 1930, Decided on 21st July 1930, from order of Sess. Judge, Rae Bareilly, D/- 24th June 1930.

(a) Evidence Act, S. 30 — Retracted confession believed to be true by Court is sufficient evidence for convicting person making it—Corroborative evidence is necessary only in case of co-accused.

A retracted confession, even without any corroborative evidence, is sufficient evidence, if the Court believes it to be true, for convicting the person who makes it. A man of sound

mind and full age who makes a statement in ordinary simple language must be bound by the language of the statement and by its ordinary plain meaning. As regards his co-accused corroborative evidence is, of course necessary : 20 All. 138; 29 All. 494; A. I. R. 1925 All. 627 and A. I. R. 1927 Oudh 17, *Rel. on.* [P 953 C 2, P 954 C 1]

(b) Evidence Act, S. 30—Retracted confession of accused standing unrebutted and corroborated sufficiently by material evidence is admissible and goes strongly against co-accused.

Retracted confession alone of an accused is not sufficient to justify a conviction—the co-accused, but when such confession stands unrebutted and there is nothing to show that the accused had any reasons for naming other persons falsely and the story fits in exactly with the facts known and is corroborated sufficiently by material evidence against the co-accused the evidence is admissible and is strong piece of evidence against the co-accused.—A.I. R. 1929 Oudh 167, *Rel. on.* [P 954 C 2]

J. N. Misra—for Appellants.

H. K. Ghosh—for the Crown.

Judgment.—Wajid Quraishi, aged forty, and his cousin, Bachcha Quraishi, aged twenty-five, of village Chaksara in the district of Partabgarh, have been convicted by the learned Sessions Judge of Rae Bareilly of an offence of murder under S. 302, I. P. C. Bachchu Quraishi, aged forty, of Kundri, has been convicted of abetment of murder under Ss. 302/109, I. P. C. They have been sentenced to death subject to confirmation by this Court. They appeal and the reference in confirmation is also before us.

Chaksara and Kundri are adjoining villages. Only a nala (ravine) intervenes between the two villages. The houses nearest to the nala are those of Wajid and Bachcha accused. Wajid is the son of Makun who was also sent up for trial, but was given the benefit of doubt and acquitted by the learned Judge. It is quite unnecessary to determine in this case whether Makun was or was not rightly acquitted by the learned Judge.

Bachchu accused is the son of Abdul Quraishi by his first wife. Abdul deserted his first wife long ago and married another woman, Mt. Nasiba by whom he has two sons, Umar Ali and Moharram. Abdul lives with his second wife and her children. Bachchu occupies a separate house which adjoins Abdul's house. He lives with his mother and his wife Mt. Jinta and his children by her. Mt. Hadisul (deceased) was one of the four children (two sons and two daughters) of Bachchu by his wife, Mt. Jinta.

The charge in this case relates to the murder of Mt. Hadisul who was of about eleven years of age. She was brutally murdered, shortly after nightfall on the night of 30th-31st January 1930. The medical evidence shows that she had received twenty-two injuries on different parts of her body and her death was due to asphyxia caused by pressure applied to the neck.

This is a case of horrible murder committed under unusual circumstances. It has been found, that Hadisul's father Bachchu himself entered into a conspiracy with Wajid and Bachcha to murder her with the nefarious object of implicating his own father, stepbrothers and stepmother.

The evidence on the record shows that the relations between Bachchu and his father Abdul were very strained. Abdul has given Bachchu only a small area of the *sir* land and has kept the rest of the zamindari for himself and his children by Mt. Nasiba. Bachchu made a report of burglary against his father Abdul and his stepbrother Umar Ali about a year ago. The case was investigated by the police, but the report was found to be utterly false. The result was that ill-feeling between Bachchu and his father and stepbrothers became more acute. [His Lordship then discussed the evidence and came to the conclusion that there had been a conspiracy between the three accused to commit the offence and proceeded]. It will be convenient now to take up the case of each accused separately. We should like to note that they pleaded not guilty in the Court of Sessions Judge but produced no evidence in defence.

1. *Bachchu*.—The confessional statements made by this man show clearly that he was concerned in the crime. He made a full and detailed confession and stuck to it in his statement before the Committing Magistrate, but retracted it in the Sessions Court. He wishes it to be believed that he had made the confession at the instance of the police who had caused him to believe that his co-accused had murdered Hadisul and that if he (Bachchu) would make a confession, he would be granted a pardon and his co-accused would be convicted on his evidence. There is nothing on the record in support of this

allegation. The police officers have denied the allegation in question. After most careful and anxious consideration we have come to the conclusion that there is nothing in the confession or in the evidence to show that the making of the confession was caused by any inducement, threat or promise. The confession is full of detail and very circumstantial and bears on it the impress of truth. The man confessed and then produced the ornaments of Mt. Hadisul tied in a piece of her sari which he himself had buried in the nala. He states now that the ornaments in question were supplied to the police by his wife and that they belonged to his younger daughter, Mt. Ahidul. This is surely untrue. The evidence given by his wife, Mt. Jinta is clear on this point. There is sufficient corroborative evidence in support of the confession. We have no hesitation in finding that the confession was genuine and the retraction false. There is no doubt that Bachchu is on inimical terms with his father and stepbrothers. He went so far as to get his own daughter, Hadisul, murdered with the object that his father, his stepmother and his stepbrother might be falsely charged with the murder of the girl. The confession being in our opinion a true confession is sufficient without any corroborative evidence even for the conviction of Bachchu. This view of the law has been taken by the Allahabad High Court and by the Chief Court on many occasions. It was held in the case of *Queen Empress v. Maiku Lal* (1) that such a confession, namely a retracted confession, was sufficient evidence, if the Court believed it to be true, for convicting the person who made it. This view was carried further in the case of *Emperor v. Kehri* (2). It is there expressly laid down that as regards the person making it, the retracted confession may even without any corroborative evidence form the basis of conviction. This view has been recently confirmed by a Full Bench of the Allahabad High Court in the case of *Ragha v. Emperor* (3). The decision in *Ragha's* case (3) has been followed by this Court

(1) [1897] 20 All. 183 = (1897) A.W.N. 224.

(2) [1907] 29 All. 434 = 5 Cr. L. J. 360 = (1907) A.W.N. 140.

(3) A. I. R. 1925 All. 627 = 89 I.C. 908 = 28 Cr. L. J. 1481 (F.B.).

in several cases in particular in the case of *Raj Bahadur Singh v. Emperor* (4). A man of sound mind and full age who makes a statement in ordinary simple language must be bound by the language of the statement and by its ordinary plain meaning. As regards his co-accused corroborative evidence is of course necessary. Thus even if there was no corroborative evidence we would feel ourselves justified in upholding the conviction of the accused Bachchu on the basis of his confession alone. His appeal therefore fails and must be dismissed.

2. *Wajid*—The evidence on record shows that this man is on inimical terms with Abdul. There has been criminal litigation between him and Abdul and Abdul had given evidence against him in the badmashi case recently. It appears that when ill-feeling between Bachchu and his father became more acute, he (*Wajid*) and Bachchu became friends of each other and made a common cause against their common enemy. Bachchu's confession though retracted is admissible in evidence against this man. There is sufficient circumstantial evidence in corroboration of the confession. This man was seen with the other accused sitting at the nala at about noon by Asad Ali P. W. 7. Rahmat, P. W. 4 had seen the girl Hadisul with this accused and others under a babul tree at the nala in the evening. This man had the mark of an injury on his left knee which had healed up on 11th February when he was examined in jail. The medical evidence shows that the injury could be due to friction against a kankar soil, and was about a fortnight old at the time he was examined by the Civil Surgeon on 11th February 1930. It appears that he had incurred the injury while committing murder on the kankar soil. The accused has not suggested any enmity with Asid Ali or Rahmat. There is no reason why they should have given false evidence against this man. We think the learned Sessions Judge was perfectly right in holding that Bachchu's confession implicating this man is true and that he was concerned in the crime. His appeal also fails and must be dismissed.

3. *Bachchu*. — Bachchu's confession

(4) A. I. B. 1927 Oudh 17=93 I. O. 108=27 Cr. L. J. 1258.

shows that this man was also concerned in the crime. He produced the ornaments of Hadisul by digging them out from his own gramfield. The evidence given by Asad Ali, P. W. 7 and Rahmat, P. W. 4 shows that this man also was seen with the other accused at the nala at noon and that the girl was with them in the evening. This man had also an injury on the knee as old as the time of the occurrence. He says that he has been falsely implicated by Bachchu as he had refused to give evidence for him, but he admits at the same time that he has no enmity with Bachchu. As pointed out in the case of *Sheoratan v. Emperor* (5) retracted confession alone of an accused is not sufficient to justify a conviction of a co-accused, but where such confession stands unrebutted and there is nothing to show that the accused had any reasons for naming other men falsely, and his story fits in exactly with the facts known and is corroborated sufficiently by material evidence against the co-accused, the evidence is admissible and is strong piece of evidence against the co-accused. We find in this case that there is sufficient circumstantial evidence in corroboration of Bachchu's confession. We think the learned Sessions Judge was perfectly right in finding that this man also was concerned in the crime. His appeal also must be dismissed.

The appellants have been rightly sentenced to death. As observed by the learned Judge the offence is so heinous, inhuman and cold-blooded that the accused amply deserve the extreme penalty of the law. The result is that we dismiss these appeals, uphold the convictions, confirm the sentences and direct that Bachchu, Wajid and Bachchu each be hanged by the neck till he be dead.

B.M./R.K. Appeals dismissed.

(5) A. I. B. 1929 Oudh 167=114 I. O. 771=90 Cr. L. J. 860.

1930 Cr. Cases 954 *

(Oudh)

PULLAN, J.

Ganga Prasad—Accused—Applicant.

v.

Emperor — Complainant — Opposite Party.

Criminal Ref. No. 25 of 1930, Decided on 19th May 1930.

Penal Code, S. 182 — False report of dacoity by A — Police did proceed on A's complaint but prosecuted some persons under S. 326 who were acquitted — Prosecution and conviction of A under S. 182 — Conviction held to be legal — Police held to be only person who could take action and not the Court.

A made a false report of dacoity. The police did not proceed on his complaint but prosecuted certain persons under S. 324. This offence also was not brought home to them and the police made a complaint against A requesting his prosecution under S. 182 for making a false report of dacoity. A was convicted.

Held: that the conviction was legal. The complaint was properly made under S. 182. The only persons who could take action in the case were the police and not the Court which not having tried any case of dacoity was not in a position of being able to say a false complaint had been made of dacoity before it: *A. I. R. 1928 Rang. 254, Dist.* [P 955 C 1, 2]

H. K. Ghose—for the Crown.

Judgment.—This is a reference made by the learned Additional Sessions Judge of Unao requesting this Court to set aside the conviction and sentence passed upon one Ganga Prasad under S. 182, I. P. C.

It appears that this man made a false report of a dacoity at a police station. The police did not proceed on his complaint of dacoity but prosecuted certain persons under S. 324, I. P. C. That offence also was not brought home to them and the police made a complaint requesting the prosecution of this man Ganga Prasad under S. 182, I. P. C., for making a false report of dacoity. He was convicted and sentenced to pay a fine of Rs. 50.

The learned Additional Sessions Judge has found difficulties where none exist. He thinks that because the matter came into Court and the Court passed an order of acquittal, no proceedings could be instituted by the police, but that a complaint should have been made by the Magistrate who passed the order of acquittal. He bases his view upon a judgment of the Rangoon High Court recently, in *Rambrose v. Emperor* (1) reported but he failed to observe that in the present case no case of dacoity was tried by the Magistrate. Indeed no action was taken on that charge. Consequently the Court was not in the position of being able to say that a false complaint had been made of dacoity before the Court. The only persons who could take action were

the police in respect of the false report of dacoity. The complaint was properly made of an offence under S. 182. The conviction is legal and there is no reason to interfere with the sentence.

Let the record be returned.

R.M./R.K.

Order accordingly.

* 1930 Cr. Cases 955

(Oudh)

PULLAN, J.

Aulad Husain—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 51 of 1930, Decided on 21st May 1930, from order of Dist. Magistrate, Gonda, D/- 22nd April 1930.

* (a) Criminal P. C., S. 437—Dictum that further inquiry after discharge is improper unless order of discharge is perverse does not apply to Magistrate acting as Court of inquiry.

The dictum that "further inquiry after discharge is improper unless the order of discharge was manifestly perverse or foolish" does not apply to a case in which the Magistrate is acting as a Court of enquiry and not a trial Court: 10 P. R. 1911 Cr. (F.B.), *Expl.*

[P 956 C 1, 2]

(b) Criminal P. C., S. 437—Order of discharge by Committing Magistrate set aside by District Magistrate and case exclusively triable by Court of Sessions committed to Sessions — High Court will not interfere unless order of District Magistrate is unjustifiable.

There is nothing in the Criminal Procedure Code which suggests that the District Magistrate should go further in case where the accused is charged by the trial Court than find that the order of discharge was improper.

But, where a District Magistrate sets aside the order of discharge passed by a Committing Magistrate and orders a case to be committed to Sessions which is exclusively triable by a Court of Sessions, the High Court will not interfere in revision unless the District Magistrate's order is, in the circumstances of the case, shown to be unjustifiable: 19 O. C. 109, *Rel. on.* [P 956 C 1, 2]

Haider Husain—for Appellant.

H. K. Ghose—for the Crown.

Judgment.—This is an application in revision of an order passed by the learned District Magistrate of Gonda under S. 437, Criminal P. C., directing the commitment to Sessions of one Aulad Husain for an offence under S. 376, I. P. C.

The applicant was put before a Magistrate of the First Class who wrote a

(1) A. I. R. 1928 Rang. 254 = 6 Rang. 578.

lengthy order of discharge. The District Magistrate considered the reasons for discharge given by that Magistrate were insufficient. In his opinion there was sufficient evidence for the case to go to Sessions.

I have been asked to consider that the District Magistrate should not have taken action in this case unless he was satisfied that the order of the Sub-Divisional Magistrate was perverse or foolish, and I have been referred to a judgment of a Full Bench of the Chief Court of the Punjab reported in *Emperor v. Kiri* (1) which was followed by the Judicial Commissioner of Oudh in the case of *Emperor v. Jagadamba Singh* (2). There is nothing in the Criminal Procedure Code which suggests that the District Magistrate should go further in a case of this nature than find that the order of discharge was improper, but it is clearly within the powers of this Court to consider whether the District Magistrate himself has or has not acted properly in the discharge of his own duties in committing the case to the Sessions. The authorities to which I have referred do not lay down any definite rule for guidance in such matters. The Full Bench of the Punjab Chief Court, after saying that generally speaking further enquiry after discharge is improper unless the order of discharge was manifestly perverse or foolish or based upon an incomplete record of evidence, go on to observe:

"We cannot say more by way of general guidance as so much depends on the particular circumstances under which an order of discharge has been given, but if Magistrates use the discretion vested in them by law they are expected to do so with common sense and with due regard to the general consideration that an accused should not be unduly harassed by further proceedings undertaken without good cause."

It cannot be said in the present case that the District Magistrate has acted contrary to common sense or that he has unnecessarily harassed the accused and I am not prepared to accept the dictum of the Chief Court of the Punjab that

"further enquiry after discharge is improper unless the order of discharge was manifestly perverse or foolish"

as applying to a case in which the Magistrate was acting only as a Court of enquiry and not a trial Court. The cases to which I have been referred are cases in which the Magistrate had power to try the case finally and two of those cases were cases taken under the preventive sections of the Criminal Procedure Code. I have been referred to one case only in which the case was exclusively triable by the Court of Sessions, and in that case the Judicial Commissioner of Oudh refused to interfere with the order of the Sessions Judge setting aside the Magistrate's order of discharge and ordering commitment to Sessions: *Harkaran Singh v. Harnam Singh* (3). In my opinion, where a District Magistrate sets aside the order of discharge passed by a Committing Magistrate and orders a case to be committed to Sessions which is exclusively triable by a Court of Session, this Court will not interfere in revision unless the District Magistrate's order is in the circumstances of the case shown to be unjustifiable.

In the present case it has been found that a young girl has been raped. She has named the accused as her assailant. The District Magistrate has in his order pointed out the nature of the defence, but he is still of opinion that the case is one in which there is sufficient evidence to justify a commitment to Sessions. I consider that the District Magistrate was acting justifiably and within his powers in making the commitment. All that I can do is to direct that the case having been committed shall be tried by the learned Sessions Judge of Gonda in person and not made over to a less experienced Judge. Subject to this direction I dismiss the application.

R.M./R.K.

Application dismissed.

(1) [1911] 10 P. R. 1911 Cr.=11 I. C. 182=19 Cr. L. J. 864 (F.B.).

(2) A. I. R. 1924 Oudh 368=81 I. C. 802=25 Cr. L. J. 1026.

(3) [1916] 19 O. C. 106=34 I. C. 835=17 Cr. L. J. 423.

1930 Cr. Cases 957 (1)

(Allahabad)

MEARS, C. J.

Ram Dulare Lal—Plaintiff.

v.

Chhanganamal and others—Defendants.

Appln. in Civil Suit No. 17 of 1929,

Decided on 19th April 1929, pending in Court of Sub-Judge, Farrukhabad.

Legal Practitioner—Lawyer in his profession has to do his duty—He cannot refuse to accept party's case though other party is lawyer if all conditions are fulfilled and no honest excuse exists: see A. I. R. 1929 All. 367.

The lawyers in their profession have got to do their duty and they cannot refuse to take up a party's case even if the other party is also a lawyer, when all the conditions are fulfilled, viz. the tender of a proper fee, the willingness to give complete instructions and the case of the character that the pleader is accustomed to take, and when no allowable, reasonable and honest excuse exists.

Nizam Uddin Ahmed Siddiqui—for Defendants.

Judgment.—This is another application in which professional misconduct is alleged generally against a local counsel at Farrukhabad, that is to say, the defendant having had a suit brought against him by a plaintiff, who is a legal practitioner, says that he could not secure the services of local counsel even for writing a petition for adjournment and had got it drawn up by a petitioner-writer and they have all refused to accept his case on one ground or the other. Apparently the valuation of the case is considerable, being Rs. 29,705-5-0. Changamal must adopt the same procedure as I have indicated before, that is to say, he should write a letter to a local vakil expressing his readiness to pay him a fee, appropriate and proper for the case. He should at the same time offer to furnish him with all the instructions necessary to defend the case and he should keep a copy of that letter. If the vakil is not willing to accept the case and makes excuses of a dubious character a copy of the letter sent by Changamal to the lawyer and the letter of the lawyer should be sent to me and I will deal with the matter.

Again, there has been made the surprising suggestion in this Court that the result of requiring lawyers to do their public duty may be that a lawyer may accept the case and will deliberately refrain from putting up a good

fight. Whether a lawyer puts up a good fight or not is a matter that can be ascertained from the record, when the case is completed. It can then be seen, if he asked proper questions and if he examined his witnesses with care and cross-examined the witness of the opposite party on material matters with discretion. If on enquiry it comes to light that a lawyer deliberately refrained from doing his duty, one step alone must be taken and that is to remove him from profession, which he has so manifestly disgraced by his conduct. In Farrukhabad, as elsewhere, lawyers have got to learn that in this profession they have got to do their duty, and if Changamal can bring to my notice a clear case of a pleader refusing to take his brief, when all the conditions are fulfilled, namely, the tender of a proper fee, the willingness to give complete instructions and the case of the character that the pleader is accustomed to take and no allowable, reasonable and honest excuse is put forward I will see that justice is done in the matter.

A copy of this order is to be sent to Changamal and to the Subordinate Judge of Farrukhabad and let all proceedings in the case be stayed until one hears with what success Changamal has met.

S.N./R.K.

Order accordingly.

1930 Cr. Cases 957 (2)

(Oudh)

MISRA, J.

Saktay Sah and others—Appellants.

v.

Mahadin and others—Respondents.

Second Appeal No. 321 of 1928, Decided on 13th February 1929, against decree of Sub-Judge, Hardoi, D/- 6th August 1928.

(a) Criminal P. C., S. 345—Determination of whether or not offence is compoundable depends on offence directly charged in complaint.

In order to determine whether a case can be considered to be compoundable or not the Court has to look to the offence with the commission of which the accused is charged in the complaint, or in any case with which the Court charges him; and, therefore, it cannot be pleaded that though the offence with which the accused is charged is an offence under S. 325, Penal Code, yet the facts in the complaint are such that the accused might well have been charged with an offence under S. 147, Penal Code, which is an offence which could not be compounded, and that, therefore,

the settlement between the prosecutor and the accused cannot be arrived at: 20 C. W. N. 946, *Rel. on.* [P 959 C 1, 2]

(b) Criminal P. C., S. 345—It is lawful to compound offence allowed by law—Such composition does not stifle prosecution and is not illegal within Contract Act, S. 23.

Where an offence with which a particular person is charged is compoundable, he is at liberty to come to a settlement with the prosecutor and the settlement so arrived at cannot be considered to be one, the consideration of which might be considered to be illegal. Where the offence charged is non-compoundable the settlement must be deemed to be invalid, but where the offence charged is compoundable the settlement cannot be deemed to be invalid, because the legislature itself allows a settlement of such case and it cannot, therefore, be said that the object of such an agreement is opposed to public policy: 8 A. L. J. 498, *Foll.*; 3 C. W. N. 5; A. I. R. 1928 Bom. 305, *Rel. on.* and 17 O. C. 213, *Ref.* [P 959 C 2, P 960 C 1]

(c) Contract Act, S. 23—Court will not assist enforcement of illegal contracts—If parties to contract are in *pari delicto* Court will not help any one of them.

A Court of law will not assist persons in enforcing the performance of an illegal contract, or assist them to recover back the property which they have given away under such an illegal contract. When the parties to a contract are themselves in *pari delicto* the Court will not help any one of them. The person in whose favour the agreement has been executed will not be allowed to enforce it, nor will the person, who has paid the money in pursuance of that agreement, be allowed to recover the sum paid thereunder. There can be no distinction in principle between the granting of a relief by way of declaration and the restoring of property given away under an illegal contract: 1 Pat. L. J. 48, *Rel. on.* [P 960 C 2]

Hyder Husain and Ghulam Husain—for Appellants.

M. Wasim—for Respondents.

Judgment.—The present appeal arises out of a suit for cancellation of two deeds and for recovery of Rs. 366 cash, brought by the plaintiffs appellants against the defendants-respondents, which has been dismissed by both the Courts below.

The facts of the case are that there were certain criminal proceedings taken by the defendants-respondents, who are father and son against the plaintiffs-appellants. The respondents had lodged a complaint under S. 325, I. P. C., against the appellants and two others. The counter-complaint under S. 323, I. P. C., was also brought by the appellants against the respondents. A mutual settlement was, however, subsequently arrived at between the parties to this case, under which the appellants agreed to execute two deeds in favour

of the respondents, under one of which they agreed to sell a plot of land to the respondents and under the other to remove a latrine from the vicinity of the respondents' house. They also agreed to pay to the respondents a sum of Rs. 366 in cash. In consequence of this settlement applications were filed by both the parties in the criminal Court to get their respective cases dismissed and consigned to records. The appellants' case under S. 323, I. P. C., was dismissed without any difficulty, but there was at first some hesitation on the part of the criminal Court to give permission to the respondents to compound the case, which they have brought against the appellants. The Courts, however, subsequently agreed to give the parties permission to compound the case and the complaint was after such permission allowed to be ultimately withdrawn, and the plaintiffs-appellants discharged of the offence. After they had been so discharged the two deeds of agreement executed by them were handed over to the respondents and the sum of Rs. 366 mentioned above was also paid. It may be mentioned that the two deeds and the money had remained in the custody of one of the pleaders of Bilgram named Babu Baldeo Prasad and had been handed over to the respondents only when the Court had granted permission and the compromise was effected as a result of which they were discharged from the criminal Court. The appellants seem to have backed out of the agreement since they refused to get the two deeds registered and the respondents had to apply against them for compulsory registration of the said two deeds, which were registered only under the orders of the District Registrar. After this was done the appellants brought the present suit for cancellation of the two deeds mentioned above and for recovery of the sum of Rs. 366, which had been paid by them to the respondents.

The main allegations on which the appellants brought their present suit were to the effect that they had been compelled to execute the two deeds and to pay the amount in cash under fraud and undue influence, that no consideration had passed to the appellants in respect of the two deeds of agreement and that they were also void on the

ground that they were executed with the object of stifling the criminal prosecution and were, therefore, void in law. The defendants-respondents contested the suit on the ground that the two deeds had been executed by the appellants out of their own free will and the money had also been paid by them willingly in order to save themselves from the consequences of the criminal proceedings which had been instituted by them against the plaintiff, that the said deeds were executed for consideration and were quite binding on the plaintiffs and that they were estopped from maintaining the present suit.

The learned Munsif of Bilgram who tried the suit came to the finding that the two deeds had been executed and the money paid by the plaintiffs-appellants without any fraud or undue influence having been exercised upon them and that they had done so out of their free will and pleasure. He, therefore, dismissed the plaintiffs' suit. On appeal the learned Subordinate Judge of Hardoi has confirmed those findings and dismissed the appeal. In second appeal it is contended before me that the two agreements and the payment in cash were transactions void in law, they being in pursuance of an agreement, the object of which was to stifle the criminal prosecution and the plaintiffs-appellants were entitled in law to obtain the declaration which they had sought for in the present suit.

In my opinion there is no force in either of these two contentions and I proceed to give my reasons for the same.

As to the contention that the transaction was void being for an illegal consideration, the argument advanced was to the effect that though the offence with which the appellants were charged was an offence under S. 325, I. P. C., yet the facts in the complaint were such that the accused might well have been charged with an offence under S. 147 of the said Code also, which was an offence, which could not be compounded, and that, therefore, the settlement arrived at being for an illegal consideration was void under S. 23, Contract Act 9 of 1872. I regret I cannot accept this contention. In order to determine whether the case could be considered to be compoundable or not

we have to look to the offence with the commission of which the appellants were charged in the complaint or in any case with which the Court charged them. In this case it is admitted that the respondents charged the appellants only with an offence under S. 325, I. P. C., and not with an offence under S. 147 of the Code. The Magistrate also did not charge them with an offence under S. 147, I. P. C. In such a case I am of opinion that it should not be held that the offence with which the appellants had been charged was one which could not be compounded even with the permission of the Court. I am supported in this view by a decision of the Calcutta High Court reported in *Mahomed Ismail v. Samad Ali* (1). The facts of that case were that the Magistrate had, after examining the complainant, summoned the accused under S. 325, I. P. C., although the allegations were made in the petition of the complaint as to an offence under S. 147 of the said Code also. An agreement was in that case entered into between the parties, and with the leave of the Court the case was compromised. It was held that it being a case under S. 325, I. P. C., it was compoundable with the leave of the Court, and the Magistrate having given permission to compound the case, the agreement as to the settlement was not opposed to public policy. Similarly in the case before me it may have been possible for the respondents to charge the appellants with an offence under S. 147, I. P. C., and also for the Magistrate to charge them with that offence, yet the appellants cannot be considered as having been charged with that offence, when the Magistrate issued summons only on S. 325, I. P. C., and gave them permission to compound for that offence. I am therefore of opinion that the object of the settlement was not to stifle the prosecution.

It has been held in a large number of cases that where an offence with which a particular person is charged is compoundable he is at liberty to come to a settlement with the prosecutor, and the settlement so arrived at cannot be considered to be one, the consideration of which might be considered to be illegal.

(1) [1916] 20 C. W. N. 946=32 I. C. 237.

In *Amir Khan v. Amir Jan* (2) it was held that where the defendant agreed to execute a kabala (lease) of certain lands in favour of the plaintiffs in consideration of the latter's abstaining from taking criminal proceedings against the former with respect to an offence which is compoundable, the contract could not be regarded as forbidden by law or as against public policy, and the same could be enforced.

The same view was held in *Chetan Das v. Hari Ram* (3). It was held in that case that the compounding of an offence which the law permits to be compounded is not opposed to public policy within the meaning of S. 23, Contract Act, 1872, and where such a compromise is entered into the consideration of the agreement could not be considered as illegal, and it was not void. The Bombay High Court has also taken the same view recently in *Ahmad Hasan v. Hasan Md.* (4). In *Lachman Das v. Narain* (5) it was pointed out that an agreement to stifle a prosecution in respect of an offence of a public nature was against public policy and illegal, and where the consideration for a compromise was to withdraw a criminal prosecution for a non-compoundable offence the compromise could not be enforced.

It therefore appears to me to be a settled rule of law that where the offence charged is non-compoundable the settlement must be deemed to be invalid, but where the offence charged is compoundable the settlement cannot be deemed to be invalid, because the legislature itself allows a settlement of such case and it cannot, therefore, be said that the object of such an agreement is opposed to public policy. I therefore hold that the settlement arrived at in this case was valid and the cash paid, and the agreements executed by the appellants in pursuance of such settlement cannot be treated in law to be void.

Apart from this it appears to me to be equally clear that even if the agreement had been held to be void the appellants themselves could not be allowed to take

advantage of their own action and to seek the assistance of the Court in obtaining a declaration which they desire to obtain in this case. The settled rule of law with regard to illegal contracts is that a Court of law will not assist persons in enforcing the performance of an illegal contract or assist them to recover back the property which they have given away under such an illegal contract. The principle is that when the parties to a contract are themselves in pari delicto the Courts will not help any one of them. The person in whose favour the agreement has been executed will not be allowed to enforce it, nor will the person who has paid the money in pursuance of that agreement be allowed to recover the sum paid thereunder. I am also of opinion that there can be no distinction in principle between the granting of a relief by way of declaration and the restoring of property given away under an illegal contract. I am supported in this view by a decision of the Patna High Court reported in *Bindeshwari Prasad v. Lekh Raj Sahu* (6). Chapman, J., observed in that case as follows:

"Where an illegal portion of an agreement has been carried into effect the whole matter is outlawed and the Court will not aid either party to retrieve his position if he is not able to show that he has been less to blame than the other. The Courts will not assist an illegal transaction: *Taylor v. Chester* (7). It is a scandal to assist a plaintiff to recover upon the ground that he has joined in breaking the law, but this will not prevent the Court from intervening to frustrate the illegal purpose before it has been effected, or, in any event, from giving relief to the innocent. In particular the Court will not in any case allow a defendant to retain the proceeds of fraud or oppression and the Court cannot refuse protection to those classes of persons whom the law seeks to protect. But in a case in which no such considerations arise, if the illegal purpose has already been executed in whole or in material part, the law leaves both parties to their fate: *Kearly v. Thomson* (8). In the present case the illegal portion of the agreement was the undertaking to withdraw from the prosecution certain charges which the law says shall not be compounded. This illegal promise had been carried into effect beyond possibility of recall. One side now seeks a relief from the act done in consideration for

(6) [1916] 1 Pat. L. J. 49=38 L. C. 711=20 C. W. N. 760.

(7) [1869] 4 Q. B. 809=10 B. & S. 237=38 L. J. Q. B. 225=21 L. T. 359.

(8) [1890] 24 Q. B. D. 742=59 L. J. Q. B. 298=54 J. P. 804=39 W. R. 614=63 L. T. 150.

(2) [1899] 3 C. W. N. 5.

(3) [1911] 8 A. L. J. 498=10 I. C. 216.

(4) A. I. R. 1928 Bom. 805=52 Bom. 693.

(5) [1914] 17 O. C. 213=25 I. C. 439=1 O. L. J. 553.

the illegal promise. All that they can say in excuse of their breach of the law is that they were persons accused in those criminal cases. But *executio juris non habet injuriam*, and in the absence of any evidence to suggest that the criminal proceedings were improper it cannot be held that there was any fraud or oppression or that the accused took a more innocent part in the illegal compromise than the complainant. The authorities make it clear that a suit for the recovery of property transferred in consideration for such an illegal promise would not have lain. There is no direct authority that the principle would also defeat a suit which is not for the recovery of property, but merely for a declaration that a sale deed executed in consideration for the illegal promise is void; and in America it has been apparently held that a declaratory suit would not be defeated (Keenener on Quasi Contracts, p. 441). But if it is the scandal involved that defeats suits of this class, then the principle is clearly applicable to a suit for a declaratory decree. For so far as the scandal is concerned there is no difference between a suit for the recovery of property and a suit for a declaration."

I am in full agreement with the observations quoted above. The same view was taken by the Calcutta High Court in *Amjadunnissa Bibi v. Rahim Buksh* (9) and by the Allahabad High Court in *Filayat Hussain v. Misran* (10). I am therefore of opinion that the appellants cannot be allowed the relief claimed for by them in the present suit and that it has been rightly dismissed by the Courts below. I therefore dismiss this appeal with costs.

V.S./R.K. *Appeal dismissed.*

(3) [1915] 42 Cal. 286=21 C. L. J. 642=28

I. C. 713=19 C. W. N. 333.

(10) A. I. R. 1923 All. 504=45 All. 396.

* 1930 Cr. Cases 961

(Madras)

Full Bench

BEASLEY, C.J., ANANTAKRISHNA AYYAR
AND CURGENVEN, JJ.

Polur Reddi — Complainant — Petitioner.

v.

Munusami Reddi and others—Accused—Respondent.

Criminal Revn. No. 833 of 1929 and Crim. Regn. Petn. No. 746 of 1929, Decided on 15th April 1930, from order of Dist. Magistrate, Vellore, D/- 25th June 1929, in C. M. P. No. 69 of 1929.

* Criminal P. C., S. 346 (2)—Scope.

The terms of sub-S. (2), S. 346 are quite clear and sufficiently wide to embrace a reference back of the case to the Magistrate who originally submitted it: A. I. R. 1923 Mad. 51, *Expl. and App.* (1890) *Rat. Un. Cr. C.* 499 and (1891) *Rat. Un. Cr. C.* 554, *Expl.* [P 962 C 2]

S. T. Srinivasa Gopalachari for A. S. *Sivakaminathan*—for Petitioner.

N. S. Mani for Public Prosecutor—for the Crown.

Beasley, C. J.—This case comes before us on a reference made by our learned brother Jackson, J. The facts of the case are that a complaint was made against eight persons on a charge of dacoity and came before the Second Class Sub-Magistrate of Tirupattur. The Sub-Magistrate thought that there was no basis for that charge, but as of the eight persons accused before him one was alleged to have been armed with a stick and a deadly weapon, he thought that the charge was one under S. 148, I. P. C., namely rioting armed with deadly weapons, and accordingly sent the case on under S. 346 (1), Criminal P. C. to the Joint First Class Magistrate for disposal. The Joint First Class Magistrate, after going into the case, differed from the view taken by the Second Class Sub-Magistrate and thought that the evidence disclosed that the accused might be guilty of some lesser offence. In dealing with the matter he pointed out that accused 5 who was the only accused stated to have been there armed with deadly weapons and having taken part in the riot was merely a spectator and took no part whatever in the rioting, and dismissed the complaint against him. He referred the case back under S. 346 (2), Criminal P. C. to the Second Class Magistrate on 30th May 1929. The complainant in the case feeling aggrieved at this order preferred a revision petition to the District Magistrate and he dismissed it as he came to the conclusion that the case had been properly dealt with by the Joint Magistrate. Against this order the complainant presented a revision petition to the High Court. Jackson, J., before whom it came, while strongly holding the view that the Joint First Class Magistrate was acting within his jurisdiction when he referred the case back to the Second Class Sub-Magistrate, felt himself very much embarrassed by a decision in *In re, Kothur Hampanna* (1). This decision he took to be one holding that the question of jurisdiction is irrevocably fixed by the lower Court when it submits the case under S. 346 (1) to

(1) A. I. R. 1923 Mad. 51=69 I. C. 438=23 Cr. L. J. 710=45 Mad. 846.

the superior Magistrate. S. 346 (2) reads as follows:

"The Magistrate to whom the case is submitted may, if so empowered, either try the case himself, or refer it to any Magistrate subordinate to him having jurisdiction, or commit the accused for trial."

If our learned brother Jackson, J., is right in his interpretation of the judgment, in *In re. Kothur Hampanna* (1) then we are clearly of the view that that case was wrongly decided. But, first of all, we have got to see whether the interpretation placed upon that judgment by our learned brother is correct or not. He has taken the last paragraph of that judgment on p. 848 to mean that the Magistrate therein referred to is the Magistrate who makes the submission under S. 346 (1) and not the Magistrate who refers the case under S. 346 (2). In that view of the judgment, that case does decide that it is the charge which the Magistrate who submits the case under S. 346 (1) thinks is the right one that the Magistrate to whom he submits the case has to deal with and that charge alone. He has got to try it and dispose of it himself or commit the accused for trial. If that is the correct understanding of that judgment then, as before stated, we are clearly of the opinion that that judgment is wrong. Sub-S. (2), S. 346, is perfectly clear, definite and wide and the Magistrate to whom the case is submitted has got to do three things. He has either got to try the case himself, or after having heard it to a certain point, refer it to any Magistrate subordinate to him who has got jurisdiction to try the case or to commit the accused for trial. We think that that is really what was meant in *In re, Kothur Hampanna* (1), and that the Magistrate therein referred to is the Magistrate making a reference under S. 346 (2). Although the section alone is referred to and no subsections are referred to, we think, having regard to the facts of the case and the observations made at p. 847, that the Magistrate to whom the case has been submitted was intended to be referred to. At p. 847 it is stated as follows:

"It may be urged that the Sub-Magistrate who sent up the case was subordinate to the Sub-Divisional Magistrate and that his order was in effect a reference to him. If so the reference should have been made explicitly and with some distinct indication of what action the Sub-Magistrate was to take, not with an

obscure injunction which could afford no real guidance."

What happened in that case was that the First Class Sub-Divisional Magistrate to whom the case had been submitted by the Sub-Magistrate made an order as follows:

"The Sub-Divisional Magistrate declines to transfer the case to the file of another Sub-Magistrate,"

and then later on:

"As regards the section under which the offence, if proved, is likely to fall, the Sub-Magistrate is requested to study the commentary carefully under S. 379, I. P. C."

In the opinion of the Bench that was not the proper way to deal with the case submitted to him. Reference was made in that case to two unreported cases, *Queen-Empress v. Fakira* (2) and *Queen-Empress v. Purushotam* (3), as authority for the position that a superior Magistrate cannot simply return a case to the subordinate Magistrate from whom it comes but must refer it to some other Magistrate or dispose of it himself. But these cases on examination do not seem to go to that length. If they do we are clearly of the opinion that those cases were wrongly decided, because the terms of sub-S. (2), S. 346, are quite clear and sufficiently wide to embrace a reference back of the case to the Magistrate who originally submitted it. In our view therefore there is no warrant for saying that the Magistrate who acted under S. 346 (2) had no jurisdiction in this case so to act. The question argued before our learned brother Jackson, J., was merely a question of jurisdiction. No argument was addressed to him upon the merits. We have heard a brief argument upon the merits of the case, and in view of the order of the Magistrate in which he states that the evidence points to the fact that accused 5, who is the only person alleged to have been present armed with deadly weapons was merely a spectator, we think that the view he took with regard to the offence possibly committed by the accused persons was correct. As soon as accused 5 was eliminated from the charge obviously no charge against the other accused persons of rioting armed with deadly weapons could possibly lie.

(2) [1890] Rat. Un. Cr. C. 499.

(3) [1891] Rat. Un. Cr. C. 554.

In view of the observations we have made the petition must be dismissed.

P.R.S./S.N. *Revision dismissed.*

1930 Cr. Cases 963

(Madras)

Full Bench

BEASLEY, C. J., AND ANANTAKRISHNA

AYYAR AND CURGENVEN, JJ.

Pilla Ramaswami—Accused—Petitioner.

v.

President, Taluk Board, Tadepalligudam—Complainant—Respondent.

Criminal Revn. No. 894 of 1929 and Criminal Revn. Petn. No. 802 of 1929, Decided on 15th April 1930, from judgment of Second Class Stationary Sub-Magistrate, Tadepalligudam, in Misc. Case No. 44 of 1928.

Madras Local Boards Act, S. 221—Magistrate to whom case is referred under S. 221 can consider whether alleged encroachment was true: 46 *Mad.* 888=91 *I. C.* 529=A. I. R. 1925 *Mad.* 1015; 108 *I. C.* 414=A. I. R. 1928 *Mad.* 495; 104 *I. C.* 910=A. I. R. 1927 *Mad.* 1113; 97 *I. C.* 947=A. I. R. 1926 *Mad.* 1068 and 97 *I. C.* 812, *Overruled.*

The Magistrate, to whom a case is referred under S. 221, for recovering a fine imposed for alleged encroachment, has power to go into the question whether the alleged encroachment was true and therefore justified the imposition of the fine: 49 *Mad.* 888=91 *I. C.* 529=A. I. R. 1925 *Mad.* 1015; 108 *I. C.* 414=A. I. R. 1928 *Mad.* 495; 104 *I. C.* 910=A. I. R. 1927 *Mad.* 1113; 97 *I. C.* 947=A. I. R. 1926 *Mad.* 1068 and 97 *I. C.* 812, *Overruled.* A. I. R. 1928 *Mad.* 882; A. I. R. 1929 *Mad.* 600; *Cr. Revn.* 1039 of 1928 and *C. R. Revn.* No. 247 of 1929, *Confirmed.* [P.965 C 1]

V. Govindarajachari—for Petitioner.

K. Kameswara Rao and N. S. Mani for Public Prosecutor—for Respondent.

Curgenven, J.—This criminal revision case comes before this Full Bench in the following circumstances. Under sub-S. (1), S. 164, Madras Local Boards Act, the Taluk Board of Tadepalligudam imposed a penalty of Rs. 50 upon the petitioner in respect of an alleged encroachment in the village of Tadepalligudam. He is said to have erected a shed without permission upon ground belonging to the Taluk Board. The petitioner did not pay the penalty and accordingly the matter was referred to the Magistrate's Court under S. 221 which provides that, in default of payment of such a sum, it may be levied under the warrant of a Magistrate. At the hearing of the case the point arose whether the Magistrate was competent to go into the question whether the al-

leged encroachment was true and therefore justified the imposition of the penalty and following certain decisions the Court came to the conclusion that it was not open to it to enquire into an issue of this character and accordingly although it recorded the evidence, it refused to give an opinion upon the matter and directed that a warrant should issue for recovery of Rs. 50 together with Rs. 10 as costs. The petitioner thereupon presented this criminal revision case, which came in the first instance before Jackson, J. That learned Judge found that there were conflicting decisions with regard to the question at issue, and, deeming it to be an important point which frequently arises, directed that the matter should be placed before the Chief Justice for orders.

The case law upon this subject has been laid before us and opens with the case of *Ramachandran Servai v. President, Union Board, Karaikudi* (1) decided by Wallace and Devadoss, JJ. They were of the opinion that, if a contention of this kind were allowed to prevail, the Magistrate would be constituted as a sort of appellate authority over the Local Board in the matter of deciding whether or not there had been in fact an encroachment; and they pointed out what inconvenience would arise from such a situation. Nor did they think that the language of S. 221 would justify such a construction. This case was followed by Devadoss, J., sitting alone, in *Rangesa Rao v. Swaminatha Ayyar* (2) and again by myself in *Narayana Ayyar v. Subramania Chetty, A. I. R.* 1927 *Mad.* 1113. So far as my recollection of that cases goes, no cases contra were cited before me and, sitting singly, I was of course bound to follow the ruling of a Bench. In the (1926) *Madras Weekly Notes* volume will be found two succeeding cases, *Union Board, Paramakudi v. Chellasami Tevar* (3) and *Syid Mustapha Saheb v. Union Board of Kaveripatnam* (4) decided by Devadoss and Waller, JJ. In the judgments delivered by Waller, J. he was of opinion that under the

(1) A. I. R. 1925 *Mad.* 1015=91 *I. C.* 529=27 *Cr. L. J.* 97=49 *Mad.* 888.

(2) A. I. R. 1928 *Mad.* 495=108 *I. C.* 414=29 *Cr. L. J.* 389.

(3) A. I. R. 1926 *Mad.* 1068=97 *I. C.* 947=27 *Cr. L. J.* 1187=(1926) *M. W. N.* 676.

(4) [1926] 97 *I. C.* 812=27 *Cr. L. J.* 1190=(1926) *M. W. N.* 678.

parallel procedure by which a prosecution is instituted for breach of the law regarding encroachments and which is provided for in S. 164 (2) and 207 of the Act, it was open to an accused person to raise this question of whether the alleged encroachment was indeed an encroachment or not. But he was of opinion also that anomalous though it might be when the case came before the Court under S. 221 the decision in *Ramachandran Servai v. President, Union Board, Karaikudi* (1), was right and should be followed.

The first Bench which seems to have taken a contrary view was in *Emperor v. Gopayya* (5), where Phillips and Madhavan Nair, JJ. had to deal with circumstances which gave rise to proceedings under S. 221, the petitioner in that case having erected a pandal without the permission of the Union Board. The decision proceeded substantially upon other grounds but both the learned Judges, while acknowledging that this point did not really have to be decided, expressed their inability to follow *Ramachandran Servai v. President, Union Board, Karaikudi* (1). Phillips, J. observes with reference to the alleged inconvenience mentioned by Wallace and Devadoss JJ. in that decision :

"The anomaly pointed out by Wallace, J. is that such a view would amount to the Magistrate being set up as a final Judge over the Local Board. When, however, it is remembered that the Board has applied to the Magistrate for the recovery of the dues, it is not open to the Magistrate to decide summarily and recover the amount without enquiry; and he must be satisfied before he issues the order that such order is correct. If the offender had been prosecuted under S. 219 he would be able to plead that no offence had been committed by him and therefore on the facts of this case it is difficult to hold that he must be precluded from such a defence because a different form of procedure has been taken against him."

That in other words, of course, is the anomaly detected by Waller J. in *Syid Mustafa Saheb v. Union Board, Kaveripattam* (4). A similar case came before Waller and Pandalai, JJ. in *In re, Rahim Sahib*, (6) and there, after referring to all the previous decisions, the conclusion was come to that *Ramachandran Servai v. President, Union Board, Karaikudi* (1) had been wrongly decided

and the view was expressed that a Magistrate should go into the question of the merits of the Board's action before enforcing the payment of the penalty. The same point has been decided in the same sense by Waller and Anantakrishna Ayyar, JJ., in *Criminal Revision Case No. 1089 of 1928*. As I have already said it has not been disputed before us that, where a prosecution has been instituted for failure to comply with the terms of a notice, it is competent to the Court in disposing of the case under S. 207 to undertake an enquiry of this character. This has been recently decided by a Bench composed of the learned Chief Justice and Cornish, JJ., in a case so far unreported: *Criminal Revision Case No. 247 of 1929*.

It appears then that the recent trend of authority has been distinctly in the direction of holding that the nature of an alleged encroachment may be investigated. Mr. Mani, however, for the Crown has asked us to hold on the language of the Act itself that this view of the matter is incorrect. Under S. 164 (1) the land which is occupied must be vested in or belong to a Local Board. It is only then that the occupant shall be bound to pay such sum as may be demanded of him by the local authority by way of penalty and, "such sum," the section goes on, "may be recovered in the manner hereinafter provided." This seems clearly to mean that the recovery of the sum must be contingent upon satisfaction of the conditions which the section lays down, namely that the land must be vested in or belong to a Local Board and accordingly it would be illegal for the Board to levy a penalty in respect of a so-called encroachment upon any land which does not satisfy that condition. Whether or not, however, it is open to the Court which has to enforce this order under S. 221 to enquire into whether the land was so vested or not must of course depend upon the terms of that section. It may be conceded that they are not very clear. The last sentence of sub-S. (1) provides that :

"the amount of apportionment of any such sum shall in case of dispute be ascertained by such Magistrate."

It is possible to give a narrow and also a broad meaning to that direction. But we think that it would be very rea-

(5) A. I. R. 1928 Mad. 682=110 I. C. 223=29 Cr. L. J. 681=51 Mad. 866.

(6) A. I. R. 1929 Mad. 600=1929 Cr. C. 56=118 I. C. 278=30 Cr. L. J. 911=52 Mad. 714.

sonable to give it the construction which has been adopted by the learned Judges who decided *Emperor v. Gopayya* (5), namely that where the Court has power to decide upon the amount or the apportionment of the sum :

"It is difficult to understand why it should not be open to it to decide that the amount is nil."

It seems undesirable to go into the relative advantages and disadvantages of the two constructions. In the one case it has been suggested that the Magistrate would be converted into a civil Court if he had to go into the difficult questions of title upon which many of those encroachment cases are founded. On the other hand there is the disadvantage that under S. 164 a Local Board may, perhaps without due enquiry, impose and demand a penalty in respect of an alleged encroachment and that, if the power of the Magistrate to enquire into the truth of the prosecution allegations is withheld, the party has no remedy except that of a slow and troublesome civil suit. The clear preponderance of opinion is in favour of the view that the Magistrate has such a power and we are of the opinion that it is the correct view. In these circumstances, we set aside the order of the trial Court and remand the case for a finding on the evidence whether the alleged encroachment is true, and for disposal, accordingly. Meanwhile the fine and costs paid, if any, will be refunded.

P.R.S./S.N.

Case remanded.

1930 Cr. Cases 965 (1)

(Lahore)

ADDISON, J.

Baisakhi Ram and others—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 618 of 1929, Decided on 25th October 1929, against order of Mag., First Class, Lahore, D/- 12th October 1928.

Criminal P. C., S. 133—S. 133 is intended for unlawful obstruction lately built on public place.

Section 133 is not intended for long standing obstructions but for an unlawful obstruction lately built in a public place : *A. I. R. 1926 All. 157 (1), Foll.* [P 965 C 2]

Shambu Lal Puri—for Petitioners.

Order.—The Additional Sessions Judge of Lahore has referred three cases Cr. Rev. 618-29, Cr. Rev. 619-29, Cr. Rev. 900-29, of orders passed under 1930 Cr. C. 121 b/4

S. 133, Criminal P. C., by a First Class Magistrate to this Court in order that the orders should be quashed.

What happened was that the Municipal Committee gave sanction to three persons to construct tharas in front of their doors on the Lytton Road. These tharas were constructed on land between the houses and a drain running alongside the road but at some distance from the houses. Permission was given in the case of two persons in the year 1911 and in the case of the third in the year 1921. The Public Works Department of Government are the complainants. It has been held established that the whole road right upto the houses and beyond the drain belongs to Government. Apparently up to 1924 or 1925 the road was shown in possession of the Municipal Committee though undoubtedly the true owners are Government. It is obvious, however, that the Municipality bona fide thought that it could give permission to build on the land as it seems to have considered that the land belonged to itself.

In a case reported in *A. I. R. 1926 All. 157 (1)* an order similar to the present orders was set aside. It was pointed out that the alleged obstruction was at least 15 or 16 years old, and it was held that S. 133, Criminal P. C., was not intended to be employed to avoid the necessity of filing a civil suit in regard to a construction which had been in existence for some 15 years. My view is the same as that taken by Daniels, J. S. 133, Criminal P. C., is not intended for long standing obstructions but for an unlawful obstruction lately built in a public place.

I therefore accept all three petitions, and set aside the three orders of the Magistrate First Class ordering the tharas to be demolished.

V.S./R.K.

Order set aside.

1930 Cr. Cases 965 (2)

(Oudh)

RAZA AND PULLAN, JJ.

Emperor

v.

Bhagwandin—Accused—Opposite Party.

Criminal Revn. Appln. No. 63 of 1930, Decided on 11th July 1930, from order of Sess. Judge, Fyzabad, D/- 22nd March 1930.

Criminal Trial—Court's duty—Mere fact that accused is young does not justify not passing of death sentence—Persons understanding nature of act are liable to extreme penalty of law—Penal Code, S. 302.

There is no law which justifies a Court in not passing a sentence of death on any person merely because he is young. All persons who can understand the nature of their act are liable to the extreme penalty of law. Youth may be a circumstance to be taken into consideration when the accused person is not fully able to understand the nature of his act or has been influenced by older persons. The consideration that the accused may reform should be excluded in all questions where a capital sentence can be inflicted. It is not for legislature to reform murderers. [P 966 O 1, 2]

H. K. Ghose—for the Crown.

M. H. Kidwai—for Accused.

Judgment.—This is an application filed on behalf of the Local Government for revision of the sentence of transportation for life passed by the learned Sessions Judge of Fyzabad on one Bhagwandin Lonia. The accused was found guilty of the offence of murdering a small boy of six for his ornaments. We have heard counsel on behalf of the accused as to whether the conviction is or is not justified. In our opinion the case was clearly proved. Not only was there ample evidence that the accused committed the crime, but there is on the record a long and detailed confession made by him to the Magistrate after he had been given ample time for reflection. We are satisfied that the conviction was a proper conviction. In such cases it is the duty of the Judge to give reasons for not inflicting the death penalty under S. 367, Cl. 5, Criminal P. C. In the present case the Judge has given the following reasons: (1) That the accused is a young lad of about 18. (2) That he may still reform. (3) That the murder was committed without premeditation.

As to the third finding we do not consider that it is justified by the evidence. The accused decoyed this little boy into a sugarcane field, gave him sugarcane to eat, removed his ornaments and when he cried and said that he would tell his parents, he strangled him. This does not in our opinion bespeak an unpremeditated crime. As to the age of the accused he is said to have been either 18 or 19 years of age. He is an adult and has reached years of discretion. There is no law which justifies a Court in not passing a sentence of death on any person merely because he is young. All

persons who can understand the nature of their act are liable to the extreme penalty of the law. Youth may be a circumstance to be taken into consideration in offences where the accused person is not fully able to understand the nature of his act, or has been influenced by older persons. But this is a case in which a youth has deliberately murdered a small boy for motives of greed and there is no suggestion that he was prompted to the crime, by any motive except his own base nature. There remains the second consideration, and this is one which should be excluded entirely in all questions where a capital sentence can be inflicted. It is not for the legislature to reform murderers. The sentence of transportation for life is imposed in cases where there are in the opinion of the Court some extenuating circumstances, and it is not necessary in the interests of the public at large that the sentence of death, which is primarily a deterrent sentence, should be inflicted. There is no question of the reform of criminals who are sentenced to transportation for life. In our opinion this was a brutal murder. We do not consider that the accused was so young that he did not understand the full nature of the act. He rendered himself liable to the full penalty prescribed by the law and we can find no extenuating circumstances. We, therefore, allow this application and impose the sentence of death on Bhagwandin Lonia. The order of the Court is that he be hanged by the neck till he be dead.

R.M./R.K.

Order accordingly.

1930 Cr. Cases 966

(Lahore)

DALIP SINGH, J.

Sita Ram—Plaintiff—Appellant.

v.

Ram Lal and another—Defendants—Respondents.

Second Appeal No. 189 of 1929, Decided on 3rd April 1929.

Legal Practitioner—Counsel intending to appear as witness should not conduct case.

It is improper for a counsel who is intending to appear as a witness for a party to conduct the case on his behalf. [P 967 O 1]

Ram Lal Anand—for Appellant.

Shamair Chand—for Respondents.

Judgment.—The only point that arises for decision in this appeal is whe-

ther certain evidence should be allowed to be led on behalf of the plaintiff whose case has been dismissed in both the Courts below, and rightly so on the record as it stands. As regards the refusal of the Courts to admit further evidence, the facts are that the plaintiff on 9th January 1925, applied for sending for a municipal file which was duly sent for and kept along with the Court's record. Later, a clerk was summoned with the same file. The clerk appeared on 27th October 1925, naturally without the file which was already in Court and the clerk stated that he could not trace it in the Municipal Office. Nobody seems to have remembered that the file had been previously sent for. The plaintiff then proceeded on the assumption that the file was not traceable and closed his case. The case was postponed on account of the plaintiff going on active service. On 16th March, after the plaintiff had closed his case on 14th March 1928, an application was put in on behalf of the plaintiff to summon two new witnesses, Ghulam Mohammad Mistri and Lala Lal Chand, to prove the municipal file which had been discovered on that very day by plaintiff's counsel when he was inspecting the record for the purpose of argument, the date for which was fixed on the 19th. I am informed by counsel for the appellant before me that Ghulam Mohammad Mistri was to prove a plan which had been prepared by him and which was on the said municipal file and Lala Lal Chand, Pleader, who had been one of the plaintiff's counsel in the case was to prove the report made by Lala Lal Chand as Municipal Commissioner with reference to this very house at the time when the said house was rebuilt.

Counsel for the appellant did not contest before me that it was improper for Lala Lal Chand, who evidently intended all along to appear as a witness for the plaintiff, to have conducted the case on his behalf and it seems to me that it would be improper for this Court to sanction any such procedure. Apart from this two Courts have considered whether the prayer of the plaintiff should be granted or not. It is obvious that it was the neglect of plaintiff's counsel which caused the initial error. Further I agree generally with the learned District Judge's observations as to

the effect of the admissions of the plaintiff and the plaintiff's mukhtar, who is plaintiff's own father, that the easement they claimed had been enjoyed by the permission of the defendant's counsel, for the appellant contends that the admission could not be fatal to the case. No doubt this is so but repeated admissions would certainly throw a very heavy onus on the plaintiff which, in my opinion, would not be discharged by the evidence which at the time was *ex parte*.

I, therefore, see no force in the present appeal and I dismiss it with costs.

P.R./R.K.

Appeal dismissed.

1930 Cr. Cases 967

(Allahabad)

SULAIMAN AND NIAMATULLAH, JJ.

Kapoor Chand Jain—Applicant.

v.

Emperor—Opposite Party.

Civil Revn. No. 37 of 1929, Decided on 25th April 1930, against order of Collector, Agra, D/- 15th October 1928.

(a) High Courts Act, S. 15—Revision lies from order including person in list of touts—Legal Practitioners Act, S. 36.

High Court can entertain in exercise of general powers of superintendence an application in revision from an order of District Magistrate including the name of a person in a list of touts under S. 86, Legal Practitioners Act: 21 All. 181 and A. I. R. 1928 All. 384, *Rel. on.* [P 968 C 1]

(b) Legal Practitioners Amended Act (15 of 1926), S. 2 (A)—Enquiry entrusted to Subordinate Court—Superior Court cannot include name of person in list of touts contrary to recommendation.

If the enquiry is entrusted to a subordinate Court it is the subordinate Court which must be satisfied that the person is proved to be a tout. If that authority is not satisfied and does not send up his name, the superior authority which itself made no enquiries cannot include the name of a person who has not been so recommended. [P 968 C 2]

Baleshari Prasad—for Applicant.

U. S. Bajpai—for the Crown.

Sulaiman, J.—This is an application in revision from an order of the District Magistrate and Collector of Agra including the name of Kapoor Chand in a list of touts under S. 86, Legal Practitioners Act, framed and published by him. A preliminary objection is taken that no revision lies. We think that this question is now concluded by the opinion expressed in *Kashi Nath v.*

Emperor (1), where following an earlier case in the matter of the petition of *Madho Ram* (2), it was remarked that this Court could interfere in the exercise of the general powers of superintendence conferred upon it by S. 15, High Courts Act, 1871 and S. 107, Government of India Act. We may point out that although this objection was not raised, another Bench also did entertain the application in *Ghafoor Khan v. Emperor* (3).

On the merits we find that the order of the District Magistrate and Collector cannot be supported. Instead of making an enquiry into the complaint himself he thought it fit to entrust the enquiry to the Joint Magistrate under him. The Joint Magistrate took evidence and drew a report in which, so far as Kapoor Chand was concerned, his opinion was that there was a possibility that this man's name had been included in the list on account of party intrigues against him owing to his association with the police. The Joint Magistrate noted that a pleader supported another witness who said that Kapoor Chand was a man of respectable status. The actual recommendation was in the following words:

"At any rate the case against this man is doubtful, of which he should be given the benefit."

This report bears the date 12th October 1928. On 15th October the District Magistrate and Collector passed the order which is the subject of revision. He started by saying: "I accept the report" and then went on to declare that all the persons including Kapoor Chand were declared touts and remarked:

"All these persons were given an opportunity to explain their activities in and about Court and all failed."

Although the report of the Joint Magistrate was in favour of Kapoor Chand, the District Magistrate did not give him any opportunity to appear and to be allowed to be heard, it is not correct to say that he had failed to explain his activities because the Joint Magistrate, who enquired into his case did not feel satisfied that the case had been made out against him without any reasonable doubt. It is also extraordi-

nary that although the learned District Magistrate and Collector said that he accepted the report he actually differed from the recommendation of the Joint Magistrate so far as Kapoor Chand was concerned. Apart from these irregularities we think that the District Magistrate has acted illegally in declaring Kapoor Chand a tout.

Under S. 2 (A), Legal Practitioners Amended Act (Act 15 of 1926), if the District Magistrate sends the names of persons suspected to be touts to a Subordinate Court and that Court holds an enquiry and reports to the authority which has ordered the enquiry the name of such person who has been "proved to the satisfaction of the Subordinate Court to be a tout" that authority may include the name of such person in the list of touts. It is therefore quite clear that if the enquiry is entrusted to a subordinate Court it is the subordinate Court which must be satisfied that the person is proved to be a tout. If that authority is not satisfied and does not send up his name, the superior authority which itself made no enquiries cannot include the name of a person who has not been so recommended. The District Magistrate did not make any additional enquiry himself, but merely acted on the report submitted to him. We think that he acted illegally in going contrary to the report.

We have already pointed out that no opportunity was given by the District Magistrate and Collector to Kapoor Chand to appear and show cause, particularly when the report of the Joint Magistrate was in his favour. This was in contravention of the proviso to that section. We accordingly allow this revision and set aside the order of the District Magistrate and Collector dated 15th October 1928 so far as it concerns Kapoor Chand and direct that his name be not included in the list of touts. We direct that the parties should bear their own costs of this revision.

P.N./R.K.

Revision allowed.

(1) A. I. R. 1924 All. 69=79 I. C. 693=45 All. 676.

(2) [1899] 21 All. 121=(1899) A.W.N. 15.

(3) A.I.R. 1928 All. 824.

1930 Cr. Cases 969

(Calcutta)

RANKIN, C. J. AND C. C. GHOSE, J.

Emperor

v.

Kutub Bux—Accused.

Jury Ref. No. 11 of 1929, Decided on 2nd May 1929, made by Sess. Judge, Rajshahi and Malda.

(a) Evidence Act, S. 24—Co-villager exercising no influence or authority is not "person in authority."

It would be doing violence to the terms of S. 24, to hold that a co-villager who does not exercise any influence of authority in the village is a person in authority, although the accused might have thought him to be such a person: *A. I. R. 1923 Cal. 458; 11 C. W. N. 904 and A. I. R. 1922 Lah. 268, Rel. on.*

[P 971 C 1]

(b) Evidence Act, S. 24—Prisoner may be convicted on his own confession without any corroborative evidence and even when confession is retracted he may be convicted if jury believe that confession contains true account of prisoner's connexion with crime.

It is a rule of practice not to rely on a retracted confession unless it is corroborated by some evidence to show that the confession is true. As a matter of law it cannot be laid down that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence, and a prisoner may be convicted on his own confession without any corroborative evidence and even when a confession has been retracted, if the jury believe that the confession contains a true account of the prisoner's connexion with the crime.

[P 971 C 1]

Khundkar—for the Crown.

Mrityunjay Chattopadhyay and Sukumar Hazra—for Accused.

C. C. Ghose, J.—This is a reference by the learned Sessions Judge of Rajshahi and Malda under S. 307, Criminal P. O., arising out of a case, in which the accused Bandhu and Kutub were charged with having committed an offence punishable under S. 302, I. P. O. The jury brought in a unanimous verdict of not guilty against both the accused. The learned Judge disagreed with the verdict of the jury and, being of opinion that, in the ends of justice, it was necessary that the entire case should be laid before this Court, has made this present reference.

The case for the prosecution, shortly stated, is as follows: On 1st January 1928, which was a Sunday, the deceased Paltu left his home, after taking his meals in the evening, to look after his kalai in a field, which was at a little distance off to the west of his house.

1930 Cr. C/122

There was a hut in the kalai field. It appears that three persons, named Chhota Uniad, Makbul and Kutub, went later in the evening to the house of Paltu and made enquiries about him. Salikhan Bewa, the mother, told them that he had gone to the field. They called Bandhu, brother of the deceased Paltu, and persuaded him to accompany them. The next morning, Bandhu returned home alone. The mother, Salikhan Bewa, asked him what had happened to Paltu. Bandhu replied that Paltu had gone to Panchananpur. Paltu did not however return on the next day, namely Tuesday, and Salikhan Bewa, feeling worried went to two co-villagers, Paigambar and Hamid. She told them that Paltu had been absent since Sunday night. Paigambar thereupon questioned Bandhu and the latter promised to go and enquire at Panchananpur. As a matter of fact, Bandhu did not go to Panchananpur. In the evening, at about 10 p. m., Hamid, on his return home from Paigambar's house, heard voices in the adjacent house. He heard Bandhu and Chhota Uniad talking. Chhota Uniad was saying that "the dead body must be removed or else there will be great trouble." Hamid overheard this and went over at once to Paigambar's house and told him what he had heard. Barha Uniad was then present at Paigambar's house and the three went together to Chota Uniad's house. They saw Bandhu come out and Paigambar caught him and brought him to his house. Bandhu asked Paigambar to save him. Paigambar promised to do so; Bandhu said that he, Makbul, Chhota Uniad and Kutub had killed Paltu and had kept his body concealed in the Kalindri river.

A number of villagers were then called and, in the presence of them all, Bandhu repeated what he had already said to Paigambar. Kutub, who is a servant of Paigambar, was present at the time at the house of Paigambar and was immediately arrested by the villagers. The chaukidar was informed and both the accused were kept under the custody of the chaukidar during the night. Next morning, Bandhu showed the villagers the spot where the dead body had been concealed. The barley field, where Paltu had been killed, was pointed out by Bandhu. The villagers

went to the barley field mentioned by Bandhu and found that the barley plants were damaged, that there were marks of struggle and also marks of blood on the ground. Information was then lodged at the thana; investigation followed and, after the necessary enquiries, Bandhu and Kutub were committed to take their trial in the Sessions Court on a charge of murder. Makhul and Chhota Unaid could not be traced and it is said that they are still absconding.

We have been taken through the entire record by the learned Deputy Legal Remembrancer and by Mr. Chatterji and it would appear that the evidence of Paigambar, Hamid, Hazrat, Gahar, Aujal and Jagir, if believed, would tend to show that Bandhu made a confession before them on the night of Tuesday, implicating himself and Kutub and two other persons. It is not necessary to go through the evidence in detail of these witnesses; it will be sufficient if a few extracts from the evidence of Paigambar are set out herein. Paigambar stated as follows:

"At about 9 or 10 p. m., Hamid and other persons left for home. I was about to go to my inner apartments, when Barha Unaid came. We had talk about missing Paltu. Soon after this, Hamid returned. I asked him why he returned. Hamid told me that he sat down to pass water on the outer yard, when he heard Chhota Unaid speaking to Bandhu 'the dead body will have to be removed, otherwise there will be great danger.'"

"Then I, Barha Unaid and Hamid went to the house of Chhota Unaid. Just when we arrived at the house of Chhota Unaid, Bandhu was coming out of Chhota Unaid's house. I at once caught hold of Bandhu and brought him to my house. At my house, I questioned, as to what he was talking to Chhota Unaid, and why he did not go to Panchananpur to search for Paltu. At first he kept quiet. I then asked him to tell the truth and that I would help him in saving him. He fell into my feet and stated that he, Chhota Unaid, Makhul and Kutub—these four persons—had killed Paltu.

"When Bandhu made this statement, Barha Unaid and Bandhu were also present. Barha Unaid then cried out very loudly."

"Barha Unaid is cousin of Paltu. Barha Unaid is dead. On hearing Barha Unaid's cry Nasiruddin, brother of Barha Unaid, came. I, sent Nasiruddin to call Hasrath Mandal, Gahar Ali, Mir Waresali, Asgar Mandal and others. They all came. I then made over Bandhu to Hasrath, as he is the pradhan of the village and asked him to question Bandhu about Paltu. Bandhu questioned Bandhu about Paltu. Bandhu stated to him also that he, Kutub, Makhul and Chhota Unaid killed Paltu."

"Hasrath asked Bandhu, as to wherefrom he was called away. He stated that he, Chhota Unaid and Makhul were lying in wait at the jala 'low land' to the west of Sangu's mango garden; and Kutub went and called Paltu from his kuria (hut). After Paltu came, Chhota Unaid and Kutub knocked him down and sat on his chest, Bandhu caught hold of his legs and Makhul cut his throat with a knife. Hasrath then asked him, 'Where have you kept the dead body?' He replied, 'The dead body has been concealed in the Patia jungle in the Hilsamari dhab.'"

"Hilsamari is about three miles from our village. We did not believe that the dead body was carried so far. We then pressed Bandhu to tell the truth about it. Then Bandhu said: 'The dead body has been kept under water in the Kailindri river near the Usir. The body has been tied to a post.'"

The evidence of the other witnesses is, as indicated above, on the same lines, and there can be no doubt whatsoever that Bandhu did make a confession before these villagers on Tuesday night. That the confession was of a voluntary character and was true, there cannot be much doubt. The learned Sessions Judge points out in his charge to the jury and, in his letter of reference, that the confession of Bandhu has been amply corroborated in various material particulars. On this point, I accept the statement of facts, as set out by the learned Sessions Judge, and will not, therefore, repeat the same here. It has, however, been strenuously argued before us that the confession of Bandhu is inadmissible in evidence, having regard to the provisions of S. 24, Evidence Act. It is said that Paigambar was a person in authority within the meaning of S. 24 and that he held out an inducement to Bandhu before he made the confession and that such inducement was sufficient to give Bandhu grounds which would appear to him reasonable for supposing that, by making the confession, he was going to gain an advantage or avoid evil. Therefore, the real point for determination is whether Paigambar was a "person in authority." The mere fact that the accused Bandhu thought that Paigambar was a person in authority is clearly not sufficient: *Emperor v. Ganesh Chandra Golder* (1). It has no doubt been held from time to time that too restricted a meaning should not be given to the expression, but the test has always been: Had the person authority to interfere

* (1) A. I. R. 1923 Cal. 458=74 I. C. 264=24 Cr. L. J. 760=50 Cal. 127.

with the matter? and any concern or interest in it would appear to be held sufficient to give him that authority: see for an illustrative case *Regina v. Warringham* (2). Now, Paigambar was not a panchayat as in *Emperor v. Jasha Rewa* (3), nor a lambardar as in *Mahammad Yur v. Emperor* (4), nor a pradhan or village matbar. It does not appear from the evidence on record that Paigambar was a person who exercised any influence or authority in the village. In other words, the evidence does not show that he can be described as being a person whose word was accepted by the villagers. In these circumstances, in my opinion, it would be doing violence to the terms of S. 24, Evidence Act, if I were to hold that Paigambar was a person in authority within the meaning of that section. I am, therefore, of opinion that S. 24, Evidence Act, has no application and that the confession of Bandhu was admissible in evidence.

I am not unmindful of the fact that the confession was retracted. It is a rule of practice not to rely on a retracted confession unless it is corroborated by some evidence to show that the confession is true. As a matter of law it cannot be laid down that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence; and a prisoner may be convicted, on his own confession, without any corroborative evidence and even when a confession has been retracted, if the jury believe that the confession contains a true account of the prisoner's connexion with the crime. As referred to above, the confession, in this case, has been corroborated by reliable evidence to a material extent and in material particulars. Therefore, in my opinion, so far as Bandhu is concerned, the evidence on record is such that the conclusion may safely be drawn therefrom that Bandhu was guilty of murder.*

I have not gone into the question of motive. The motive alleged, in this case, is that Paltu objected to the marriage of Bandhu with the daughter of one Guruji. There is some evidence on

this point, but, after all, the guilt or otherwise of Bandhu must be determined upon the circumstances related by the witnesses.

The case against Kutub stands on a different footing. The main evidence against him is the retracted confession of the co-accused. The learned Sessions Judge is of opinion that the confession of Bandhu, so far as Kutub is concerned is also true. It is said that the confession of Bandhu, as against Kutub, derives corroboration from the fact that blood-stains were found on the vest that he was wearing and that several injuries were found on his right hand, namely, three scratch marks, one cut and one abrasion. On behalf of Kutub, it was sought to be suggested that the injuries referred to above were caused by a fall with a tin canister. No doubt, the Imperial Serologist is of opinion that the blood that was detected in the stains on the vest was human blood, but it is by no means clear, on the evidence on record, that the vest in question had not been stained with blood due to the fact that Kutub had several injuries on his person. At any rate, after examining the entire record, I am unable to say that the case against Kutub is of such a clear character that I have no other alternative but to come to a conclusion adverse to him. In my view Kutub should be given the benefit of the doubt and forthwith discharged.

The result is that I find Bandhu guilty under S. 302, I. P. C. I have examined the record carefully to find out if there are any circumstances present, which would justify me in inflicting the lesser penalty indicated in S. 302. Bandhu is aged 18 or 19: see p. 44 of the paper book. It is clear from the record that Paltu objected and strenuously objected to his marrying the daughter of Guruji. This is spoken to by several witnesses. It is, therefore, possible that he was led to commit the crime in question, because of the opposition of Paltu to his marriage. In these circumstances, I think the ends of justice will be sufficiently met if, instead of passing the extreme penalty of the law on Bandhu, I direct that he do undergo transportation for life. I order accordingly.

Rankin, C. J.—I agree.

S.N./R.K. Order accordingly.

(2) [1851] 2 Den. C. O. 447n.

(3) [1907] 11 C. W. N. 904=6 Cr. L. J. 154.

(4) A. I. R. 1922 Lah. 263=81 I. C. 555=25 Cr. L. J. 939.

1930 Cr. Cases 972

(Calcutta)

CUMING, J.

Kalipada Das Karmarkar—Accused—
Petitioner.

v.

Sashi Bhusan Majhi—Complainant—
Opposite Party.Criminal Revn. No. 184 of 1930, De-
cided on 25th March 1930.Evidence Act, S. 35—Entry in death re-
gister may be rejected when used to prove or
disprove death on particular day, if register
is prepared in casual way.If the fact of the death of a person on a parti-
cular day is sought to be proved or disproved
by the aid of a death register, it is open to
the Court to place no reliance on it, if it comes
to the conclusion that, that register was pre-
pared in a somewhat casual way. [P 972 C 2]*Debabrata Mukherji and Mrityunjoy
Chatterji*—for Petitioner.*Jnan Chandra Roy*—for Opposite
Party.

Judgment.—In the case out of
which this Rule has arisen the peti-
tioner has been convicted of theft and
also of being a member of an unlawful
assembly. The case for the prosecution
was that the complainant was in pos-
session of a certain piece of land and
that the present petitioner with a large
number of persons trespassed upon the
complainant's land and dug up potatoes
which he had grown on the land. The
defence was that it was the petitioner
who owned the land and who had grown
the potatoes and removed them. Both
Courts below have found that it was
the complainant who was in possession
and had grown the potatoes and hence
the petitioner was convicted and fined.

The first ground on which the Rule
has been granted is that the judgment
of the Court of appeal below does not
indicate the defence evidence in the
case and contains no independent dis-
cussion of the same. It is perfectly
clear from a perusal of the judgment
what the defence evidence was, namely
the testimony of certain persons who
stated that they saw the petitioner
cultivating the land and growing pota-
toes. The learned Court of appeal
below has discussed this evidence and
has come to the conclusion that he
prefers on this question of possession the
evidence of the complainant's witness.
Anyone familiar with cases of this
nature realizes that the evidence which
was given in this case was of persons

who said that they saw the complainant
or they saw the accused person culti-
vating the land and growing potatoes.
There is no substance whatever in this
ground. The next ground on which
the Rule has been granted is that on
the findings of the Court of appeal
below the conviction of the petitioner
under S. 379, I. P. C., is not sustainable.
It is somewhat difficult to realize how
the petitioner has obtained the Rule on
this ground for is it perfectly clear
from a perusal of the judgment of the
lower appellate Court that that Court
finds that it was the complainant who
was in possession of the land and who
grew the potatoes and the petitioner
removed the potatoes from the land.
Clearly therefore on the facts found the
conviction of the petitioner under S.
379 was right.

The last ground on which the Rule
has been obtained is that the Court of
appeal below ought to have held that
the complainant's vendor had no right
to convey the property to him on the
day he did in view of the only evidence
in the case, viz. the death register
which the said Court of appeal below
was not justified in rejecting on mere
suspicion. The question before the
Court apparently was whether a cer-
tain person was or was not dead on a
certain date when the sale deed was
executed. The lower appellate Court
came to the conclusion that he could
not place any reliance on the death
register which would apparently show
that on the date when this sale deed
was executed the father of the person
executing the deed was not dead. It
was obviously open to the Court to
reject or accept any piece of evidence.
In the present case the Magistrate was
not prepared to place any reliance on
the death register in view of the some-
what casual way in which the death
register was prepared and it is impos-
sible to say that the lower appellate
Court was wrong in so dealing with
the death register. There is no sub-
stance in this ground either. The Rule
is therefore discharged.

V.B./R.K.

Rule discharged.

1930 Cr. Cases 973
(Calcutta)

RANKIN, C. J.

Thakurda Mundra and others — Accused—Petitioners.

v.

Emperor—Opposite Party.

• Criminal Revn. No: 670 of 1929, Decided on 3rd January 1930, from order of Chief Presy. Magistrate, Calcutta, D/- 30th April 1929.

Calcutta Police Act (Bengal Act 4 of 1866). S. 44—Members of association alleged to carry on business for purchase and sale of jute for future delivery — No delivery intended—Accused are guilty under S. 44.

Certain persons were members of an association called the Bengal Jute Association which carried on business at particular premises in respect of transactions for purchase and sale of jute for future delivery. It was found that there was no intention between the parties either to take or give delivery.

Held: that the accused were guilty under S. 44 their intention being to gamble and not to deal in jute. [P 973 C 2]

Narendra Kumar Basu, K. C. Gupta and Satindra Nath Mukerjee—for Petitioners.

Probodh Chandra Chatterjee for Diben-dra Narain Bhattacharjee — for the Crown.

Rankin, C. J.—In this case the Chief Presidency Magistrate has found 25 men guilty of an offence under S. 44, Calcutta Police Act (Bengal Act 4, 1866), that is, of the offence of keeping a certain house, room or place, to wit 2/1 Royal Exchange Place, as a common gaming house. It appears that the police raided the premises 2/1 Royal Exchange Place on 27th February 1929, and out of a large number of persons then and there arrested, the present accused were prosecuted. The accused are all modis or members of a limited company called the Bengal Jute Association Limited which carried on business at the address mentioned, and the sole question in the case is whether or not the transactions which were entered into or arranged by members of the association were wagering transactions or were in truth, as they purported to be in form transactions for the purchase and sale of jute for future delivery. This question is one of fact and it is for the prosecution to show that in these transactions the intention of the parties was in no circumstances either to take or give delivery. If it be shown that the intention of both parties to each contract was

merely that according as the prices of jute should rise or fall payment of differences should be made, then it is proved that the true intention of the parties was to gamble and not to deal in jute. The Court has to arrive at the true intention of the parties upon a consideration of all the facts. I know of no special rules of proof or presumption which affect this question. If however it be first found that the transactions entered into at this place were transactions by way of wager or gaming, then no doubt the books and contract forms which were kept upon the premises must be regarded as instruments of gaming and, in the circumstances of this case, the accused have no defence to a charge under S. 44.

It appears that the Bengal Jute Association Limited was registered under the Companies Act in October 1928. The case of the accused is that this association was incorporated for the purpose of dealings in "futures," that is to say, dealings in jute for delivery in certain specified months of the year namely, September, December and March and that in February 1929, when the business was brought to an end by the police raid, only one delivery month, namely December 1928, had elapsed and the dealings then taking place were dealings for delivery in March. It appears from the evidence that these dealings were of two classes according as they were made by and between modis who were members of the association, that is between modi and modi, or were made by the agency of modis between third parties or beparis. A printed form was kept for each class of contract. The form for use between modi and modi is a very short one and purports merely to record a sale subject to the bye-laws of the Bengal Jute Association. The contract form for the latter class of contract is more elaborate and has all the appearance in many of its clauses of a real sale of jute. It provides that the sellers between the 1st and 20th of the delivery month shall tender a delivery instruction form and that the buyers within three days thereafter are to send shipping instructions. It contains however, certain remarkable terms, in particular the terms providing for the periodical payment of margin namely that a party shall pay to or receive

from the other the difference between the contract rate and the market rate on Saturday as quoted by the association. It provides that interest on all margin will be calculated at the rate of 6 per cent per annum from the date of payment on the due date of the contract, but that any failure to pay margin is to entitle the other party to terminate the contract and to claim difference on the basis of the rate prevailing on the date of default. The contract also provides that no contractual privity is established with the persons with whom a corresponding contract is entered into; that is to say that while the modi acts in form as a broker he is in reality alone responsible to his principal for the performance of the contract.

The contention of the accused is that the provision for payment of margins was intended to minimize the chance of loss by reason of failure on the part of the buyer or seller to make payment of to give delivery as the case may be. It is further contended that although the accused or the persons with whom they dealt were not possessed of any stock of jute, or godowns for the storage thereof, delivery could be and was intended to be effected by means of delivery orders which enabled the holder to obtain delivery from jute balers or other persons who were possessed of stocks of jute. They further contend that several deliveries had in fact been made in this manner; that owing to the cornering of jute by a certain dealer many transactions had to be settled in December by the payment of differences; but that there is no proof, or no sufficient proof, that the transactions which were for delivery in March would not have been completed in some cases at least by delivery.

The Chief Presidency Magistrate is in my judgment right in saying that the only question in the case is as to the real nature of the business done. On this question it is quite true that the defence have done nothing to prove the genuineness of such business. They have not produced their books or customers to speak to any particular transactions and give evidence of their genuine character. They are entitled however, to say that it is for the prosecution to prove the offence. In the first place it is clear, both from the

contract itself and from the evidence, that the business was to be done according to certain clearing house procedure: the delivery order for example, by Cl. 23 of the contract between modi and bepari was to be obtained by the modi from the clearing house. Now the association kept a delivery book as under this system it would have to do. In spite of evidence which shows that a very large volume of business—the exact amount is of small importance—was being transacted by members of the association, the records of the association disclose, as the Magistrate has conclusively shown in his judgment, that delivery orders for 250 bales from each of three jute balers represent the only cases in which there can have been any question of delivery. In no single one of these cases was delivery ever given in fact. It appears that two orders were paid for by the secretary of the association. They were sold and then resold to the sellers who got them back with a substantial profit in a few days. One of the balers from whom a delivery order was obtained is shown to have been in liquidation and to have had no godowns for months, and there is no evidence of money having been paid for this delivery order. There is no evidence of any delivery order having been taken or given in connexion with any transaction conducted at this place. The conclusion of the Magistrate is that these delivery orders are not genuine but were a mere “blind,” the possession of them being intended to conceal the fact that delivery was not intended at all.

Upon a careful consideration of the evidence I am of opinion that the Magistrate was right in thinking that the case against the accused was proved and in my judgment the rule must be discharged.

R.M./R.K.

Rule discharged.

1930 Cr. Cases 974

(Calcutta)

CUMING, J.

Kusum Baistami and others — Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1453 of 1929,
Decided on 21st January 1930, from an
order of Sub-Divl. Mag., Pabna, D/-24th
April 1929.

Eastern Bengal and Assam Disorderly Houses Act (2 of 1907), Ss. 2 and 3—Order to discontinue use of house as disorderly house and not to vacate it can be made—Order imposing fine on non-compliance of order vacating house is ultra vires.

Under the Eastern Bengal and Assam Disorderly Houses Act the owner or occupier of disorderly houses may be ordered to discontinue the use of a house as a disorderly house but not to vacate it. An order imposing daily fine on prostitutes for non-compliance with an order to vacate their houses is therefore not competent under Ss. 2 and 3 and is ultra vires.

[P 975 C 2]

Surajit Chandra Lahiri — for Petitioner.

Dinesh Chandra Roy—for the Crown.

Order.—This is an application by four persons who have been sentenced to pay a daily fine of Rs. 2 a day each for not carrying out the orders passed against them under S. 3, Eastern Bengal and Assam Disorderly Houses Act of 1907. The grounds on which the rule has been issued are : first, that the notices upon which the present order is based being ultra vires and without jurisdiction the order itself is not maintainable; and secondly, that the judgment is not in accordance with law since the cases of the individual accused have not been separately considered. As far as I can see, the ground stated first is well founded. These persons were ordered to vacate the houses. S. 2 of the Act provides that a Magistrate may summon the owner, tenant, manager or occupier of the house to appear before him to show cause why the use of such house should not be discontinued for any of the purposes or in any of the ways described in the section. Admittedly notices on these persons were to show cause why they should not vacate the house, an order which could not obviously be passed under the section. Apparently some order was passed on 9th October 1928 which directed the petitioners not to use the houses as brothels and allowed them eight weeks' time to discontinue such use. Against this order an application was made to the District Judge which was rejected on 28th March 1929. On 4th April 1929 the following order was passed :

"The Judge has rejected their motion on 28th March 1929. Prostitutes have not vacated the quarters up to this time. They had sufficient time to vacate the houses used by them as brothels. They are directed to carry out the orders under S. 3, Act 2 of 1907, within seven days".

Apparently therefore at that time the order was to vacate the house. On 24th April 1929 the Magistrate passed the following order :

"Prostitutes are still occupying the houses and they are still using the same as brothels. Thus it will appear that they have not carried out orders passed on them under S. 2 (b), Act 2 of 1907 on 9th October 1928 and upheld by District Judge. They were given six weeks' time by this Court and after the Judge's confirmation of the order on 28th March 1929 owners and prostitutes were given further time from 4th April 1929 to 24th April 1929 to close down the brothels, but neither the owners of the houses nor the prostitutes living in the brothels have taken any notice of the said order."

For these reasons he imposed the fine which is now the subject of the rule. It seems to me, as far as I can understand these somewhat contradictory orders of the Magistrate, that he directed that the prostitutes were to vacate the houses, and as they did not vacate the houses they were fined Rs. 2 per diem until they carried out the order. That order was obviously ultra vires. The Act does not provide that they should be ordered to vacate the houses but merely they should discontinue the use of the houses as brothels. The order of the Magistrate therefore seems to be ultra vires. The order inflicting fines in the present case is accordingly set aside.

It will be open of course to the Magistrate to take proper proceedings against the petitioners under the Act if he thinks necessary.

The fines if paid must be refunded.

R.M./R.K. *Order set aside.*

* 1930 Cr. Cases 975

(Calcutta)

SUHRAWARDY AND COSTELLO, JJ.

Rash Behary Ray and others—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 22 of 1929, Decided on 19th May 1930.

* Civil P. C., S. 115, and O. 8, R. 2—Something put in written statement which is not true and something omitted which ought to have been there—Court holding that such action constituted offence under S. 193, Penal Code—Order is so misconceived that High Court is bound in revision to set it aside.

In many cases persons in verifying the pleadings, defendants their written statements, or plaintiffs their plaints, are often found to say something which is not strictly true; for example a defendant may deny the making of a contract or deny that a certain transac-

tion took place in order to force the plaintiff to give evidence and be subjected to cross-examination in the matter or to put the matter raised in issue. But by such action he does not render himself liable for prosecution for perjury for making false statement. Where the Judge so misconceives the operation and function of a written statement as to imagine that because something is put in in a written statement which is in a sense not true and something is omitted from the written statement, that of itself constitutes offence under S. 193, Penal Code, the High Court is not only justified in exercising but is bound to exercise its power in revision to set aside the order.

[P 976 C 1, 2]

Debendra Nath Bhattacharjee and *Bikash Chandra Ghose*—for Petitioners.

Narendra Kumar Basu and *Jatindra Nath Mitter*—for the Crown.

Costello, J.—The only possible point which could be taken is that this is not a matter which can properly be said to fall within the provisions of S. 115, Civil P. C. But in this particular case the learned Judge has taken such a fantastic view of the law and has made an order in circumstances where it is quite impossible for this Court to make any order than that we feel not only justified in exercising but bound to exercise our power in revision to set this order aside. We can only express astonishment that a Judge of the experience of the learned Judge should have so misconceived the operation and function of a written statement as to imagine that because something is put in in a written statement which in a sense is not true, and something is omitted from the written statement that of itself constitutes an offence under S. 193, I. P. C. It is obvious that written statement in a civil suit corresponds to the pleading which in England is called the defence, and that being so it is competent to the defendants to a suit to raise such pleas in their written statements as they think fit or to abstain from raising things which appear to the defendants not to be of advantage to them. In the present instance the matter, as I have said, is so fantastic as to be utterly ridiculous because these persons were charged, not with having made statements in their written statement which are not true but simply with omitting to say something which the learned Judge, by reason of the terms of O. 8, R. 2, Civil P. C., thought that they ought to have included. O. 8, R. 2

which corresponds to O. 9, R. 15, of the English rules provides that the defendant must raise by his pleading all matters which show the suit not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise or would raise issues of fact not arising out of the plaint, as for instance fraud, humiliation, release, payment, performance or facts showing illegality. Of course all matters of the nature of those mentioned in that rule, if the defendant desires to take advantage of them, must be mentioned or raised in his written statement as otherwise he would be debarred from raising those matters at the trial. The word "must" means such an obligation, that if he fails to do so he would be restrained from raising those matters later except under R. 9 of that order. The learned Judge has wholly misunderstood the purpose and intent of the rule to which he has referred. It is perhaps a little unfortunate that by reason of the provisions of the Code pleadings, such as written statements, have to be verified because in many cases persons in verifying their pleadings, defendants their written statements or plaintiffs their complaints, are often found to say something which is not strictly true; for example, a defendant may deny the making of a contract or deny that a certain transaction took place, in order to force that plaintiff to give evidence and be subjected to cross-examination in the matter or to put the matters raised in issue. But I do not think that he renders himself liable for prosecution for perjury for making false statements. It is obvious that there is no justification for the order passed by the learned Judge in this case, which must be set aside. The rule is therefore made absolute.

Suhrawardy, J.—I agree.

P.N./B.K.

Rule made absolute.

*** 1930 Cr. Cases 977**
(Lahore)

SHADI LAL, C. J.

Donlea—Accused—Petitioner.

v.

Mrs. Donlea—Respondent.

Criminal Revn. No. 515 of 1930, Decided on 2nd June 1930, reported by Dist. Magistrate, Ambala:

*** Criminal P. C., S. 439—High Court does not interfere in case pending in subordinate Court unless it is of exceptional nature—Test for determining exceptional nature laid down—Criminal P. C., S. 488.**

The High Court does not interfere in a case pending in a subordinate Court unless it is of an exceptional nature. One test of its being of exceptional nature is that a bare statement of the facts of the case without any elaborate argument should be sufficient to convince the High Court that the case is a fit one for its interference at an intermediate stage.

Where in a proceeding under S. 488, Criminal P. C. by a wife against her husband the trial Magistrate passed an order that certain letters from his wife produced by the husband were inadmissible under S. 122, Evidence Act, the case was forwarded to the High Court for setting aside the order.

Held: that the order being purely an interlocutory order the High Court could not interfere, it being not convinced that the case was of any exceptional nature and a fit one for its interference at an intermediate stage: 25 Cal. 233, *Rel'on*. [P 978 C 1]

Chiranji Lal—for Petitioner.

Ananth Ram Khosla—for Respondent.

Facts.—The facts of this case are as follows:

Mrs. Donlea filed a complaint under S. 488, Criminal P. C., against her husband Mr. Donlea. The trying Magistrate held on 1st March 1930, that he had jurisdiction to try this case and on 24th March 1930, the trying Magistrate held that the three letters produced by the accused being communications from a wife to a husband were inadmissible in evidence under S. 122, Evidence Act. Against both these orders Mr. Donlea filed a revision petition to the District Magistrate.

Report.—The proceedings are forwarded for revision on the following grounds:

This is an application for revision of an order of the Cantonment Magistrate, Ambala Cantonment. Two grounds have been put forward for this application. The first is that the lower Court wrongly decided that it had jurisdiction and the second is that the lower Court improperly refused to

admit certain evidence. The case is as follows:

Mrs. Donlea has filed an application under S. 488, Criminal P. C. Mr. Donlea in his reply stated that he had never resided with his wife in Ambala and also alleged that he had never neglected or refused to maintain her. As regards the first point Mr. Donlea admitted that two years ago he came to Ambala on casual leave and resided for 10 days (Mrs. Donlea says 14) with Mrs. Donlea who lives with her mother in a boarding house in Ambala Cantonment. Mr. Donlea asserts that this does not constitute residence within the meaning of S. 488. In reply counsel for Mrs. Donlea has quoted *A. I. R. 1928 Lah. 853*, in which the facts were almost exactly similar to the facts in the present case, the only difference being that in that case the husband had visited his wife more than once and that she was living in her father's house. I do not think these differences are sufficient to take the present case outside the scope of that ruling. Counsel for Mr. Donlea has quoted a Bombay ruling and an Oudh ruling, but these have no force in face of a Lahore ruling. I accordingly hold that the Cantonment Magistrate has jurisdiction and I reject this ground of revision. The second ground is a very much more difficult one and in my opinion the lower Court was wrong. The evidence which the applicant wished to put in consisted of three letters written to him by his wife. These letters prove that the applicant has not in fact neglected or refused to maintain his wife and also tend to prove other facts which will constitute a good defence by the husband. The lower Court held that being communications from a wife to a husband they were inadmissible in evidence under S. 122, Evidence Act. The difficulty lies in this: that proceedings under S. 488, Criminal P. C., are of a peculiar nature. They apparently do not constitute a crime or offence, and at the same time they are not a regular civil suit, so as to be covered by the exception to S. 122. Nevertheless they do constitute a kind of a suit and are in any case judicial proceedings in which evidence has to be taken. It is obviously open to a husband against whom

proceedings are taken under this section to produce evidence to show that he has not in fact neglected or refused to support his wife, and he could certainly give oral evidence to this effect, but under the general rule that in all cases the best available evidence should be produced, I consider that the husband is entitled in such a case as this and in the circumstances mentioned to produce in evidence letters written to him by his wife admitting quite clearly that he has been maintaining her, which is the case here. Such letters disclose no secrets which it is advisable on grounds of general public interest to keep secret. I therefore forward this case to the High Court, Lahore, with the recommendation that the order of the Magistrate declaring these letters to be inadmissible be set aside.

Order.—The question whether the letters written by the wife to the husband are admissible in evidence would require a very careful consideration, but this is not the stage at which the matter can be decided by the High Court. The order passed by the trial Magistrate is purely an interlocutory one, and the High Court does not interfere in a case pending in a subordinate Court unless it is of an exceptional nature. As pointed out in *Choa Lal Dass v. Anant Parshad Misser* (1) one test of its being of exceptional nature is that a bare statement of the facts of the case without any elaborate argument should be sufficient to convince the High Court that the case is a fit one for its interference at an intermediate stage. Without expressing any opinion on the merits, I must say that this test is not fulfilled in the present case. I accordingly decline to express any opinion on the correctness or otherwise of the order of the Magistrate.

R.M./R.K. *Order accordingly.*

(1) [1898] 25 Cal. 233.

1930 Cr. Cases 978

(Lahore)

• TEK CHAND, J.

Ram Piara Lal—Petitioner.

v.

• *Emperor*—Opposite Party.

Criminal Misc. Petn. No. 103 of 1930,
Decided on 1st July 1930.

Criminal P. C., S. 526—Directions of appellate Court with regard to trial disregard—

ded—Application under S. 526 by accused ignored and proceedings continued—Matter not irrelevant expunged from written statement of accused by Magistrate—*Held* these incidents were sufficient to justify transfer case to another Magistrate.

A Magistrate did not adopt the suggestions of the Sessions Judge with regard to trial of two cases in which the accused was involved. He further ignored the application of the accused under S. 526, Criminal P.C., asking him to stay the proceedings as it was intended to move the High Court but continued the proceedings contrary to the specific provisions of the Code. Again, the Magistrate summarily expunged certain passages from the written statement by the accused, which could not be and ought not to have been struck off, not being irrelevant to the defence of the accused.

Held: these incidents were sufficient to raise a reasonable apprehension in the mind of the accused that he would not have a fair and impartial trial in the Court of the Magistrate and transfer of the case to another Magistrate was necessary. There was, however, no adequate ground for transfer of the case from the district. [P 979 C 2]

M. L. Batra—for Petitioner.

Public Prosecutor—for the Crown.

Order.—The petitioner along with a number of other persons, is being tried in the Court of Sheikh Allah-ud-din Arshad, Magistrate, 1st Class, Sargodha, for having committed offences under Ss. 147, 152 and 427, I. P. C., arising out of certain incidents, which are alleged to have occurred on the occasion of the visit of His Excellency the Governor to Sargodha on 9th and 10th April. He has applied under S. 526 for transfer of the aforesaid case to another District, and failing that, to the Court of another Magistrate in the Shahpur District.

The grounds on which transfer is sought are set out in detail in the lengthy and somewhat prolix application filed by him and the affidavit which accompanies it. Some of the incidents narrated in the application are of little or no significance and do not afford any ground for transfer. There are, however, certain important matters, which clearly indicate that the learned Magistrate has not approached the case from a proper judicial standpoint and, in my opinion, they are sufficient to raise a reasonable apprehension in his mind that he will not have a fair and impartial trial in that Court.

It appears that on 11th April, i. e. three days before the *chalan* was presented, the petitioner had filed a complaint against some of the persons, who

have now appeared, or have been cited as witnesses for the prosecution in the chalan case. In this complaint he gave a totally different version of the incidents, in connexion with which he is being prosecuted. This complaint was also assigned to Mr. Allah-ud-din Arshad for disposal. The learned Magistrate having refused to grant bail to the petitioner and his co-accused in the chalan case, they moved the Sessions Judge who by his order dated 29th April 1930, ordered their release on bail. In this order the learned Sessions Judge pointed out very clearly that the procedure followed by the learned Magistrate in trying the two cases had been distinctly prejudicial to the accused, and he gave certain directions as to how the trial of the cases should proceed. The subsequent proceedings before the Magistrate show, however, that he did not adopt these suggestions.

On 12th May, when the case came up for hearing before the Magistrate an application under S. 526, Criminal P.C., was filed by the petitioner asking him to stay further proceedings as it was intended to move this Court. The learned Magistrate seems to have ignored the application for the time being and continued the proceedings contrary to the specific provisions of the Code. The explanation which the learned Magistrate has submitted to this Court on both these points is by no means satisfactory and the learned counsel for the Crown has expressed his inability to support it.

These incidents by themselves would not, perhaps, have been sufficient to justify a transfer of the case. But the real mind of the learned Magistrate is clear from the manner in which he conducted the examination of the petitioner. In the questions which he put to the accused, as contained in the type-written sheet to be found at pp. 75 and 76 of the record, the petitioner was asked whether he along with the other co-accused was a member of an unlawful assembly, the common object of which was (inter alia) to beat those persons who were against his "anti-Government creed such as the observance of hartal." The answer to this and other questions orally given by the petitioner was recorded and he was alleged to file a written statement. The learned

Magistrate placed the statement on the record and then proceeded to expunge certain passages from it by striking them out with blue pencil. These passages have been read out to me and the learned counsel for the Crown concedes, that with the simple exception of the very last sentence at p. 281 of the record, they cannot, by any means, be said to be irrelevant to the defence of the petitioner. As stated already in question No. 1 as put by the Magistrate the petitioner was asked if he was a member of an unlawful assembly, the common object of which was to beat certain persons who do not agree with "his anti-Government creed." In answer to this the petitioner stated that his political creed did not include the use of violence. Again his main defence was that he had incurred the displeasure of the local police and certain other officials by reason of his political activities and that for this reason a false case had been concocted against him. Now this defence may be difficult of proof. It may, indeed, be wholly false (a matter on which I do not and cannot express any opinion), but it cannot be said that having regard to the allegations made by the prosecution witnesses and the nature of the questions put to the petitioner by the Magistrate himself, it was not a kind of defence which could not have been allowed to be raised or which should have been summarily struck off. There is no doubt that the learned Magistrate in proceeding in the manner he did has prejudged the case of the petitioner. I am therefore of opinion that these incidents are sufficient to raise a reasonable apprehension in the mind of the petitioner that he will not have a fair and impartial trial in the Court of this Magistrate.

I cannot, however, find any adequate ground for transfer of the case from the district. I have no reason to believe that all the Magistrates at Sargodha are prejudiced against the petitioner and that they will not deal with the case properly and legally, uninfluenced by any extra-judicial considerations. I, therefore, disallow this prayer but think that the case should be tried by a senior Magistrate. I accept this petition to the extent that I withdraw the case from the Court of Mr. Allah-

uddin Arshad, Magistrate, 1st Class, and remit it to that of Mr. Ujagar Singh, Additional District Magistrate, Sargodha, for disposal in accordance with law. The Deputy Registrar will take steps to transmit the record to the Court of Mr. Ujagar Singh at as early a date as possible.

R.M./R.K. *Order accordingly.*

1930 Cr. Cases 980

(Lahore)

ADDISON AND DALIP SINGH, JJ.

Emperor—Appellant.

v.

Binjha—Accused—Respondent.

Criminal Appeal No. 788 of 1929,

Decided on 6th January 1930, from acquittal order of Sess. Judge, Hissar, D/- 13th June 1929.

Punjab Excise Act, S. 61 (1) (a)—Mere fact that illicit liquor is found in room occupied by son for sleeping does not make him guilty—Legal possession remains with father, house-master—Penal Code, S. 27.

Where articles are found in a house in such place or places as several persons living in the house may have access to, there is no presumption as to possession and control of any other person than the house-master, though it is open to the prosecution to prove that the possession was with some other member of the family. 15 All. 129 and A.I.R. 1928 Lah. 272, *Foll.* [P 980 C 2]

When most of illicit liquor is found in the room occupied for the night by the son and his family for sleeping, it does not necessarily mean that the son was in the exclusive possession of the room. The legal possession still remains with the father, the house-master, and there is obvious possibility that the liquor could have been placed there by the father. The mere fact that the son does not report the matter to proper authorities but uses the room along with his wife and family to sleep in does not make him guilty of the offence of being in possession of that liquor:

[P 980 C 2; P 981 C 1]

Abdul Rashid—for the Crown.

Qabul Chand for Shamair Chand—for Respondent.

Addison, J.—This is an appeal by the Crown against the acquittal of one Binjha of an offence under S. 61 (1) (a), Punjab Excise Act. The facts are undisputed. At the dead of night on 20th February 1929 a police search party went to the village of Binjha and his father Dulla and surrounded their house. This house consists of a small living room and a more or less open cattle-shed inside a courtyard. Binjha along with his wife and one or two children was at the time inside the living room while the father Dulla was

sleeping in the cattle-shed. When the search was made five bottles of illicit liquor were recovered from underneath a tandi in the living room while one tin of illicit liquor was standing near the tandi. Another bottle of illicit liquor was found buried at the cattle-shed. It is admitted that father and son live jointly in this house. It is further admitted that Dulla is the head of the family. On these facts the police sent up for trial both father and son. The Magistrate acquitted the father Dulla and convicted the son Binjha under S. 61 (1) (a), Excise Act, on the ground that he considered that Binjha was in exclusive use and possession of the living room where the liquor was found as he was sleeping there with his wife and family when the raiding party arrived and as he could not have done so without knowing that the liquor was there. Binjha appealed and the learned Sessions Judge held he could not be convicted as father and son were in joint possession and there was no reason to depart from the usual presumption that the head of the family was in possession of the illicit liquor or had the control of it. He accordingly accepted the appeal and acquitted Binjha and the Crown has appealed to this Court.

In *Queen-Empress v. Sanham Lal* (1) it was stated that where articles are found in a house in such place or places as several persons living in the house may have access to, there is no presumption as to possession and control that these articles are in the possession and control of any other person than the house-master though it is open to the prosecution to prove that the possession was with some other member of the family. This was followed by a Division Bench of this Court in *A.I.R. 1928 Lahore 272*. In this case it is true that the son Binjha and his wife and family were sleeping in the room where most of the liquor was lying, but that does not mean necessarily that he was in exclusive possession of that room though he was undoubtedly occupying it for that night for the purpose of sleeping in it. The legal possession still remained with the father, the house-master, and it is an obvious possibility that the liquor could have been placed there by

(1) [1893] 15 All. 129—(1893) A. W. N. 43.

the father. If this was the case the mere fact that Binjha did not report the matter to the proper authorities but used the room along with his wife and family to sleep in would not make him guilty of the offence of being in possession of the liquor. In these circumstances I see no reason in the present case to disagree with the finding of the learned Sessions Judge to the effect that Binjha has not been proved to be guilty. I would dismiss the appeal.

Dalip Singh, J.—I agree.

R.M./R.K.

Appeal dismissed.

1930 Cr. Cases 981

(Lahore).

CURRIE, J.

Malik Amir Alam—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 523 of 1930, Decided on 7th July 1930, from order of First Class Mag., Rawalpindi, D/- 28th April 1930.

(a) Words and Phrases—*Tahzirat-i-Hind*. The words "*Tahzirat-i-Hind*" means Indian Penal Code. [P 982 C 1]

(b) Penal Code, S. 124-A—To represent that Penal Code enforced by Government attacks every religion amounts to offence under S. 124-A—Where speech as a whole excites disaffection towards Government accused is guilty.

A speaker representing in his speech that the Penal Code enforced by the Government attacks every religion is guilty under S. 124-A.

Where reading the speech as a whole there cannot be the least doubt that it is an attempt to excite disaffection to the Government by law established, the speaker is guilty under S. 124-A. [P 982 C 1]

(c) Penal Code, S. 124-A—While sentencing accused circumstances and atmosphere of the time must be considered.

In considering the question of sentence with regard to an offence under S. 124-A each case must be dealt with on its own particular facts and the circumstances and atmosphere of the time when it was delivered must be considered. [P 982 C 2]

Gobind Ram Khanna—for Appellant.

R. C. Soni—for the Crown.

Judgment.—The appellant *Malik Amir Alam* who is a well educated man and was the editor of the "*Tarjaman-i-sarhad*" has been convicted under S. 124-A, I. P. C., in respect of a speech delivered by him on 24th January 1930 at a meeting of the *Naujawan Bharat Sabha* held at Rawalpindi, to celebrate the anniversary of Lenin.

The appellant admits making the

speech but contended that the report of speech was incomplete and incorrect. The only specific instance put forward by him was that whereas he had said : "*Tahzirat-i-hind men har mazah par hamla hai*" the reporter represented him as saying : "*tahzirat-i-hind ki har dafa men mazhab par hamla hai*." This is not a very vital difference and there can be no doubt that the reporter has substantially reported the speech correctly. The appellant further objected that the speech had been incorrectly translated. This refers to the translation of the speech contained in the order sanctioning the prosecution. There are certain inaccuracies in that translation but the translation that has been prepared in this Court gives the correct version and I shall use that.

The learned Magistrate has given a summary of the speech in his judgment and has cited in the original vernacular the two passages which he considered to be most objectionable. It is unnecessary to reproduce them here.

The appellant filed a very lengthy written statement in which he argued that the speech could not be classed as seditious. His arguments have been repeated by his counsel. It is contended that the first portion of the speech which deals with what happened in Russia is intended to show that whereas Lenin in Russia owing to restrictions imposed on public meetings and the press achieved his aims by secret societies, in this country there is no need to have resort to secret societies in view of the license allowed to the press and public meetings, and that therefore a peaceful revolution can be brought about. He further contended that the second portion of the speech which deals with religion and restrictions imposed upon it does not refer to the Indian Penal Code but to the general system of penal law in force, and in his written statement the appellant cited the *Sarda Act* as an instance. As regards the third portion of the speech it has been contended that this is intended not as an attack on Government but as an attack on the existing economic system owing to which the labouring classes are suffering. The appellant produced no defence.

As regards the first portion of the speech relating to Lenin, the speaker in

my opinion by implication put forward as an example to be followed though he attempted to safeguard himself by saying that in this country peaceful revolution could be brought about.

As regards the second portion of the speech, this clearly put forward the proposition that the subject race cannot be said to have any religion, and that at the present in India there is no religion but slavery. The Indian Penal Code contains an attack on every religion. It is idle to contend that the word "tazhirat-i-hind" does not mean the Indian Penal Code but the penal law generally. No ordinary man attaches to the word 'tazhirat-i-hind' any other significance than the Indian Penal Code. This passage is in my opinion clearly an attempt to bring into hatred or contempt or to excite disaffection towards the Government established by law in British India by representing that the Penal Code enforced by Government attacks every religion.

The third portion of the speech suggests that if their association works on proper lines they will paralyze the present system of Government which has made slaves of the people.

"The labourers can paralyze the whole system like the labourers of Bombay. The day is not far off when we will with our might paralyze this Government."

Counsel for the appellant urges citing *Bal Gangadhar Tilak v. Emperor* (1) that the speech must be read as a whole in a bold and liberal spirit and that undue attention should not be paid to isolated passages. He further contends that mere advocacy of a change in the system of Government does not fall within the purview of S. 124-A, I. P. C., in view of the spirit of Explanations 2 and 3 to that section. He further contended that the speech was cautious, tame and insipid and did not attack Government, and further urged that there was no incitement to violence and that the speech is not as intemperate as some speeches that are made. Reading the speech as a whole, however, there cannot be the least doubt in my opinion that it is an attempt to excite disaffection towards the Government by law established. The evidence shows that the audience during the speech

raised various revolutionary cries such as "inglah zinda bad" "down down with the Union Jack" and "hakumat ko tabah kar do." It is unnecessary to refer to the previous speeches of the appellant which have been brought on the record as showing his intention as his intention is sufficiently clear from the speech delivered by him on 24th January. I therefore consider that the conviction under S. 124-A, I. P. C., must be maintained.

As regards the question of sentence the appellant's counsel has cited various cases in which the appellate Court has reduced the sentence imposed to the imprisonment already undergone, but each case must be dealt with on its own particular facts and the circumstances and atmosphere of the time when it was delivered must be considered. It is urged that the present speech was addressed to an audience of only 200 or 300 persons. That in itself, however, is no reason for reducing the sentence. I see no reason to reduce the sentence of one year's rigorous imprisonment imposed on the appellant and dismiss the appeal.

R.M./R.K.

Appeal dismissed.

* 1930 Cr. Cases 982

(Lahore)

TEK CHAND, J.

Sita Devi—Petitioner.

v.

Har Narain—Respondent.

Criminal Revn. No. 337 of 1930, Decided on 20th June 1930, on report by Dist. Magistrate, Gujranwala, D./6th March 1930.

* Criminal P. C. S. 488—Neglect or refusal to maintain is first essential to invest Court with jurisdiction under S. 488.

In order to give jurisdiction to a Magistrate to take proceedings under S. 488 the first essential is to find that the respondent has neglected or refused to maintain the person for whose maintenance an allowance is asked for.

Where wife is allowed maintenance under S. 488 the mere fact that the son is of tender years and that it is in the interests of the minor son that he should be left with the mother till the father is able to get the custody of the minor son from the civil Court is not sufficient to invest the criminal Courts with jurisdiction under S. 488 as regards the son unless it can be shown that he has neglected or refused to maintain the boy. [P 985 C 1]

• *Govind Ram Khanna*—for Petitioner.
Mehr Chand Mahajan and *H. R. Mahajan*—for Respondent.

Report.—The facts of this case are as follows : Mt. Sita Devi, wife of Pandit Har Narain, B. A., LL. B., and a practising pleader at Wazirabad, lodged an application under S. 488, Criminal P. C. claiming maintenance from him for herself and her minor son Brij Bhosan by him aged about 4 years now. Lala Mulkh Raj, Magistrate 1st Class, Gujranwala, who heard that application awarded Rs. 30 per mensem to Mt. Sita Devi from the date of her application i. e. 3rd June 1929, and disallowed the application for maintenance of the minor son on the ground of the respondent Pandit Har Narain being anxious to keep the boy with himself.

Mt. Sita Devi has now come up to me on revision saying that maintenance should have been separately allowed for her minor son who is too young to live away from his mother and that Rs. 30 per mensem allowed to herself is too small and should be increased to Rs. 70 per mensem. Pandit Har Narain has on the other hand lodged a revision saying that no maintenance could be legally allowed to Mt. Sita Devi and that the Magistrate hearing the case should not have examined him as a witness for the applicant Mt. Sita Devi.

I have heard pleaders for both parties in these revision applications and have gone through the evidence oral as well as documentary put in by them. I do not think there is much in the argument of the respondent being examined as a witness for the applicant as the Magistrate was bound to examine him fully as to the facts of the case as if he were a party in a civil suit vide *A. I. R. 1928 Bom. 347*.

I note that Mt. Sita Devi is an educated girl aged about 23 knowing Hindi and Urdu and the daughter of a clerk in the Irrigation Office, Lyallpur, drawing Rs. 80 per mensem. Her father it appears was of some monetary help to the respondent also during the course of his educational studies. The respondent Pandit Har Narain, B. A., B. T., and LL. B. is aged about 28 and is practising as a pleader since 1924. His income has been taken by the Magistrate after careful consideration to be about Rs. 150 per mensem, and from this conclusion I do not see any good grounds materially to differ. They were married in 1920 but their relations it seems have never been

happy. To use the respondent's own words he could not keep her with himself on account of incompatibility of temper. She has been finally living away from him with her own parents since June 1928. There she received a post-card Ex. P. F. dated 24th June 1928, in which the respondent told her that if she came to him uncalled, he would send her back again. On 21st November 1928 he sent her a notice by post saying that

"matters have come to such a pass that unfortunately it has become quite impossible for me to reside any longer for good with you, Shrimati under the same roof."

and that

"you would not be ill-advised if you could see your way to settle your maintenance at once."

On 13th December 1928 he sent another notice to her Ex. P. E. telling her to get her monthly maintenance fixed either in a civil or a criminal Court as suited her. Meantime he was arranging to get another suitable wife for himself, and the letter Exhibit P.B. dated 11th February 1929, which he wrote to one Gurbachan Singh at Jullundur in this connexion is an interesting document. He states his monthly income there to be about Rs. 300 per mensem and says that he did not like his first wife from the very day of his marriage with her and the disliking increased as the years rolled on on account of her multifarious defects and that he is not on speaking terms with her since 2½ years.

In face of all these facts I fully agree with the conclusions arrived at by the Magistrate that the respondent has not only neglected but practically deserted his wife, and that he has been quite persistent in his refusal to keep her with himself. The application filed by the respondent before the Magistrate on 19th October 1929, when the case was fixed for arguments, to the effect that he was prepared to maintain and feed her, was evidently not in good faith, and was made with the simple object of escaping, if possible, the legal obligations to maintain her. As remarked by the Magistrate, Mt. Sita Devi cannot, under the Hindu law, marry a second husband, and there is not the slightest suspicion so far as to her personal character. Rs. 30 per mensem, allowance fixed for her is, I think, very fair on the whole, and so I

am not prepared to recommend either its reduction or its increase.

As to the minor boy now living with his mother, I cannot agree with the reasons given by the Magistrate for refusing to allow him maintenance. A boy of such tender age should, in my opinion, specially in a case like this, where the relations between his father and mother are so strained be best left with the mother, till the father is able to get his custody from the civil Courts: vide *Hira Lal v. Sarasvahi* (1). The criminal Courts have no right to decide about his custody, and it is too much to say, as the Magistrate has done in this case, that the child is not entitled to an allowance so long as he chooses to live with his mother. A boy of this age can have little or no choice being drawn to his mother only by natural instinct.

In view of the above reasons, I, therefore, submit the proceedings to the High Court and would recommend that something like Rs. 10 per mensem be allowed from 3rd June 1929 for the maintenance of the minor son so long as he is with his mother and unable to maintain himself, and that the revision application of Mt. Sita Devi be accepted to that extent.

Order.— This and the connected petition No. 552 of 1930, arise out of certain proceedings under S. 488, Criminal P. C., started at the instance of Mt. Sita Devi against her husband, Pandit Har Narain, pleader, for an order directing the latter to make a monthly allowance for her maintenance as well as for the maintenance of their son, Brij Bhoshan, aged four years.

The trial Magistrate in a careful judgment found that Pandit Har Narain had neglected and refused to maintain Mt. Sita Devi and ordered him to pay her a maintenance allowance at the rate of Rs. 30 per mensem with effect from the date of the application. He, however, dismissed the application so far as the claim for the maintenance for the boy was concerned as he was of opinion that the facts on the record did not establish that Pandit Har Narain had refused or neglected to maintain him and that, on the other hand, it appeared that he had been doing his level best not only to look to his

maintenance but to provide comforts for him in proportion to his means.

Against this order a revision petition was presented to the District Magistrate on behalf of Mt. Sita Devi praying for an enhancement of the allowance which had been allowed to her by the Magistrate and also urging that the order of the Magistrate dismissing the petition so far as it related to the maintenance of the boy was erroneous and that separate allowance should be fixed for him. The learned District Magistrate found no reason to enhance the amount of allowance fixed by the Magistrate for Mt. Sita Devi and refused to make a recommendation to this Court in that behalf. He, however, has recommended that a separate allowance of Rs. 10 per mensem should be allowed for the maintenance of Brij Bhoshan minor. Pandit Har Narain also has preferred a petition for revision to this Court against the order of the trial Magistrate and has urged that no case has been made out for an order under S. 488 in favour of Mt. Sita Devi and that, in any case the amount of allowance fixed by the trial Magistrate is excessive and ought to be substantially reduced.

I have heard Mr. Mehr Chand Mahajan on behalf of Pandit Har Narain and Mr. Gobind Ram Khanna on behalf of Mt. Sita Devi. After giving the case my best consideration I am of opinion that the order of the trial Magistrate was just and proper and that no interference is called for. As regards the prayer in the revision petition filed by Pandit Har Narain I have no doubt that the evidence on the record conclusively establishes that he has neglected and refused to maintain Mt. Sita Devi and is legally liable to give her suitable maintenance allowance. Having regard to the station in life of the parties and the other circumstances of the case, I do not consider the sum of Rs. 30 per mensem is by any means excessive for the maintenance of Mt. Sita Devi. I, therefore, dismiss Criminal Revision No. 552 of 1930.

As regards the prayer for a separate allowance for the boy: I find myself unable to accept the recommendation of the learned District Magistrate. It is hardly necessary to point out that in order to give jurisdiction to a Magis-

trate to take proceedings under S. 438 the first essential is to find that the respondent had neglected or refused to maintain the person for whose maintenance an allowance is asked for. The learned trial Magistrate, after a careful and lengthy examination of the evidence, found as a fact that it had not been established that Pandit Har Narain had neglected or refused to maintain the boy. The learned District Magistrate in his order of reference has not found that this finding was incorrect. I. asked Mr. Gopind Ram Khanna to argue, if he could, that neglect or refusal on the part of Pandit Har Narain to maintain the boy had been established on the record, but the learned counsel was unable to put forward any cogent reasons for differing from the finding of the trial Magistrate on this point. For this reason alone, therefore, this petition must fail. The only ground given by the learned District Magistrate in support of his recommendation is that

"it is best in the interest of the minor boy that he should be left with the mother till the father is able to get his custody from the civil Courts."

Howsoever desirable such an arrangement might be, it is not sufficient to invest criminal Courts with jurisdiction under S. 438. As pointed out above, an order under that section can be passed only if neglect or refusal to maintain the child is established, and there is no doubt that this has not been done in this case.

I, therefore, reject the recommendation of the learned District Magistrate and dismiss the petition of Mt. Sita Devi praying for a reversal of the order of the trial Magistrate refusing to grant separate allowance for the maintenance of Brij Bhoshan minor. Having regard to all the circumstances, I leave both parties to bear their own costs throughout.

V.B./B.K.

Reference rejected.

* 1930 Cr. Cases 965

(Lahore)

ADDISON AND HILTON, JJ.

Chatar Bhuj—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 502 of 1929, Decided on 12th March 1930.

* Legal Practitioners Act, S. 36—High Court can revise order passed under S. 36 in furtherance of justice by virtue of Government of India Act, S. 107.

High Court has power to revise orders passed under S. 36 of the Legal Practitioners Act by reason of power of superintendence vested in the Court by S. 107 of the Government of India Act, but this power is of a very exceptional nature and cannot be invoked except in furtherance of justice : *Cases reviewed.*

[P 937 C 2]

Shamair Chand, Qabul Chand, Mohammad Amin and Nawal Kishore—for Petitioner.

Des Raj Sawhey—for the Crown.

Addison, J.—The District Judge of Hissar, after holding an enquiry under the Legal Practitioners Act, declared certain persons to be touts. A certain number of them came to this Court on the revision side, asking that the orders passed should be set aside. A preliminary objection was taken on behalf of the Crown that this Court has no jurisdiction to entertain such petitions and that the intention of the legislature appeared to be that an order passed under S. 36, Legal Practitioners Act, should not be open to examination by this Court. The Single Judge before whom this question came was of opinion that the matter was one of considerable interest and importance, and he therefore referred the petitions to a Division Bench for decision as to whether this Court has or has not the power to interfere on the revision side in cases of this nature.

One of the first cases of this kind was *In the matter of the petition of Madho Ram* (1). A Division Bench in that case held that so far as an order passed under S. 36, Act 18, 1879 was concerned, the High Court could only interfere in the exercise of the powers of superintendence conferred upon it by S. 15, High Courts Act, 1861, and that it would not interfere even then when the sole ground on which its interference was asked for was that the decision of the District Judge was against the weight of evidence. S. 15, High Courts Act, has been replaced by S. 107, Government of India Act. That section enacts that "each of the High Courts has superintendence over all Courts for the time being, subject to its appellate jurisdiction."

In the Allahabad decision referred to, it was said that the law gave no

(1) [1899] 21 All. 181=(1899) A. W. N. 34.

right of appeal to the High Court from an order under S. 36, Legal Practitioners Act. As regards revision such cases were clearly not criminal proceedings to which the revisional powers of the High Court under S. 439, Criminal P. C., could apply. Nor did they fall within the power of civil revision conferred by S. 622 (now 115), Civil P. C. But it was held that the High Court had no doubt very wide powers of superintendence over the proceedings of subordinate Courts by virtue of S. 15, High Courts Act. It was possible to imagine cases in which in the exercise of those powers it might find it its duty to interfere with an order passed under S. 36, Legal Practitioners Act. For example the conditions prescribed by the section had of course to be observed, while no person's name could be included unless he had an opportunity of showing cause against such inclusion. Lastly, it was pointed out that a High Court was not competent under S. 15, High Courts Act, to interfere with the orders of subordinate Courts merely on the ground of an error in law or an error in fact. It seems to me that this decision states very clearly the powers of a High Court with reference to orders passed under S. 36, Legal Practitioners Act.

Another Division Bench of the Allahabad High Court took the same view in *Kashi Nath v. Emperor* (2). It was said that the High Court had power under S. 107, Government of India Act, to call for and examine the record of any proceeding taken under S. 36, Legal Practitioners Act, and to issue such orders or instructions as might appear to be proper and would hold it a valid ground for interference if the District Judge had disobeyed any specific direction of the Act. But it was further said that it would be straining the powers of interference and setting an undesirable precedent if the High Court were to take it upon itself in every case of the kind to consider whether the evidence relied upon by the District Judge was or was not evidence from which the High Court itself would have drawn the same inference. This again is a decision which, in my judgment, lays down clearly the powers of

the High Court when examining the record of a proceeding under S. 36, Legal Practitioners Act.

Another Division Bench of the Allahabad High Court in *Ghafoor Khan v. Emperor* (3) assumed without discussion that it had power to interfere with such orders under the provisions of S. 107, Government of India Act. The final conclusion in this case appears to have been that there was nothing illegal in the procedure adopted for declaring the names of touts, and the revision could not, therefore, succeed.

A Division Bench of the Madras High Court in *Bava Sahib v. Dist. Judge of Madras* (4) held that a person affected by an order under S. 36, Legal Practitioners Act could move the High Court under S. 622 (now 115), Civil P. C. The order passed by the District Judge in that case was modified in so far as the District Judge had acted in excess of his jurisdiction, but no further.

A Single Judge of the Madras High Court in *Karadachariar v. Kalyanasundaram*, A. I. R. 1923 Mad. 188, held that the High Court had power to interfere in revision, but it was not clearly stated on what basis this jurisdiction was founded.

In *Hari Charan Sircar v. Dist. Judge, Dacca* (5) a Division Bench of the Calcutta High Court held that the High Court had power to revise orders passed under S. 36, Legal Practitioners Act, but that this revisional jurisdiction was of a very special nature and could only be invoked in furtherance of justice. This comes to the same thing as basing the jurisdiction on S. 107, Government of India Act.

Another Division Bench of the Calcutta High Court in *In re Khandakar Mohammad Makhi* (6) assumed that it had power to interfere, and it was held in that case that the name of a person cannot be inserted in the list of touts without making an enquiry in accordance with the provisions of S. 36, Legal Practitioners Act.

The first case that came before the Punjab Chief Court appears to be *Channan Das v. Empress* (7). At the time

(2) A. I. R. 1924 AM. 69=79 I. C. (93)=15 All. 676.

(3) A. I. R. 1928 All. 834=118 I. C. 524.

(4) [1908] 26 Mad. 596=13 M. L. J. 272.

(5) [1910] 11 Cr. L. J. 320=6 I. C. 327.

(6) [1929] 116 I. C. 173.

(7) [1900] 3 P. R. 1900 Cr.

S. 13, the Punjab Courts Act, vested the general superintendence and control over all other civil Courts in the Chief Court. This S. 13, which has now been repealed is practically in the same terms as S. 107, Government of India Act. It was held that the Chief Court was justified in interfering under S. 13, Punjab Courts Act 1884, where the District Magistrate omitted to consider the definition of a tout and held the person to be a tout although the acts necessary to constitute him such were not even alleged to exist. Again a Division Bench of the Punjab Chief Court, in *Man Singh v. Emperor* (8), held that it was competent to consider and deal with an illegal order passed under S. 36, Legal Practitioners Act, by reason of the wide powers of superintendence given under S. 13, Punjab Courts Act. It was said that the Chief Court would not interfere with an order so passed unless it could be shown that the provisions of S. 36, had not been complied with, or for other good and substantial reason, such as an opportunity not having been given to the petitioner of showing cause against his name being included in the list. It was further stated that the Chief Court would interfere if it found that there was no evidence whatever to support the finding. The matter again came before a Single Judge of the Chief Court in *Bute Khan v. Emperor* (9). The previous decisions to the effect that the Chief Court had power under S. 13, Punjab Courts Act, to revise orders passed under S. 36, Legal Practitioners Act, were followed.

A Single Judge of the Lahore High Court in *Diwan Chand v. Emperor* A.I.R. 1926 Lah. 227, interfered with an order passed under S. 36, Legal Practitioners Act, but in the case it was assumed that there was jurisdiction to do so. In *Fakir Chand v. Emperor* (10) I assumed that I had jurisdiction to interfere with such an order and did so. The learned Chief Justice in *Lakshmi Narain v. Mt. Ratni* (11) held that this Court could, in the exercise of the power of general superintendence under S. 107, Government of India Act, send for the record of proceedings under S. 14,

Legal Practitioners Act against a pleader and direct the transfer of the proceedings or pass such orders as it thought fit. It follows that this Court has power under S. 107, Government of India Act, to send for the record of proceedings under S. 36, Legal Practitioners Act and to examine that record and to interfere if necessary in the ends of justice. In fact it has for long been held that the High Courts have under S. 107, Government of India Act, not only administrative but judicial powers. In the exercise of its powers of superintendence the High Court may direct a subordinate Court to do its duty. A High Court, however, would not be competent in the exercise of this power to interfere with or set right the order of a subordinate Court on the ground that the order of the subordinate Court has proceeded on an error of law or an error of fact. In the exercise of its superintending power it will not ordinarily interfere except in cases of grave and otherwise irreparable injustice e. g., a High Court will interfere with orders passed under S. 36, Legal Practitioners Act, if the provisions of the section have not been complied with or if the person affected has not been given a full opportunity to meet the charge, brought against him, i.e., no order will be interfered with except for good and substantial reasons, including the absence of any evidence. A High Court, however, would not be justified in interfering when the ground urged was that the decision of the Court was against the weight of evidence. Again a mere irregularity in procedure which has not prejudiced the petitioner will be no ground for interference.

I would, therefore, reply to the question put to the Division Bench by the Single Judge that this Court has power of revision in the limited sense set out above. In other words, I would hold that the High Court has power to revise orders passed under S. 36, Legal Practitioners Act, by reason of power of superintendence vested in the Court by S. 107, Government of India Act, but this power is of a very exceptional nature and cannot be invoked except in the furtherance of justice.

The cases should now go back to the Single Judge for disposal.

V.B./R.K.

Order accordingly.

(8) [1909] 11 P.R. 1909 Cr. 8 I.C. 977.

(9) [1909] 10 Cr. L. J. 447=3 I. C. 982.

(10) A.I.R. 1926 Lah. 405.

(11) A. I. R. 1926 Lah. 199=93 I. C. 700=27 Cr. L. J. 476.

* 1930 Cr. Cases 988

(Lahore)

TEK CHAND, J.

Ram Saran Das—Accused Appellant.

• v.

Emperor—Opposite Party.

Criminal Appeal No. 454 of 1930, Decided on 8th July 1930.

* (a) Criminal Trial—Evidence—Police-man's testimony, like that of every other witness, must be judged on its own merits.

A policeman's testimony, like that of every other witness, must be judged on its own merits and should be accepted or rejected according to the circumstances disclosed in each particular case. [P 939 C 2]

* (b) Penal Code, S. 124-A—No violence advocated by speaker—Heavy sentence should not be inflicted.

Where the speaker in his speech does not in terms advocate violence in any shape and there is nothing in the speech which might by implication or innuendo suggest its use, a heavy sentence is not called for: 103 I. C. 372, Ref. [P 931 C 1]

Shamair Chand and Mohd. Amin—for Appellant.

Ram Lal—for the Crown.

Judgment.—The appellant Ram Saran Das has been convicted under S. 124-A, I. P. C., for having made a seditious speech at a meeting held in the Rohtak Mandi on 25th January 1930 and has been sentenced to rigorous imprisonment for three years.

The questions to be decided in the appeal are :

(1) What is the text of the speech which the appellant made on the occasion in question ?

(2) Whether that speech falls within the purview of S. 124-A, I. P. C. ? and

(3) If so, whether the sentence awarded by the learned trial Magistrate is appropriate ?

With regard to the first point the prosecution have placed on the record the following materials :

(i) A report of the speech, Ex. P. E. prepared by Jai Gopal, Sub-Inspector, P. W. 3, from pencil notes, Ex. P. D., which had been taken down at the meeting by Amar Singh, Head Constable, (P. W. 2).

(ii) A report of the speech, Ex. P. M., alleged to have been prepared by a District Board Contractor, Ram Dya. (P. W. 6), under the instructions of Gobind Ram (P. W. 5), all of whom claim to have been present at the meeting.

(iii) The oral evidence given at the trial by the above-mentioned persons and Fazal Ali, lambardar (P. W. 7), and Ram Nand, carpenter (P. W. 8).

It will be convenient to take first

Ex. P. M. and the evidence of Gobind Ram, Balram and Ram Dya. The speech, as reported in Ex. P. M., is admittedly much stronger than that in Ex. P. E. or P. D. This report was originally stated by the prosecution to have been prepared by Ram Dya under instructions of the zaildar and the sufaidposh. In the course of cross-examination of these witnesses it, however, transpired that the original notes taken by Ram Dya were not forthcoming and Gobind Ram admitted that several "points" were added in Ex. P. M., which had been omitted by Ram Dya in his pencil notes, as he was not a fast writer. It was also conceded that Ex. P. M. instead of being in the handwriting of Ram Dya was actually written by a retired police constable Badri Prasad (D. W. 1), who is alleged to have suddenly arrived at Gobind Ram's house when the notes were being fair copied, and who has now appeared as a witness for the defence. Again we find that the statement of these witnesses as to the time, place and occasion when Ex. P. M. was prepared is discrepant in material particulars. According to Ex. P. M. one of the persons present at the meeting, was Pt. Ramphul Singh, pleader (D. W. 3). But it is proved that this gentleman was at Sonapat at the time, and it is significant that his name is not mentioned in Exs. P. D. or P. E., which were prepared by the police. There are several other points which thoroughly discredit this report. After careful consideration I have no hesitation in holding that Ex. P. M. is not a true and faithful report of the speech in question. In his argument the learned Assistant Legal Remembrancer also did not place much reliance on it and I, therefore, leave it out of account.

The oral evidence of Gobind Ram, sufaidposh, Balram, zaildar, Ram Dya and Fazal Ali, lambardars and Rama Nand is also very unsatisfactory. Each of these witnesses has tried to give a highly coloured version of the speech and to put in the mouth of the appellant expressions like "Government is zalim" and "it sucks the blood of the poor" which are not to be found in the police report Ex. P. D. or P. E. These witnesses state that on hearing the speech of the appellant their feelings were roused against the Government, but as

they come out of the meeting they thought better of it, and regained their good will towards it. A perusal of their depositions, however, leaves no doubt that they attended the meeting with the sole object of finding an excuse for making reports against the speakers, with a view to secure personal advantage to themselves. Two of them Balram and Gobind Ram stated that some years ago they had been granted two squares of land and a jagir respectively for services rendered during the Great War, and it is in evidence that an impression had gone about that services on the present occasion would also be similarly rewarded. It is obvious that it was for this reason that Balram and Gobind Ram, who themselves are persons of little or no education, engaged the services of Ram Dya to take notes of the proceedings, and after having these notes edited and amplified as Ex. P. M. on the following day and affixing their own signatures on it gave it to the Tahsildar. It is significant that within a short time after the submission of this report Ram Dya, who was formerly a pleader's munshi, and is now a contractor, secured four or five contracts from the District Board though there is no indication of his having been so lucky before. In the witness box these persons contradicted each other on several points and gave inconsistent and discrepant accounts of the same incident. Their evidence is unreliable on the face of it and I am constrained to reject it as such.

It remains now to consider the reports Exs. P. D. and P. E. which are in the handwriting of Amar Singh, Head Constable (P. W. 2), and Jai Gopal Sub-Inspector (P. W. 3), respectively. Both these persons were present at the meeting and Amar Singh took down the notes of the speech in pencil just as it was being delivered. Next morning these notes were faircopied by Jai Gopal, (P. W. 3) as Ex. P. E., which was submitted by him in due course to the authorities. I have carefully examined these documents with the assistance of both counsel and find that they agree with each other on all material points. Both Amar Singh and Jai Gopal appeared as witnesses at the trial and were cross-examined at length, but nothing was brought out to throw

doubt on the accuracy of these reports. The only ground which Mr. Shamair Chand was able to put forward for discrediting them is that they had been prepared by police officials. He argued that a document of this kind should be presumed to be suspicious. I can find no warrant for making any such presumption. A policeman's testimony, like that of every other witness, must be judged on its merits, and should be accepted or rejected according to the circumstances disclosed in each particular case. In the case before me I can find nothing suspicious about Ex. P. D., and after giving due weight to the arguments of counsel I see no reason to doubt its correctness. The defence have not led any evidence to point out any inaccuracies in the report. Indeed it is significant that none of the witnesses produced by the appellant attempted to say one word as to what the contents or the nature of the speech in question were. The accused in the written statement which he filed before the Magistrate gave a brief summary of his speech, and though it differs from Ex. P. D. in some important points, the framework of the speech, as given in it, is substantially the same as that of Ex. P. D. I hold therefore that on the whole this document gives a true and faithful account of the speech and the guilt or innocence of the appellant must be judged on it.

The speech as reported in Ex. P. D. or P. E. contains some passages to which exception has been taken by the learned Magistrate and which he has held as falling within the purview of S. 124-A and adding to the gravity of the offence. Some of these, however, appear to me to be innocent, whether taken singly or along with the context. As an instance I might refer to the speaker's criticism of the appointment and composition of the "Simon Commission" and to his remarks that the Commissioners travelled in comfort from Bombay to other big cities but did not visit the villages, where there are "no roads, no hospitals for men or cattle to get medicines from or schools," where insanitary conditions prevail and malaria rages, and for this reason they are not likely to form a correct estimate of the poverty of people living in rural areas. The learned Magistrate appears to have been much im-

pressed by this part of the speech, and after holding that he "incited bad feelings against the Government" has emphasized the fact that he "even blackmailed the Simon Commission." The exact meaning of this expression, as it stands, is not clear. It has been suggested that by a slip of the pen, the word "blackmail" has been erroneously used for the not very elegant word "blackguard". Be that as it may there is no doubt that by no stretch of language can these references to the Simon Commission be held punishable under S. 124-A, I. P. C., or add to the gravity of the offence, if the speech could otherwise be brought within its purview.

The same may be said of the reference in the speech to the economic drain from India caused by the export of foodstuffs and other raw materials, in exchange for which a

"motor-car of Rs. 6,000 is sent back, which after a few years become useless and means an expense of four or five rupees in maintaining it."

Another matter to which the learned Magistrate has referred, and which was also stressed before me by the learned Assistant Legal Remembrancer is the instigation alleged to have been made by the appellant that the Congress was originally started at the suggestion of the Government and that when some of its leading members in early days became opposed to Government they were appointed to big offices. This statement again whether it is in fact true or not cannot be said to be seditious. If anything, it is a condemnation of the honesty of the Congressmen of those days and has no bearing on the real question before me.

But while views like these described above are innocent, there is no room for doubt that the speech contains several passages which offended against the wide provisions of the section. I do not think it necessary or desirable to give wider publicity to those passages by incorporating them in this judgment. It will be sufficient to say that the language in which the appellant referred to the "War of Independence" of 1857, which "unluckily failed," is advise to his hearers to attain the same object, though by different means and other similar expressions clearly offend

against S. 124-A, and are sufficient to sustain the conviction.

As regards the sentence, the learned Assistant Legal Remembrancer has very frankly and properly admitted that it is excessive and is heavier than any other sentence passed under S. 124-A which had come to his notice. In awarding this sentence the learned Judge has taken into consideration, besides the speech in question, certain other matters, e. g., the circumstances that during the progress of the trial the appellant at the time entering the Court-room raised certain cries and recited a certain couplet in Urdu. There is, however, no evidence on this point, nor even a note by the Magistrate on the record, and Mr. Shamair Chand for the appellant does not admit the correctness of this statement. This being so, it is not necessary to decide, to what extent and for what purpose such conduct on the part of the appellant could have, if at all, been taken into consideration.

The learned Magistrate has also referred to certain other speeches which are alleged to have been made by the appellant on other occasions, before and after 25th January 1930. Pencil "notes" of some of these speeches have been placed on the record, but they have not been subjected to close examination either by the Magistrate or by counsel for the parties. In these circumstances, and having regard to the manner in which Ex. P. M. has been prepared and produced in this case, I consider it highly unsafe to accept these reports as containing a true and correct version of these speeches. I think, therefore, that must be left out of account. It may be stated that the learned Assistant Legal Remembrancer very properly admitted that these reports, even if they were accepted as correct, are not of much use in judging the intention of the appellant in this case, as his intention appears to be quite clear from Ex. P. D. there being no ambiguity whatsoever about it.

In the judgment the learned Magistrate also has dealt on the "Bolshevik tendency" of the appellant. I cannot, however, find any trace of any such tendencies, either in the speech as reported in Ex. P. D. or in the other facts proved at the trial.

It is, therefore, clear that the learned Magistrate has relied upon several extrinsic matters and the sentence imposed by him is disproportionately excessive. It was conceded for the Crown that the appellant did not in terms advocate violence in any shape or form, nor can I find anything in the speech which might by implication or innuendo suggest its use. On the question of sentence both counsel have cited a number of rulings before me. As those cases proceeded on their peculiar facts it is unnecessary to discuss them here. The case which can, however, be taken as a safe guide is that of *Ram Chandra v. Emperor* (1) in which the offending article was admittedly stronger than the speech now in question but where Addison, J., sentenced the convict to rigorous imprisonment for six months, with a fine of Rs. 150. Having regard to the facts of the present case and keeping in view all the circumstances, I think that the ends of justice will be met by sentencing the appellant to rigorous imprisonment for four months.

I, therefore, maintain the conviction but accept the appeal to this extent that the sentence of rigorous imprisonment for three years is reduced to that of four months.

R.M./R.K. *Order accordingly.*

(1) [1923] 103 I. C. 372=29 Cr. L. J. 381.

1930 Cr. Cases 991

(Lahore)

BHIDE, J.

Emperor

v.

Sis Ram and others—Accused—Respondents.

Criminal Revn. No. 258 of 1930, Decided on 1st May 1930, reported by Dist. Magistrate, Rohtak, on 17th February 1930.

Criminal P. C., S. 145—Order without notice and finding as to danger of breach of peace is *ultra vires*.

The provisions of S. 145 (1) are mandatory and consequently if no notice is issued as required and there is no finding that there was a danger of breach of peace, the order under S. 145 becomes *ultra vires*: A. I. R. 1924 Lah. 91, *Rel. on.* [P 991 C 2; P 992 C 1]

Qabul Chand and Shamair Chand—for Respondents.

Facts.—One Gopi, a kamin by caste, made an application under S. 145, Criminal P. C., that a house belonging to him in Bhawar village was for-

cibly taken possession of by Sis Ram and two other Jats, that he had collected material for rebuilding it but was stopped from doing so, and that there was an imminent danger of breach of the peace. On that very day he made another application requesting the Magistrate to see the spot. The Magistrate did not record any preliminary order as required by law and fixed 26th July for inspection of the spot. After inspection of the spot he issued no notice to the other party nor did he affix any copy of this notice to some conspicuous place at or near the house in dispute. He simply noted on the file that he had informed Sis Ram of the date. Now Sis Ram is only one of the other party. There are two other real brothers of Sis Ram also concerned in this case, who were not informed by the Magistrate. After getting the written statement of the other side and recording evidence produced by both parties, the Magistrate restored the possession of the house to the applicant.

Grounds.—The application for revision of this order has been presented to me on the following grounds: (1) That the Magistrate did not record any preliminary order and that the procedure adopted by him is illegal, and that therefore the Magistrate had no jurisdiction in this case. (2) That no notice was served upon the other party according to law, nor was a copy of this notice affixed to some conspicuous place at or near the house in dispute. (3) That in his final order he did not say that there was any imminent danger of breach of the peace, and that therefore that order was not justified.

In support of his pleas for revision Rai Bahadur Chaudhri Lal Chand quotes *Abdulla v. Gunda* (1) and *Teku v. Buta Singh* (2). In my opinion the provisions of law have not been observed in this case which were mandatory and therefore all the proceedings of the Magistrate are vitiated. I therefore recommend that the order of the Magistrate may be quashed and a retrial ordered.

Order.—I agree with the learned District Magistrate that the order of the Magistrate under S. 145, Criminal P. C., in this case was *ultra vires*. No

(1) [1907] 7 P. R. 1907=24 P. W. R. 1907 Cr. =6 Cr. L. J. 113=71 P. L. R. 1903.

(2) [1915] 27 I. C. 766.

notice was issued as required by the section and there is no finding that there was a danger of a breach of the peace. In these circumstances the order must be set aside: see *Hakam v. Ralia Ram* (3). I therefore, quash the order passed by the Magistrate and direct fresh proceedings to be taken on the application according to law.

V.B./R.K. *Order quashed.*

(3) A. I. R. 1924 Lah. 91=74 L. C. 79=24 Cr. L. J. 751=4 Lah. 66.

1930 Cr. Cases 992 (1).

(Lahore)

DALIP SINGH, J.

Mangha Ram—Accused—Petitioner.
v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1568 of 1929. Decided on 14th February 1930, from order of Sess. Judge, Multan. D/- 19th August 1929.

Criminal P. C., S. 239—Two persons abducting girl—Third person not taking part in abduction cheating purchaser of girl by false representation as to her caste—Transactions cannot be said to be same.

A transaction of abduction for which two persons have been convicted cannot be said to be part of the same transaction when a third person, not alleged to have taken part in the abduction, proceeds to cheat by false representation as to caste, etc., of the girl, a person who buys the girl, there being no continuity of purpose, nor any contiguity of time.

[P 992 C 1]

B. R. Puri—for Petitioner.

S. L. Puri for Govt. Advocate—for the Crown.

Judgment.—The joint trial of all these persons has not been justified by counsel for the Crown. He refers only to S. 239 (d) and contends that the transaction was one. I am unable to see how the transaction of abduction for which two persons have been convicted is part of the same transaction when a third person not alleged to have taken part in the abduction proceeded to cheat by false representation as to the caste, etc., of the girl, a person who bought the girl. There does not seem any continuity of purpose nor any contiguity of time. I therefore accept the revision and quash the conviction and the sentences as the trial was wholly illegal.

R.M./R.K.

Revision allowed.

1930 Cr. Cases 992 (2)

(Rangoon)

BAGULEY, J.

Nga San Tin—Accused—Appellant.
v.

Emperor—Opposite Party.

Criminal Appeal No. 550 of 1930, Decided on 30th June 1930, from order of Sess. Judge, Tharrawaddy, D/- 13th May 1930, in Sessions Trial No. 15 of 1930.

Criminal P. C., S. 350—S. 350 has no application to cases tried in a Court of Sessions.

Consent cannot give jurisdiction in a criminal trial. S. 350 only applies to Magistrates and not to cases tried in a Court of Sessions. Where the judgment is written and sentence passed by the Sessions Judge, but practically the whole of the evidence was recorded by the Additional Sessions Judge, the conviction cannot stand even though the accused agrees to the dealing with the case by the Sessions Judge: 26 Bom. 50 and 35 All. 63, *Rel. on.*

[P 992 C 2]

Judgment.—The appellant has been convicted under S. 304, I. P. C., and sentenced to seven years' rigorous imprisonment, and he appeals against the conviction and sentence. It is quite clear that the conviction cannot stand. The judgment was written and sentence passed by the Sessions Judge, but practically the whole of the evidence was recorded by the Additional Sessions Judge who was transferred when only one witness remained to be examined for the defence. The Sessions Judge mentions this fact in his judgment, but says that the accused agreed to his dealing with the case.

Consent cannot give jurisdiction in a criminal trial. The learned Judge appears to have considered himself as acting under S. 350, Criminal P. C., but this section only applies to Magistrates. It has no application to cases tried in a Court of Sessions, and I would draw the learned Judge's attention to *Emperor v. Sakharam* (1) and *Emperor v. Badri Prasad* (2). I therefore set aside the conviction and sentence and direct that the case be retried by the Additional Sessions Judge of Tharrawaddy.

P.N./R.K.

Conviction set aside.

* (1) [1902] 26 Bom. 50=3 Bom. L.R. 558.
(2) [1913] 35 All. 63=17 L.C. 797.

1930 Cr. Cases 993

(Allahabad)

DALAL, J.

Ghassoo—Accused—Applicant.

v.

Emperor—Opposite Party.Criminal Misc. Case No. 423 of 1929,
Decided on 6th January 1930.

(a) Criminal P. C., S. 526—Ground for transfer is not to be decided in abstract—What is to be determined is whether Magistrate behaved so as to give legitimate ground for fear of impartial trial.

The matter is not to be decided in abstract whether a certain Magistrate would deal with a matter impartially or not. The question always is whether through some error or unfortunate accident the Magistrate has behaved in a way to give legitimate ground for fear to one party or the other. [P 993 C 2]

(b) Criminal P. C., Ss. 526 and 162—When copy of statement of witnesses before police is asked for, Court is bound to grant same insisting on a written application and refusal to grant them on misapprehension of law or flimsy pretext are enough circumstances to make accused believe that Magistrate had no desire to be fair to him.

When a copy of a written statement made by a witness before the police is asked for, it is the bounden duty of the Magistrate, and it does not depend upon his volition or good will that he should refer to the statement made before the police and furnish a copy or record a definite order that he did not think it expedient in the interests of justice to furnish the accused with the copy. Nor can he insist upon a written application for the same, an oral request being sufficient. Therefore, insistence on a written application and refusal to grant copies on misapprehension of law laid down under S. 162 or on other flimsy pretext are enough circumstances to give the accused person reasonable belief that the Magistrate had no desire to be fair to him : 36 Cal. 560, *Ref.*

[P 994 C 1,2]

(c) Criminal P. C., S. 556, Expl.—Local inspection—Transfer is advisable but not necessary.

Explanation to S. 556 merely means that the local inquiry would not amount to a necessity for transfer, but there may be circumstances under which it would be advisable to direct a transfer from the Court of a Magistrate who has made a local inquiry. [P 994 C 2]

Zahur Ahmad—for Applicant.

U. S. Bajpai, A. P. Dube and S. B. L. Gour—for the Crown.

Judgment.—I have gone through the various affidavits and the explanation of the Magistrate who is trying the different cases. Unfortunately, the cases have assumed a communal aspect as the dispute is between Hindus and Mahomedans. I well realize that in such a case the class to which the Magistrate belongs raises a suspicion in

the opposite class, and, therefore, in cases of transfer where communal interests are involved a transfer should be granted with considerable hesitation. In the present case, however, I am afraid that the trying Magistrate has shown a certain amount of irritation and behaved in a way which would give legitimate cause to the Mahomedans to think that they would not receive justice in his Court. As I have often stated from this Bench, the matter is not to be decided in the abstract whether a certain Magistrate would deal with a matter impartially or not. The question always would be whether through some error or unfortunate accident the Magistrate has behaved in a way to give legitimate ground for fear to one party or the other. In this case such legitimate ground does exist. First of all certain Mahomedans were prosecuted by the police out of several against whom a complaint was made by the Hindus. When others were not prosecuted a complaint was made in Court and the Magistrate without holding any inquiry under S. 202, Criminal P. C., promptly ordered all the Mahomedans to be prosecuted at the same time. It is true that the complaint was made prior to the result of the police inquiry. Even so, when the favourable result of the police inquiry was available to some of the Mahomedans it would have been better if the Magistrate had waited until the completion of the inquiry in the case sent up by the police before ordering the prosecution of men whose prosecution was not desired by the police. A certain amount of confusion must arise and the defence must be prejudiced when the police case is mixed up with the case put forward by a partial complainant. It is rightly pointed out on behalf of those who are prosecuted by the police that by the complainant spreading wide his net to include all the Mahomedans, the persons prosecuted by the police have been deprived of defence witnesses because those who were prosecuted on the private complaint were the witnesses for those prosecuted by the police.

Secondly, the Magistrate has passed a most extraordinary order on the prayer of the Mahomedan accused for a copy of the statements of witnesses recorded by the police. Under S. 162,

Criminal P. C., a witness who was examined by the police and whose statement was recorded by the police may be cross-examined if in Court he makes a statement in conflict with the statement made by him before the police. The Magistrate has a curious idea that the person to be contradicted is the police officer who recorded the statement and not the witness who made conflicting statements. He even goes to the length of informing the public that such is the law "as it exists" meaning thereby that the law was different previously. As is usual with Magistrates, I am certain that a copy of the Code of Criminal Procedure was not handy for this Magistrate to refer to, and he never read the provisions of that section before recording this most amazing order.

Another thing is that there was no necessity to insist on the Mahomedan accused putting in an application. An oral request ought to be entertained as the law does not prescribe any application. To ask for a reason is another amazing order when every Magistrate ought to know that when a statement is required under S. 162 it must be required for the purpose of contradicting a witness. Another noticeable matter is that the application was filed on 19th July, and no order thereon was passed till 30th September. It appears to me that the order was passed on 30th September, merely for the purposes of the record and that the Magistrate had no desire to carry out orders of the law under S. 162. The procedure is well laid down in *Salt v. Emperor* (1) by a Bench of two Judges of the Calcutta High Court. The rule laid down there was that when a copy of a statement made by a witness before the police is asked for it is the bounden duty of the Magistrate, and it does not depend upon his volition or good will, that he should refer to the statement made before the police and furnish a copy, or record a definite order that he did not think it expedient in the interests of justice to furnish the accused with such a copy. The irritation shown by the Magistrate in first of all insisting on an application from an accused person who in every case has to be

given facility for his defence, secondly, in passing an order more than two months afterwards on the application, and, thirdly, in giving a most amazing reason for the refusal of the copy, would naturally give an accused person reasonable belief that the Magistrate had no desire to be fair to him.

In one case the prosecution was no doubt on behalf of the police, yet there was a Mahomedan complainant. When that complainant applied for stay so that he may request this Court to transfer the case, the Magistrate again took an exceedingly narrow view. He gave it out as his opinion that the Mahomedan was not the complainant and that he had no right to apply to this Court for transfer. In ordinary language the Mahomedan was certainly a complainant even though the prosecution was launched by the police. The refusal to grant a postponement which was absolutely compulsory under the law may have been an error of judgment but yet combined with the other actions of the Magistrate would create an impression of fear in the minds of the Mahomedans.

It appears that this Magistrate made a local inquiry. Mr. Dube on behalf of the opposite party was under the impression that the inquiry was made for some report to be submitted to Government. If so the inquiry was of a nature in which the Magistrate had to arrive at some conclusion, and I do not think that such a Magistrate would approach an inquiry in Court with an open mind. Reference was made on behalf of the opposite party to the explanation under S. 556, Criminal P. C., that the local inquiry did not deprive a Magistrate of jurisdiction. That merely means that the local inquiry would not amount to a necessity for transfer but there may be circumstances under which it would be advisable to direct a transfer from the Court of a Magistrate who has made a local inquiry.

I direct the transfer of all the cases to which these five applications for transfer relate from the Court of Mr. Chandra Mani to the Court of some other Magistrate having jurisdiction in the Etawah District. The District Magistrate is requested to fix upon such a Court. The trial shall proceed from the stage where it was left off. I have

(1) [1909] 86 Cal. 560=10 Cr. L. J. 88=2 I.C. 591.

informed Mr. Zahur Ahmad, counsel for the applicants, accordingly.

V.B./R.K. *Order accordingly.*

1930 Cr. Cases 995

(Allahabad)

BOYS, J.

Bhairo Prasad—Applicant.

v.

Emperor—Opposite Party.

Criminal, Revn. No. 154 of 1930, Decided on 26th May 1930, from order of Sess. Judge, Agra, D/- 29th October 1929.

U. P. Municipalities Act, S. 82—Interest in contract doubtful—Still permission of Commissioner is necessary.

A member of the Board acquiring share or interest in any contract must obtain permission in writing of the Commissioner. Where there is doubt as regards the interest, the Commissioner should be applied to for permission.

[P 996 C 1]

K. D. Malaviya—for Applicant.

Govt. Advocate—for the Crown.

Judgment.—The applicant has been convicted under S. 168, I. P. C., read with S. 82, Municipalities Act, in that while he was a public servant, i. e. a Municipal Commissioner, he had an interest in a contract made with the Board. This application is only before me on the revisional side of the Court, but the facts are of such importance to the public that it is desirable that they should have full publicity. The facts found are that the Board had some difficulty in arranging for the supply of gram to the conservancy bullocks. Whether these difficulties were genuine difficulties or manufactured in order to prepare the way for entering into an irregular arrangement with the applicant, there is no evidence. The applicant in 1926 was a member of the firm of Gobindram Chunnil Lal, grain-dealers. He apparently began to supply gram for the conservancy bullocks to the Board through his firm, Gobindram Chunnilal, on 5th May 1926. He apparently had either some doubts himself as to the risk that he might be incurring by this course of action, or thought that someone who was hostile to him might make capital of it. He has been given the credit by the lower appellate Court of the most favourable view of his application to the Board (Ex. 121) of 3rd June 1926, to the effect that he and the man who was associated with him in

the supply of gram felt that their position might be invidious.

Upon the application a resolution of the Board (Ex. 114), dated 30th June 1926, was passed to the effect that the applicant and the man associated with him should supervise the buying of gram at market rates. This gram then continued to be supplied by the applicant's firm, Gobindram Chunnilal, up to 21st September 1926, when the firm's name was changed to Bansidhar Rekhabdas, and apparently the object of this change was to conceal the fact that the same firm was really continuing to supply the gram. There is no reason to suppose that this suspicion is not well founded, and the applicant in any case has only himself to blame, for he has refused to produce his account books. The supply of gram continued in this way up to 3rd March 1928, when the matter was brought to the notice of the authorities and this prosecution was instituted. The learned Magistrate sentenced Bhairo Prasad to nine months' simple imprisonment and a fine of Rs. 500. The lower appellate Court substituted for the sentence of imprisonment a further fine of Rs. 300. Mr. K. D. Malaviya has urged every point that could be urged on behalf of the applicant, but I am quite satisfied that there is no force in any of them. He has urged that Cl. (f) of the proviso to S. 82, Municipalities Act, excepts from the prohibition in S. 82 "occasional" dealings. Apart altogether from the question whether Cl. (f) can be held to be in force at all seeing that, as I am told, the Government has not fixed any maximum, I have no hesitation in holding that though the supply of gram may have been irregular so far as dates and possibly even quantities were concerned, the term "occasional" is wholly inapplicable to a continuing arrangement for supply as needed. Nor is there any room for a suggestion that the applicant was under a mistake of fact which might enable him to plead S. 79, I. P. C.

It was suggested to me in the course of argument that the case was due to somebody having sent an anonymous letter and to hostility entertained towards the applicant by certain persons. This is, of course, wholly immaterial. All that we are concerned with is whether the applicant did or did not commit

an offence within S. 168, I. P. C., and in view of the great interest of the public in the probity of its representatives on the Board it is a matter for sincere congratulation when such a case is disclosed whether by an anonymous petition or otherwise. On the question of sentence I am asked to hold that the fine is too severe. I think that there is grave reason for suspecting the bona fides of Bhairo Prasad, the applicant, throughout this matter, and I find reasons for that opinion in two facts. According to the account that he himself gave, there was a discussion between him and others as to the propriety of his entering upon this transaction at all. That being so it is impossible to conceive that he did not consider the terms of S. 82, Municipalities Act, and from that section it is immediately apparent that where there is doubt the Commissioner should be applied to for his permission. Notwithstanding the discussion and doubt that arose in regard to the propriety of his action he refrained, and it is fair to say he deliberately refrained, from applying to the Commissioner. Further, he has refused to produce his accounts and has only himself to blame if conclusions unfavourable to him are drawn from that fact also. I think, therefore, that he was fortunate to have the sentence of imprisonment reduced to one of fine. The application is dismissed.

G.P./R.K. *Application dismissed.*

1930 Cr. Cases 996

(Allahabad)

BOYS, J.

Paras Ram—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. 166 of 1930, Decided on 27th May 1930.

(a) Public Gambling Act (3 of 1867), S. 6—Warrant illegal—Presumption does not arise.

The presumption under S. 6 would not arise if it is found that the warrant was an illegal warrant. [P 996 C 2]

(b) Evidence Act, S. 114, Illus. (b)—Accomplice must be corroborated.

Evidence of accomplice requires corroboration. [P 996 C 2]

* F. O. O'Neill—for Applicant.

M. Waliullah—for the Crown.

Judgment.—Paras Ram applies in revision from his conviction under S. 3 read with S. 15, Gambling Act (3 of

1867, and a sentence of nine months' rigorous imprisonment. It may be that Paras Ram, who is said to have previous convictions, had started anew to keep a common gaming house, and if that is so, it is unfortunate that the defect in the warrant should lead, as it must lead in the state of the evidence, in this case, to his acquittal.

The presumption under S. 6, Gambling Act, could not arise as it has been found that the warrant was an illegal warrant, and that position is not challenged. The presumption, failing, it could be proved otherwise that the house was being used as a common gaming house, and the prosecution has endeavoured to prove this by the evidence of two witnesses Md. Yusuf and Mula. These are men who were actually among the alleged gamblers who were caught in the room. The Magistrate purported to examine them as witnesses under S. 10; it may be, I have not got to decide the point, that persons who are examined by virtue of the power given by S. 10 are not to be regarded as approvers or as accomplices in the sense that their evidence cannot be acted upon without corroboration. I have no need to consider this point because I am of opinion that S. 10 was inapplicable to the case. The house referred to in S. 10 must be one "entered under the provisions of this Act." The house was not entered under the provisions of this Act, in that there was neither a legal warrant, nor was there present in charge any officer of the rank specified in S. 5.

The fact, however, that S. 10 is not applicable to the case would not prevent the Magistrate from examining these two persons in the ordinary way as witnesses. So examined, however, they are clearly accomplices and as such their evidence requires corroboration. The Crown finds itself unable to point out any corroboration, and in fact there is no hint of any corroboration of the statement of these two witnesses, so far as they purport to show that it was a common gaming house. The presumption under S. 6 then failing, the Magistrate having no power to examine under S. 10 and therefore in any event there being no question of any special character attaching to the witnesses by virtue of examination under S. 10, and

there being no corroboration of the witnesses regarded as ordinary witnesses not examined under S. 10, there is not legal basis for the conviction. The application is allowed and the conviction and sentence set aside and the applicant will be released unless his lawful detention is required for any other purpose. His bail bond in this matter is discharged.

M.N./R.K. . *Application allowed.*

*** 1930 Cr. Cases 997**

(Allahabad)

BOYS, J.

Emperor

v.

Bashir—Accused.

Criminal Ref. No. 256 of 1930, Decided on 17th June 1930, made by Dist. Magistrate, Dehra Dun, on 9th April 1930.

* Criminal P. C., Ss. 438 and 439 (5)—S. 439 (5) cannot constitute bar to District Magistrate's action under S. 438 in case of acquittal by a Magistrate since Local Government and District Magistrate are distinct and non-interchangeable terms.

A District Magistrate and the Local Government are two distinct and non-interchangeable terms, and the District Magistrate not being the person entitled to appeal against the acquittal by a Magistrate, the mere fact that he may be able in his executive capacity to move the Local Government to appeal under S. 439 (5) cannot bar his taking action under S. 438: 24 All. 346, Dist. [P 997 C 2]

M. Wakiullah—for the Crown.

Inahimudullah—for Accused.

Order.—This is a case of a reference by the District Magistrate asking that an acquittal should be set aside and the case sent back for retrial. The ground of the reference is that the accused was acquitted by the Magistrate of a charge of harbouring only because that person had not yet been convicted though proceedings were pending against him whom the present accused was charged with harbouring. The person alleged to have been harboured has been since convicted. The accused was not acquitted on the merits. If the Magistrate thought it necessary, I do not say it was necessary, but if he thought it necessary, to know the result of the trial of the person who was alleged to have been harboured for the offence which he was alleged to have committed, he should have adjourned the trial and awaited the result of the other trial. The only contention

which could be raised here against the reference is that the powers vested in the District Magistrate under S. 438, Criminal P. C., are shut out by sub-S. 5, S. 439, because the Local Government should have appealed and has not done so. This is to confound the Local Government with the District Magistrate as if the two terms were interchangeable.

It is manifest that the Local Government could appeal, but it could so appeal even if the District Magistrate thought that it should not appeal. The two terms not being interchangeable I can see no reason, whatever why sub-S. 5, S. 439, should be held to constitute any bar to the District Magistrate taking action under S. 438. For the accused my attention is drawn to the case *In the matter of Sheikh Aminuddin* (1). There two Judges of this Court refused to hold themselves barred from entertaining a reference under S. 438 by S. 439 (5). They did, however, go on to hold that as a matter of their discretion they declined to exercise their powers under S. 439 where the Local Government might have appealed, and where the Magistrate could have moved the Local Government if he so chose. It is possible that in that case the acquittal had been on what the Magistrate considered to be an acquittal. It has been based on a mistaken view of the course which the Magistrate ought to adopt. That may not be a material distinction, but the decision quoted is one where their Lordships acted in the exercise of a discretion, and I am certainly not bound by it. The District Magistrate not being the Local Government is not the person entitled to appeal, whether or not he may be able in his executive capacity to move the Local Government to appeal. I see no reason therefore why his judicial powers should be restricted.

Accepting the reference, I set aside the acquittal and direct the trial Court to take up the case again from the stage at which it had reached immediately before the order of acquittal was passed.

V.B./R.K.

Reference accepted.

* 1930 Cr. Cases 998

(Allahabad)

SEN AND NIAMATULLAH, JJ.

Mohamed Sharif — Defendant — Appellant.

v.

Nasir Ali and others — Plaintiff and Defendants—Respondents.

Second Appeal No. 1958 of 1927, Decided on 18th June 1930, from decree of Sub-Judge, Bulandshahr, D/- 22nd August 1927.

(a) Police Act (5 of 1861), S. 42—Police Act provision of three months' period for suits is repealed by Limitation Act (1871)—Suits are now subject to general law of limitation in Limitation Act.

On the passing of the Limitation Act (9 of 1871) the part of S. 42, Police Act (5 of 1861), which provides a period of three months for suits contemplated by it was repealed with the result that such suits became subject to the general law of limitation contained in the Limitation Act and the special provision of limitation contained in S. 42, Police Act (5 of 1861), ceased to be operative. [P 1000 C 1]

* (b) Limitation Act, S. 15—Claim against joint defendants—Notice necessary against only one defendant—Period of notice given is excluded in computing period of limitation for suit.

If it is necessary for the plaintiff to bring a suit claiming relief against all the defendants jointly, and if notice under enactment was necessary against one defendant only and was in fact given, the period of notice is to be excluded in computing the period of limitation for the suit and not merely so far as the defendant to whom notice was given is concerned : *A. I. R. 1922 Pat. 549, Ref.* [P 1001 C 1, 2]

(c) Civil P. C., S. 80 — Police Inspector acting in official capacity.

Police Inspector proceeded to the scene of offence on receipt of the report forwarded to him by the head muharri. His subsequent report complaining of assault and obstruction by the plaintiff and his party was made by him in his capacity as police officer. One of the offences with which the plaintiff was charged was that under S. 332, I. P. C. Plaintiff was acquitted and suit was filed by him for damages for malicious prosecution.

Held : that the Police Inspector was acting in his official capacity and that it was imperative on the plaintiff to give notice to him of the suit for malicious prosecution : *A. I. R. 1924 All. 851, Foll.* ; 5 *I. C.* 467, *Dist.* [P 1000 C 2]

(d) Police Act (5 of 1861), S. 42—Scope.

Section 42 refers to actions for "anything done or intended to be done under the provisions or under the general police powers."

Where a suit has been brought against police officer for damages for something done in the exercise of his powers under Criminal P. C., Police Act, S. 42, does not apply : 80 *I. C.* 178, *Foll.* [P 1001 C 1]

(e) Malicious Prosecution—Finding as to conspiracy of three defendants, including police officer to prosecute plaintiff mali-

ciously—Plaintiff held to be entitled to sue all three defendants for damages.

In a suit for damages for malicious prosecution the finding was that all the three defendants conspired to prosecute the plaintiff maliciously and without reasonable and probable cause and that in furtherance of their design one of the defendants figured as the complainant in a cognizable offence of which information was lodged by him to the police and the latter prosecuted the plaintiff on the faith of such information. Evidence, in the case, was given by all the three.

Held : that under these circumstances, all the three defendants, including the police officer were rightly considered by the trial Court to have prosecuted the plaintiff so as to entitle the latter to sue them for compensation for malicious prosecution : 80 *All.* 525 (P.C.) ; *A. I. R.* 1926 P. C. 46, *Rel. on.* [P 1002 C 1]

K. N. Katju—for Appellant.

Judgment.—These two appeals arise out of a suit brought by the plaintiff-respondent Syed Nasir Ali for recovery of Rs. 1,000 as damages for malicious prosecution. Defendant 1, Sharif, was a Police Inspector stationed at Khurja at the time when the offences for which the plaintiff-respondent was prosecuted were alleged to have been committed. Syed Zafar Ali and Aftab Husain, defendants 2 and 3, who are brothers, are related to the plaintiff. On 11th January 1924 defendant 2 made a report at the Khurja Police Station that his house, which is contiguous to that of the plaintiff, had been raided by the plaintiff and his associates and that he (defendant 2) closed his doors to prevent the raiders getting into his house and made good his escape by jumping down the roof of his house. As the officer-in-charge of the police station was indisposed, the head muharri forwarded the report to the Circle Inspector, defendant 1, who, accompanied by a few constables, proceeded to the scene of occurrence. Subsequently at about 12 p. m. the Circle Inspector made a report at the thana that, while he and the constables were proceeding to the scene of occurrence, the party were waylaid by the plaintiff and a few others and beaten. This was said to have occurred between 6 and 7 p. m. Defendant 1 was under orders of transfer to Saharanpur and left Khurja next day. The offences with which the plaintiff and his party were charged by defendant 1 in the report already mentioned were those under Ss. 332 and 147, I. P. C., i. e., voluntarily causing hurt to deter public servant from his duty and

rioting. The officer-in-charge of the police station made an investigation which resulted in the plaintiff's prosecution for those offences before the Joint Magistrate, who acquitted the plaintiff and his co-accused on 27th March 1924. The suit which has given rise to these appeals was instituted on 27th May 1925 on the allegation that defendant 1 and Syed Zafar Ali, defendant 2, who is an Honorary-Magistrate, and defendant 3 conspired to bring a groundless charge against the plaintiff without reasonable and probable cause and maliciously. The Munsif, in whose Court the suit was brought, dismissed it on 22nd March 1926. On appeal the learned District Judge of Bulandshahr sent back the case to the Munsif on the ground that the latter had improperly refused to examine certain witnesses whom the plaintiff desired to produce and directed him to submit fresh findings after recording the evidence of such witnesses.

In the meantime the Munsif, who had dismissed the suit, was transferred and was succeeded by another officer, who recorded the evidence which the appellate Court had directed to be taken and found in favour of the plaintiff on all the material questions arising in the case. On receipt of the findings the learned District Judge decreed the plaintiff's claim to the extent of Rs. 700 against all the defendants. Second Appeal No. 1958 of 1927 has been preferred by defendant 1 and Second Appeal No. 2260 of 1927 has been preferred by defendants 2 and 3. To clear the ground for a consideration of the questions of law which have been argued before us we should state the findings of fact arrived at by the lower appellate Court which must be accepted as conclusive on second appeal. It has been found by the learned District Judge concurrently with the finding of the Court of first instance after remand that defendant 1 and defendant 2 were on friendly terms; that there was ill-feeling between the plaintiff and defendants 2 and 3 in consequence of disputes about a certain zamindari; that in June 1923 proceedings under S. 145, Criminal P. C., were taken by the Sub-Divisional Officer, Khurja, against the plaintiff and defendants 2 and 3; that a report of defendant 1 then made was unduly

favourable to defendants 2 and 3 and that the evidence otherwise proved that defendant 1 had identified himself with defendants 2 and 3. It has also been found that the criminal case against the plaintiff and his party was absolutely false and that the plaintiff, who was a schoolmaster, was busy with the printing of examination papers in the school building at the time when the offences were said to have been committed. The lower appellate Court has gone so far as to hold that the report of defendant 2 made at the thana on 11th January 1924, which was forwarded to defendant 1, was, without foundation and that the subsequent report of defendant 1, charging the plaintiff and his party with offences under Ss. 332 and 147 was equally without foundation. The learned District Judge has expressed himself thus:

"The plaintiff has thus proved that he could not be at the alleged row nor could he be at the tiraha to fight with the defendants. As the plaintiff was innocent and the whole story of the defendants from end to end was false, so not a single person of mohalla of defendants 2 and 3 nor any one of the tiraha appeared as a witness for them. I agree with Mr. Ratan Lal that the reports of defendants 2 and 3 to the police that there was a danger of breach of peace, as also the report of defendant 1 that the plaintiff beat him was all false so far as the plaintiff was concerned. As everything was false and imaginary it is fair to assume that the defendants were actuated by malice in so doing It seems that all the three defendants acted in a sort of conspiracy to ruin the plaintiff. Defendant 1 was going, he was to hand over charge the next day and so it needed all efforts to concoct a case against the plaintiff and men of his party as early as possible. For want of better grounds the prosecution was launched on a flimsy story not supported by reliable evidence even."

It may be that this picture is somewhat overdrawn, but sitting in second appeal we are bound by the findings of fact supported as they are by evidence which we are precluded from examining ourselves. We must therefore hold that the plaintiff-respondent was prosecuted maliciously without reasonable and probable cause.

The learned advocate for the appellant has argued: (1) that the suit should have been brought within three months from the accrual of cause of action, as required by S. 42, Police Act 5 1861; (2) that even if a longer period of one year provided for by Art. 23 Sch. 2, Limitation Act, be applicable,

the plaintiff's suit is barred and (3) that defendant 1 cannot, under the circumstances of the case, be regarded as the prosecutor and no decree for damages can be passed against him.

The first point may be shortly disposed of. On the passing of the Limitation Act 9, 1871, that part of S. 42, Police Act 5, 1861 which provides a period of three months for suits contemplated by it was repealed, with the result that such suits became subject to the general law of limitation contained in the Limitation Act and the special provision of limitation contained in S. 42, Police Act 5, 1861 ceased to be operative.

Article 23, Sch. 2, Lim. Act, provides a period of one year for suits for compensation for a malicious prosecution, to be reckoned from the date the plaintiff is acquitted or the prosecution otherwise terminates. The plaintiff-respondent having been acquitted on 27th March 1924, his suit brought on 27th May 1925, is prima facie barred unless allowance is made for two months. The plaintiff claims a further period of two months under S. 15, Lim. Act, which provides inter alia that in computing the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment for the time being in force, the period of notice shall be excluded. The plaintiff served defendant 1 with two months' notice under S. 80, Civil P. C., and brought the suit after the expiry of two months from the date of the notice. He, therefore, claimed benefit of S. 15 on the ground that such notice was imperative under S. 80, Civil P. C. If under the circumstances of the present case defendant 1 was entitled to a notice prescribed by S. 80, Civil P. C., there can be no doubt that the suit, so far, at any rate, as defendant 1 is concerned, was instituted within time. The question remains as to whether it was time barred against defendants 2 and 3 as to whom no question of notice can arise.

It was contended on behalf of defendant 1 that no notice under S. 80, Civil P. C., was necessary if the plaintiff's allegation be true that defendant 1 maliciously conspired with the other two defendants to launch a groundless

prosecution against the plaintiff, because, in that case, he cannot be deemed to have acted in the discharge of his duty as a police officer. Reference was made in this connexion to *Mumtaz Hussain v. A. E. Lewis* (1) which is, however, not a case in point. An assistant engineer against whom damages were claimed in that case by his subordinate for assault and use of abusive language was held not to be entitled to a notice under S. 80, Civil P. C. It cannot be said that a public officer acts in his official capacity in maltreating his subordinate in relation to the discharge of his duties as a public officer. S. 80 will apply to a case in which damages are claimed against a public officer in respect of any act purporting to be done by him in his official capacity. An important test is whether the public officer professed to act in his official capacity. As was ruled in *Abdul Rahim v. Abdul Rahim* (2):

"If the act was such as is ordinarily done by the officer in the course of his official duties, and he considered himself to be acting as public officer and desired other persons to consider that he was so acting, the act clearly purports to be done in his official capacity within the ordinary meaning of the term 'purport.' The motives with which the act was done do not enter into the question at all."

In the case before us defendant 1 proceeded to the scene of occurrence on receipt of the report previously made by defendant 2 and forwarded to him by the head-muharrir. He purported to do so in his capacity as a Police Inspector. His subsequent report complaining of assault and obstruction by the plaintiff and his party was likewise made by him in his capacity as a police officer. Indeed one of the offences with which he charged the plaintiff in that report was that under S. 332, i. e., voluntarily causing hurt to deter public servant from his duty. We are clearly of opinion that on the authorities of this Court and the language of S. 80, Civil P. C., defendant 1 did purport to act in his official capacity and that it was imperative on the plaintiff to give notice to him of the suit for malicious prosecution. The learned advocate for the appellant argued that notice, if at all necessary, was required

* (1) [1910] 5 I. C. 467.

(2) A. 1. R. 1924 All. 851=80 I. C. 72=46 All. 884.

by S. 42, Police Act 5, 1861, which provides for one month's notice only. If this contention is sound the plaintiff's suit should be deemed to have been instituted beyond limitation by one month. We are unable to give effect to this argument. That section refers to actions for

"anything done" or "intended to be done under the provisions of this Act or under the general police powers hereby given."

It was not in the discharge of any duty imposed by the Police Act that defendant 1 was obstructed or made the subsequent complaint at the police station against the plaintiff. Defendant 2's report which had been forwarded to him by the head muharrir complained of a cognizable offence having been committed by the plaintiff. Defendant 1 proceeded to the scene of occurrence to investigate the case initiated by that report. It was therefore, in his capacity as an investigating police officer in the exercise of powers conferred upon him as such by the Criminal Procedure Code that he acted. His own report which led to the prosecution of the plaintiff-respondent was also made in the same capacity. It was held in *Bachha Singh v. Tajar Beg* (3), that :

"where a suit has to be brought against a police officer for damages for something done in the exercise of his powers under the Criminal Procedure Code the provisions of S. 42, Police Act, do not apply and the plaintiff has to give two months notice as provided by S. 80, Civil P. C."

Accordingly we hold that S. 42, Police Act, does not apply and that the plaintiff was entitled to a period of two months being excluded in computing limitation. In this way the suit was rightly held by the lower appellate Court to be within time. The suit is in our opinion equally within time as against defendants 2 and 3. S. 15 (2), Limitation Act, provides that

"in computing the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment for the time being in force the period of such notice shall be excluded."

If it is necessary or even permissible for a plaintiff to bring a suit claiming relief against all the defendants jointly, and if a notice under S. 80, Civil P. C., was necessary against one of the defendants and was in fact given, the period of notice is to be excluded in computing

the period of limitation for the suit and not merely so far as the defendant to whom notice was given is concerned. Any other view will make the provision of S. 15 (2) nugatory in cases in which it is necessary to implead in one suit, private individuals and the public officer against whom there is but one cause of action. All that the section requires is that a notice should have been given in accordance with the requirements of any enactment for the time being in force and if this condition exists it declares without any qualification or reservation that the period of notice shall be excluded in computing limitation. The learned Judges of the Patna High Court have taken the same view in *B. & N. W. Railway Co. v. Ramsarup Lal Chowdhury* (4).

The only other question that remains is whether defendant 1 should be considered to have prosecuted the plaintiff. His report at the thana complaining that the plaintiff and his party had committed the offences under S. 332 and S. 147, I. P. C., and asking for action being taken against them, taken with his conduct previous to the report as found by the lower appellate Court, is sufficient, in our opinion, to establish that he was the prosecutor of the plaintiff. It is true he did not take any part in the proceedings which followed except by giving his own evidence, but that fact will not make him any the less a prosecutor if he can be otherwise considered to be such. In *Gaya Prasad v. Bhagat Singh* (5) their Lordships of the Privy Council held that :

"It is not a principle of universal application that if police or Magistrate act on information given by a private individual without a formal complaint or application for process the Crown and not the individual becomes the prosecutor. The answer to the question, Who is the "prosecutor," must depend upon the whole circumstances of the case. The mere setting the law in motion is not the criterion ; the conduct of the complainant before and after making the charge must also be taken into consideration. Nor is it enough to say the prosecution was instituted and conducted by the police ; that is again a question of fact. Theoretically all prosecutions are conducted in the name and in behalf of the Crown, but in practice this duty is often left in the hands of the person immediately aggrieved by the offence who *pro hac vice* represents the Crown."

(4) A. I. R. 1922 Pat. 549=70 I. C. 109.

(5) [1908] 30 All. 525=35 I. A. 189=5 A.L.J. 665 (P.C.).

(3) [1915] 80 I. C. 178.

In a later case, *Balbhaddar Singh v. Badri Sah* (6), at 460 (of 24 A.L.J.) their Lordships observed :

"Of course there is nothing in the point which seems to have been taken in the Courts below but which was not urged before their Lordships, that here de facto the appellants were not prosecuted by the respondent. In any country where, as in India, prosecution is not private, an action for malicious prosecution in the most literal sense of the word could not be raised against any private individual. But giving information to the authorities which naturally leads to prosecution is just the same thing. And if that is done and trouble caused, an action will lie."

In the case before us the finding is that all the three defendants conspired to prosecute the plaintiff maliciously and without reasonable and probable cause and that in furtherance of their design defendant 1 figured as the complainant in a cognizable offence of which information was lodged by him to the police and the latter prosecuted the plaintiff on the faith of such information. In the proceedings which followed before the Joint Magistrate all the defendants gave evidence. Defendants 2 and 3 actively aided the police in prosecuting the plaintiff in other ways. Under these circumstances we entertain no doubt that all the three defendants were rightly considered by the learned District Judge to have prosecuted the plaintiff so as to entitle the latter to sue them for compensation for malicious prosecution. In view of our findings on all the questions argued in second appeal we uphold the decree appealed from and dismiss the appeals with costs including counsel's fee on the higher scale.

G.P./R.K. *Appeal dismissed.*

(6) A. I. R. 1926 P. C. 46=95 I. C. 329=1 Luck. 215 (P.O.).

*1930 Cr. Cases 1002

(Allahabad)

BOYS AND YOUNG, JJ.

Abdul Jalil Khan and others—Appellants.

v.

Emperon—Opposite Party.

Criminal Appeal No. 949 of 1929, Decided on 25th March 1930, against order of Addl. Sess. Judge, Pilibhit, D/- 3rd September 1929.

(a) Criminal P. C., S. 288 — Previous statements of witnesses — Admissibility considered—Evidence Act, S. 157.

Previous statements of witnesses are only

ordinarily admissible to corroborate or contradict the witnesses who have made statements at the trial, or by virtue of S. 288, Criminal P. C. The latter section should only be employed when there is reason to believe that a witness at the trial is deliberately departing from the evidence which he gave before the Magistrate and where it is considered by the trial Judge desirable to bring the whole statement made before the Magistrate on record as substantive evidence. As to corroborating a witness it is unnecessary for the prosecution to corroborate their witnesses by previous statements until the statement made at the trial has been, in one way or another, challenged. As to contradicting a witness, it is not in accordance with law to use his statement made on a previous occasion, until the particular statement, by means of which it is desired to contradict the witness is put to him and he is asked what explanation he can give. In neither of these two latter cases is the previous statement itself substantive evidence.

[P 1003 C 1]

(b) Evidence Act, S. 30—Confession exculpating author from alleged offence is not confession and should not be relied upon for convicting co-accused.

A confession which does not exculpate the author thereof but is merely an explanation exculpating himself from his alleged share of the offence is not a confession at all and should not be relied upon in convicting the co-accused.

[P 1003 C 2; P 1004 C 1]

(c) Criminal Trial—Evidence—Accused identified by witness in jail but not identified in Court—Identification is not greatly reliable evidence.

Although an identification by a witness in jail who fails to point him out in the trial Court is not necessarily worthless, it is not evidence on which very great reliance can be placed.

[P 1004 C 2]

(d) Criminal P. C., S. 164—Magistrate should not ask questions so as to reconcile statements with those of co-accused unless it is to make statement intelligible but should merely record such statement as accused desires to make.

In recording confessions under S. 164, the Magistrate should merely record such confessions or statement as the accused might desire to make. It is no part of his duty to ask questions in detail on matters already within the Magistrate's knowledge and endeavour to reconcile the statements of the accused with other co-accused. But if the statement contains any real ambiguity it is the duty of the Magistrate with great caution and exercising great discretion to question the accused in order to eliminate the ambiguity and give him a chance to make his statement intelligible.

[P 1006 C 2]

M. A. Aziz—for Appellants.

U. S. Bajpai—for the Crown.

Boys, J.—This is an appeal of six men from convictions under S. 396, I. P. C., and in the case of Abdul Jalil Khan and Abdul Shakur alias Shakuri, sentences of death and, in the case of

Dilawar, Kundan, Chhida and Hemraj, sentences of 10 years' rigorous imprisonment, including 'three months' solitary confinement. The printed paper-book of the case runs to just over 300 pages. This is partly due to the fact that the learned Additional Judge has admitted on to the record the whole of previous statements made by witnesses. Previous statements of witnesses are only ordinarily admissible to corroborate or contradict the witnesses who have made statements at the trial, or by virtue of S. 288, Criminal P. C. The latter section should only be employed when there is reason to believe that a witness at the trial is deliberately departing from the evidence which he gave before the Magistrate and where it is considered by the trial Judge desirable to bring the whole statement made before the Magistrate on record as substantive evidence. As to corroborating a witness it is unnecessary, and this has been pointed out many times, for the prosecution to corroborate their witnesses by previous statements, until the statement made at the trial has been, in one way or another, challenged. As to contradicting a witness it is not in accordance with law to use his statement made on a previous occasion, until the particular statement, by means of which it is desired to contradict the witness, is put to him and he is asked what explanation he can give. In neither of these two latter cases is the previous statement itself substantive evidence. We recognize however that in the present case, in bringing the whole of previous statements on to the record, the learned Judge was only moved by a desire to give the accused every opportunity of making such criticisms against the witnesses' testimony in the Sessions Court as they could found on the earlier statements. The learned Judge's judgment extends to nearly 40 pages of the printed record, and he has dealt with the case ably and exhaustively. If as we think, he has dealt with it in greater detail than is necessary, we again recognize that that is an error on the right side and that he was only desirous of dealing with the case thoroughly. He has certainly succeeded.

We have listened to counsel for the appellants for several days and he again has given very commendable labour and

time to the study of this brief. These facts, however, which we can and do record with approval make it the less necessary for us to enter into details ourselves. The evidence consists of that of an approver, Narain, and a number of men who were eyewitnesses to the dacoity. The learned Judge has further relied on what is described as the confession of one of the accused, Dilawar. Except in one very important feature, dealing with the arrival of the dacoits on the spot and the part actually taken by Dilawar, there is no serious discrepancy between the so-called confession of Dilawar and the statement of the approver. The approver Narain's statement is that some of the dacoits came to a spot on the road to the village where the dacoity was committed on a tonga driven by one of the witnesses for the prosecution, Hafizul Rahman. Hafizul Rahman minimises his own share in the dacoity and says that he was compelled to drive some of the dacoits there. This explanation of his own presence among the dacoits is apparently accepted by the Crown.

Dilawar, accused, in his so-called confession describes how he drove the same two dacoits who are alleged to have come with Hafizul Rahman on his own ekka and says that he was compelled to this course by threats. The Crown did not in the case of this man accept the explanation. The fact remains that we have in the so-called confession of Dilawar and in the statement of the approver, as supported by Hafizul Rahman, two irreconcilable stories, one of necessity deliberately false, as to the manner in which some of the dacoits came to the meeting place. It would be possible perhaps to offer an explanation of this conflict, but in view of the line that has been taken in this Court by the Crown, it is unnecessary to deal with it in detail. The learned trial Judge has given some weight to the alleged confession of Dilawar, but in this Court the Crown has thrown it out and does not ask us to rely upon it. We think that the learned Government Pleader was right in adopting this course. Whether or no Dilawar had told the truth in the rest of the story in the alleged confession and only endeavoured to protect himself by explaining that he was forced into the course that

he followed, the fact remains that the confession, as it stands, does not implicate him himself and is in fact not a confession at all, but an explanation exculpating himself from his alleged share in the dacoity. We need not therefore say anything further on the subject of Dilawar's confession more than this, that we had to examine very carefully the circumstances in which it was made to see whether any conclusion could be drawn from these circumstances from which the appellants were entitled to reap an advantage. We do not think, however, that any conclusion can be drawn from those circumstances in favour of the appellants.

We deal with the case, therefore, as depending upon the statement of the approver Narain, supported by the evidence of eyewitnesses.

We do not find it necessary to deal with the cases of any of the appellants, excepting that of Chidda, in any detail. In the case of Abdul Jalil the evidence is, in our opinion, fully satisfactory. In the case of Abdul Shakur we eliminate the evidence of Tara. He identified Abdul Shakur in the Bareilly jail and he made no mistakes. It is true that he picked out Abdul Shakur from a line including Shakuri and Abdul Jalil and 15 other men not suspected in the case, and it is true that he did not pick out in the Bareilly jail any unsuspected person, that is, any person admittedly not suspected in the dacoity. Had his efforts at identification stopped there, there might not have been much to be said against it, but we find that he was also invited to Pilibhit to pick out other accused whom he could identify from the long line of men put up before him, and he failed to identify any one of the suspected persons, while he did identify no less than three persons who admittedly were not suspected. Eliminating Tara we find more than sufficient evidence in the testimony of the remaining witnesses to support the conviction of Abdul Shakur. Similarly in the case of Dilawar, we strike out the evidence of Pitam who, while pointing out two of the suspected persons in the jail and making four mistakes, again failed in the Magistrate's Court and the Sessions Court to point out Dilawar. We do not suggest that an identification by a witness in jail

who fails to point him out in the trial Court is necessarily worthless. His evidence that he did at the jail point out certain persons, though he cannot remember them, read with the evidence of other persons who can show who were the persons that were identified, may be of some value read with other evidence. But manifestly it is not evidence on which very great reliance can be placed. Striking out, however, Pitam from the list of witnesses against Dilawar we find there is sufficient remaining. The cases of the other accused, with the exception of Chidda, it is not necessary to deal with separately.

In the case of Chidda we find that Kandhai and Padhe, though they picked him out at the identification proceedings in the jail, did not identify him before the Magistrate or in the Sessions Court, and, as we have just said above, such an identification can ordinarily not carry much weight. Lochan, another witness, picked out Chidda in the Pilibhit jail, but he there also pointed out four persons who were not even suspected, while in the Bareilly jail he failed to pick out anybody rightly and did pick out one person wrongly. Lochan though he picked out Chidda in the Sessions Court failed to pick him out in the Magistrate's Court and picked out one Abdulla in his place. The evidence of Lochan is therefore unreliable. There remains against Chidda the statement of the approver supported only by the statement of Piare. We have, therefore, the more carefully examined the statement of Piare, for it does not follow that because there is only one witness, that witness' testimony is insufficient to corroborate the approver. We find, however, in Piare's statement before the trial Court that he constantly lays stress upon the fact that he knew Chidda because he saw him on the chabutra in front of the house where the dacoity was committed walking up and down with a sword. He was asked whether he had not in fact stated before the committing Magistrate that he saw no arms with any dacoit. He replied that he had told the Deputy Magistrate that he did see arms with the dacoits though the Deputy Magistrate may not have recorded the fact. The English record of the evidence in

the committing Magistrate's Court shows that Piare there said:

"I had not seen gun and weapon with any of the dacoits."

To further satisfy ourselves we checked the vernacular record and we found the same statement there. It is impossible then for us to believe Piare's statement that he stated the contrary and that he has been incorrectly recorded. It is difficult to suppose that both the Peshkar and the Magistrate, recording a statement in different languages, would have made the same mistake, and further it is certain that if he had said: "I did see arms in the hands of the dacoits," he would have been asked in whose hands he saw them, whatever his answer might have been. We do not think therefore that we can with confidence rely on the statement of Piare.

In our view then the appeals of all the appellants, except in the case of Chidda, must be dismissed.

A few further comments we must make. On p. 263 of the printed paper-book the learned trial Judge expresses the opinion that the statement of a woman to the police who was one of those residing in the house in which the dacoity was committed, could be treated as a first information report and that therefore such a statement was admissible against the accused, seeing that the woman in question was produced as a witness in the case and could be cross-examined on it. In this the trial Judge was in error. The first information report was clearly that which was made by the chowkidar. The statement made by the woman was nothing more than a statement made by a witness for the prosecution to the police, which could not be used by the Crown for any purpose and could only be used by the defence as a basis for cross-examination.

The next comment that we have to make is that in the course of the argument the learned Government Pleader, when dealing with the conflicting statements of Dilawar in his statement as an approver and Narain in his statement as an approver, drew our attention to the evidence of Babu Sri Krishana, Circle Inspector, which is to be found on p. 213 of the printed book. It is indeed astonishing that in the

year 1929, when this evidence was given the Government Pleader of Pilibhit should have seen fit to lead it at all. There are no less than two printed pages at the very commencement of this police officer's evidence which are directed to one purpose and one purpose alone, namely, to show what a bad character the appellant Abdul Jalil was and how justified the Crown were in proceeding against him. We quote the following two examples of the evidence that the Government Pleader of Pilibhit permitted himself to lead. They are:

"In connexion with that dacoity (some other dacoity) the Sub-Inspector of Khatewa and the Circle Inspector of Naini Tal came to me at Pilibhit. They expressed their suspicion about this dacoity on Abdul Jalil, etc."

Again:

"the police of Pilibhit was very much afraid of Abdul Jalil Khan and was also in collusion with him. Nobody dared to see his house."

There are two pages of this sort of thing. It so happened that the Government Pleader of Pilibhit who represented the Crown at the trial was present in Court before us, and we asked him to explain how it came about that he led these two pages of evidence at the very commencement of the Circle Inspector's evidence without there having been any foundation to justify the evidence being led. He could only refer us to some wholly unsubstantiated suggestion that the police were intending originally to run a gang case and, therefore, wanting to put in all the evidence they could to connect various persons suspected in various dacoities or murders. It is manifestly immaterial what the police intended; the present case was a case directed, or at least should have been directed, solely to the proof of single dacoity. The only matter to which the Government Pleader of Pilibhit could direct our attention was a statement of the Magistrate who conducted the identification proceedings in the jail to the effect that he did not know for what case the accused were to be identified, but from the large number of accused put up before him he concluded that it was a gang case.

It is unnecessary to deal with this suggestion any further. The case before the Court, and the only case with which the Government Pleader of Pili-

bhit and the Court were concerned, was this single charge of a single dacoity, and it ought to have been most manifest to the Government Pleader of Pilibhit that he was not entitled to lead evidence to prejudice the Court against the accused or any particular accused and that he could only lead evidence of the bad character of the accused if that particular accused had previously led evidence of his good character (Evidence Act, S. 54). It is not suggested that Abdul Jalil Khan or any of the accused had, up to that period at any rate, led evidence of good character. We may note also that even if the Government Pleader of Pilibhit did endeavour to lead such evidence, it was the duty of the trial Court to have stopped him immediately. We recognize of course that the learned Judge had not had much experience on the date in question of Sessions work, and his failure to stop the Government Pleader in no way detracts from our great appreciation of the care and trouble that he expended on the case.

The next comment that we feel compelled to make is in reference to the Magistrate, Mr. Sri Kishen Kumar, who recorded the confession of Narain under S. 164, Criminal P. C. He had already apparently recorded the alleged confession of Dilawar, and we have already made mention of the serious conflict between Dilawar and Narain as to the manner in which the dacoits assembled at the spot, and also in regard to the acts of Dilawar subsequently and during the dacoity. Whether or no it was from Dilawar's previous statement that the Magistrate had got his knowledge, it is manifest that at the conclusion of Narain's statement he realized the serious discrepancy between the two statements and, as the record shows, apparently made a determined effort to get Narain's statement into harmony with that of Dilawar. Narain stated that Shakuri, Jalil and Dilawar went on a tonga while the remaining persons went on foot. Dilawar had stated that Shakuri and Jalil were driven by him to the meeting place on his own ekka. Narain completely finished his own statement, that is, the statement which he had come voluntarily to make, when the Magistrate proceeded to question him at great length manifestly on the

basis of some information in his possession. It is only necessary to mention samples of the questions he asked. *Question*: "Did Shakuri and Jalil go in an ekka or in a tonga?" There was no ambiguity whatever in Narain's statement that they had come in a tonga, but it was in conflict with Dilawar's statement that he had taken two men on his own ekka. Narain relied definitely "in a tonga." The conflict remained. The next question asked was "Was Dilawar in the same tonga?" Manifestly this was with a view to giving Narain a chance of saying, "No Dilawar was in an ekka," but the witness replied definitely "yes." The witness was then asked "Who was driving the tonga?" and replied "The tonga belonged to some one else whom I do not recognize?" Now it was manifest from Narain's earlier statements that he knew Dilawar well, for he had given evidence mentioning Dilawar by name and the share that Dilawar took in the dacoity. Notwithstanding this the Magistrate asked him again "Was it driven by Dilawar?" and Narain again replied definitely "No." There are many other instances too numerous to detail showing that the Magistrate was questioning Narain in detail on matters already within the Magistrate's knowledge and endeavouring to reconcile the statement of Narain with that of Dilawar. This was no part of his duty at all. It was his duty merely to record such confession or statement as Narain might desire to make. It was also part of his duty with great caution and exercising the greatest discretion to question Narain in order to eliminate any real ambiguity that there might be in Narain's statement, or in other words to give Narain a chance of making his statement intelligible. But he had no right whatever to cross-examine the man who was making the statement or to endeavour to get particular statements out of him.

Before concluding we may discharge the more pleasant duty of expressing our approval of the very careful maps of the locality and the khasras accompanying, that were prepared by the responsible officers on behalf of the Crown. They have been of the very greatest assistance to us in appraising

the value of the evidence and the facts generally of the case. We have already expressed our appreciation of the careful judgment of the trial Judge, Mr. Ram Ugrah Lal Srivastava, which we have had to consider.

The result is that we set aside the conviction of Chidda and direct his immediate release, unless he is required in connexion with any other matter. The appeals of the remaining five are dismissed; and the sentences on Abdul Jalil and Abdul Shakur will be carried out according to law. A separate order will be passed expressing to Government our recommendation that it might consider the grant of an enhanced fee to the counsel, Mr. Abdul Aziz, who represented the appellants.

V.B./R.K. *Appeals dismissed.*

* 1930 Cr. Cases 1007
(Allahabad)
BOYS, J

Sallu Mal and another—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Ref. No. 119 of 1930, Decided on 17th June 1930, made by Sess. Judge, Agra, on 17th February 1930.

* Criminal P. C., S. 133—Chabutra in public way—Obstruction—Order for removal can be made.

When there is a chabutra obstructing a public way the fact that in a particular case he public may have lot of room to go along the road, without needing to walk upon that particular site of the chabutra has nothing to do with the case and the public road authorities can secure its removal. [P 1007 C 2]

Hazari Lal Kapoor—for Applicants.

M. Waliullah—for the Crown.

Judgment.—I see no reason whatever for interfering with the Magistrate's order which is a most proper one, and a reference to the terms of S. 133 would make that absolutely clear. The person on whom notice was issued to show cause why the obstruction should not be removed set up at the outset what has been found to be a false case, that he has only re-constructed the chabutra on an old foundation. It is found in fact that there was no old chabutra on the site of the new construction. It is most manifest on the facts found that what has happened is this: There was a tiny little portion of chabutra, which the plan clearly in-

dicates was itself an obstruction, which the proper authorities would have been entitled to have removed. Having kept that there for some time he has now extended it on either side along the whole length of the frontage wall. On the one side of the tiny portion of the chabutra previously existing the encroachment extends to no less a length than 174 ft. and on the other side 62 ft. and apparently the width of the chabutra is 8 ft. It would not make the smallest difference in principle if it was 8 inches or if the encroachment was only by the addition of a single brick. It is by adding brick to brick that these sorts of encroachments are habitually successfully carried, though S. 133 authorizes an order to remove

"any unlawful obstruction from any way which is or may be lawfully used by the public or from any public place."

There can be no question on the findings that the site occupied by the present extension is a public way and is a public place and is ground which may be lawfully used by the public. The fact that in the particular case the public may have lot of room to go along the road without needing to walk upon that particular site has nothing whatever to do with the case. They are entitled to walk along that site if they wish. The opposite party here if allowed to maintain the chabutra would, of course, immediately set up that it was his chabutra and exclude the public. But even if he did not do so the public have a right to walk on that portion of the ground which the opposite party has covered with his chabutra. On this ground, and this ground alone, the Magistrate's order would be justified. He has in my view unnecessarily strengthened his order by pointing out that the P. W. D. are entitled to use the site for taking away material to repair the road. It is true that they are so entitled, but it would not make the least difference to the case if it were shown beyond doubt that they never would want to remove any soil from that site. The issue was perfectly simple and the facts show that the opposite party has deliberately encroached upon land which is public way, and his obstruction of it is unlawful, and the Magistrate's order directing its removal is a proper

order. It is not necessary for me to say anything in the present case whether as the plan suggests the so-called original portion of the chabutra is also an unlawful obstruction or not, but nothing that I have said in this judgment must be taken to suggest that that is an old chabutra and that the public road authorities cannot secure its removal. The reference is rejected. Let the record be returned.

V.B./R.K.

Reference rejected.

* 1930 Cr. Cases 1008

(Allahabad)

SULAIMAN AND NIAMATULLAH, JJ.

Badri Prasad—Applicant.

v.

Emperor—Opposite Party.

Civil Revn. No. 75 of 1929, Decided on 25th April 1930, against order of Dist. Judge, Agra, D/- 19th January 1929.

* Legal Practitioners Amendment Act (15 of 1926), S. 36, Expl.—Expression “majority of members present” is not same thing as “majority of members voting”—Out of 67 members present 26 voting in favour of resolution declaring person to be tout, 14 against and rest remaining neutral—There is no legal evidence on which person could be declared tout.

The expression “majority of the members present” is not the same thing as the expression “majority of the members voting”. If there are a large number of members who abstain from voting, it is quite clear that they are not prepared to state that there is a general repute against the person concerned. Where out of the 67 members of the Bar Association, only 26 voted in favour of the resolution declaring a person to be a tout and 14 against it, the rest remaining neutral, there is no legal evidence against the person on which he could be declared a tout. [P 1008 C 2]

K. Verma—for Applicant.

U. S. Bajpai—for the Crown.

Sulaiman, J.—Lala Badri Prasad is one of the numerous persons who has been declared a tout by an order of the District and Sessions Judge of Agra. The only evidence against Badri Prasad is a resolution of the Bar Association passed at a meeting on 22nd November 1928 declaring him to be a tout. The report received from the Bar Association showed that there were in all 94 members of the Association, but only 67 out of these were actually present on 22nd November 1928 when the resolution was considered. The voting showed that 26 voted in favour of the resolu-

tion and 14 against it. The rest obviously remained neutral.

Ordinarily a mere resolution of an association of this kind cannot be legal evidence against a person when he is accused of any charge. But the explanation added to S. 36, by the Legal Practitioners Amendment Act (Act 15 of 1926), provides that the passing of a resolution declaring any person to be or not to be a tout by a majority of the members present at a meeting, specially convened for the purpose, of an association of persons entitled to practise as legal practitioners in any Court or revenue office shall be evidence of the general repute of such persons for the purposes of this subsection. The important words to consider are “by a majority of the members present at a meeting”. There is no doubt that a majority of votes were cast in favour of the resolution if the neutral votes were to be excluded and therefore the resolution was duly passed by the Association. But the language of the explanation makes it quite clear that every resolution passed by the Association will not be legal evidence of general repute against an accused person. It becomes such evidence only if it has been passed by a majority of the members present at the meeting. The expression “majority of the members present” is not the same thing as the expression “majority of the members voting”. If there are a large number of members who abstain from voting it is quite clear that they are not prepared to state that there is a general repute against the person concerned. If it had been intended that a mere resolution passed by a majority of votes would be sufficient there would have been no necessity to add the words “by a majority of the members present at the meeting,” as the word passing involves the idea of a majority of votes being cast in favour of the resolution.

We are therefore of opinion that there is no legal evidence against the applicant on which he could be declared a tout. We accordingly allow this revision and set aside the order of the District Judge and direct that the name of Badri Prasad be excluded from the list of tous. We make no order as to costs.

P.N./R.K.

Revision allowed.

1930 Cr. Cases 1009

(Patna)

MACPHERSON AND DHAVLÉ, JJ.

Ramsarup Singh and others—Accused
—Appellants.

v.

Emperor—Opposite Party.

* Criminal Appeals Nos. 24, 27 and 28
of 1929, Decided on 3rd July 1929, from
a decision of Sess. Judge, Shahabad,
D/- 31st January 1929.

(a) Criminal P. C., S. 297—No record of
Judge having explained law in heads of
charge—If High Court is satisfied from
charge as whole and verdict that law was
explained, and there is no miscarriage, it
can refuse to interfere with verdict—Criminal
trial.

The heads of charge are not intended to be
an exhaustive detail of every particular which
the Judge may have addressed to the jury; and
although it is desirable that record of the
charge on question of law should be sufficient-
ly full to show whether the elements constitut-
ing the offences charged have been properly
and fully explained to the jury, High Court
can refuse to interfere with the verdict where
the Sessions Judge has failed to note in so
many words that he had explained the law to
the jury if it is satisfied from the charge as a
whole and the verdict that the law was pro-
perly explained and there was no miscarriage
of justice : *A. I. R. 1928 Pat. 420* ; *30 Mad. 44* ;
1 Pat. L. J. 317 and *A. I. R. 1930 Pat. 243*,
Ref. [P 1010 C 1, 2]

(b) Criminal P. C., S. 297—Evidence of
approver—Direction not to believe guilt or
otherwise of accused alleged to be absent
from scene of offence by approver is not
misdirection.

Since an approver may tell the truth in
some parts of his story, direction to jury with
respect to evidence of an approver as 'The
mere fact that the approver says that a certain
one of the accused was not present at the place
and time of the offence does not prove the ac-
cused guilty unless you are satisfied that the
approver is telling the truth' does not amount
to misdirection. [P 1011 C 2]

(c) Criminal P. C., S. 297—Approver's
statement—Corroboration is possible by
finding of unidentifiable substance such as
sugar and Judge can refer to it as corrobora-
tion in charge to jury.

Finding of a substance not ordinarily iden-
tifiable such as for example, sugar, from the
house of a particular dacoit soon after the
dacoity can lend corroboration to the ap-
prover's statement and it does not amount to
misdirection to refer to it as such in the charge
to jury : *29 Cal. 732* and *A. I. R. 1929 Cal. 57*
Ref. [P 1013 C 1]

(d) Evidence Act, S. 114 (a)—Presumption
relates to offence of dacoity also.

Presumption referred to in illustration (a) to
S. 114 is not confined to charges of theft but
extends to all charges, however penal, not
excluding even murder. Consequently where
a person charged with dacoity is shown to have
been in possession of part of stolen property

soon after the dacoity it may be presumed that
he was one of the dacoits or he received the
property knowing it to have been stolen at the
dacoity : *13 Mad. 426, Ref.* [P 1013 C 2]

(e) Criminal P. C., S. 297—Police diary
on record under S. 162—Judge can refer to
it in charge to jury.

Although it is injudicious to refer to police
diaries in charge to jury, where the Judge re-
fers to it under S. 162 there is no misdirection
in doing so if the Court warns the jury that
they were entitled to believe the witness if
they thought so unless the defence showed that
he had on a previous occasion made a contra-
dictory statement. [P 1012 C 2]

(f) Criminal Trial—Trial by jury—Duty of
Judge.

The Judge is not bound to address himself
in every particular and in every detail to every
suggestion put forward by the defence. It is
the duty of the Judge fairly and candidly to
point out the main and salient features of the
case from the point of view of the prosecution
and of the defence respectively. And in do-
ing so he is entitled to take into consideration
the speeches made upon both sides by the
Crown and by the prisoners' counsel in con-
sidering his presentation of the evidence to the
jury : *1 Pat. L. J. 317, Foll.* [P 1015 C 1]

S. N. Sahay, R. N. Lal and Anand
Prasad—for Appellants.

Asst. Govt. Advocate—for the Crown.

Dhavlé, J.—These three appeals have
been heard together as they arise out
of one and the same trial which was by
jury. Six of the seven appellants have
been convicted of dacoity and sentenced
to nine years' rigorous imprisonment
each ; and appellant Dipan Pande has
been convicted under S. 412, I. P. C.,
and sentenced to five years' rigorous
imprisonment in the same connexion.

The dacoity charged is timed about
10 p.m. on 18th September 1928, and the
charge under S. 412, which applied to
Dipan Pande and four other appellants,
related to the recovery on 22nd Septem-
ber of properties stolen in the dacoity.
The victim of the dacoity was one Bis-
wanath Bania of Mahmudganj.

The jury brought in a unanimous ver-
dict in the case of all the appellants
except Tribeni Tiwari whom a majority
of 3 to 2 found guilty of dacoity.

It has been contended that the trial
is vitiated by the failure of the Sessions
Judge to explain the offence of dacoity
to the jury, and in support of this con-
tention the case of *Mari Vallayan v.*
Emperor (1) has been cited. The heads
of charge do not contain an explanation
of dacoity, but they do contain several
significant passages bearing on the

(1) [1907] 30 Mad. 44=5 Cr. L. J. 78.

matter. In the first place a reason has been given for the alternative charge under S. 412 against five of the appellants, and this reason is :

"In some cases there is no direct evidence that the accused took part in the dacoity. The evidence consists only of the recovery from the possession of the accused of property alleged to have been stolen in the dacoity."

Secondly, in dealing with the recent unexplained possession of property stolen in the dacoity, the learned Sessions Judge records :

"You might even think that from all the circumstances of the case the proper inference is merely that he (that is to say, the accused from whom the property was recovered) knew the property was stolen property and received it dishonestly, and in that event you could not convict him either of dacoity or under S. 412 but you could convict him under S. 411."

It seems to me impossible to imagine, notwithstanding such passages in the heads of charge, that an experienced Sessions Judge would have failed really to explain dacoity to the jury. As was observed in *Eknath Sahai v. Emperor* (2) :

"The heads of the charge are not intended to be an exhaustive detail of every particular which the Judge may have addressed to the jury."

It is unquestionably desirable that the record of the charge on question of law should be sufficiently full to show whether the elements constituting the offences charged have been properly and fully explained to the jury. In the recent case of *Dhanpat Tiwari v. Emperor* (3) decided by this Bench on 13th May last, where the heads of charge mentioned that certain sections had been read and explained to the jurors, my learned brother remarked :

"Section 367 expressly provides that in a trial by jury the Court need not write a judgment. Any suggestion to the Court that in recording the heads of the charge to the jury they should practically write a judgment, and indeed should write out to no purpose the elements of criminal law which the Judge must explain to the jury but no experienced Judge sets out in a judgment, is in my opinion strongly to be deprecated. To my mind no exception can be taken to the record by the learned Assistant Sessions Judge of the head of the charge showing how he laid down the law to the jury."

In the present case the learned Sessions Judge has failed to note in so many words that he had explained the

section defining dacoity to the jury. At the same time it is clear, as I have already indicated, that he must have done so. It has been held in *Chotan Singh v. Emperor* (4) that the failure of the Judge to record in the charge what actually his explanation of the law was did not necessarily involve the setting aside of the conviction if the omission do not occasion a miscarriage of justice, and that the High Court will not order a retrial when it is of opinion that if the jury accepted the evidence which was put forward on behalf of the prosecution, there was no doubt they were entitled to convict the accused of the offences charged. The evidence in the present case of what happened in Biswanath Bania's house, if believed, makes out a case of dacoity and nothing else. The verdict read with the heads of charge also shows an appreciation of the three inferences from the finds referred to by the learned Sessions Judge. In my opinion, therefore, it cannot be said that the convictions of the appellants must be set aside merely because it is not stated in the heads of charge that the offence of dacoity was explained to the jury.

In dealing with the question of the dacoity, the learned Sessions Judge refers, *inter alia*, to the evidence of the approver Nagina Singh, and says :

"The defence have not challenged the evidence that there was a dacoity in Biswanath Bania's house and that the approver Nagina took part in the dacoity and there seems to me no reason why you shall not believe this much of the prosecution story. . . . If, however, you are satisfied that the evidence of the dacoity is generally true, then you will come to what seems to me the only question of any difficulty, namely, which, if any of the prisoners took part in the dacoity. . . ."

It has been contended that the learned Sessions Judge was in error in telling the jury that the defence had not challenged the evidence that Nagina Singh took part in the dacoity, and Mr. Srinarayan Sahay has endeavoured to show from the cross-examination of Nagina Singh that the man was challenged as regards his participation in the dacoity. The challenge is, however, confined to a few details and is not of the kind to suggest that according to the defence Nagina Singh was not in the dacoity at all. It is also obvious that the case

(2) [1916] 1 Pat. L. J. 317=35 I. C. 657=17 Cr. L. J. 353.

(3) A. I. R. 1930 Pat. 743=1030 Cr. C. 511=125 I. C. 131=9 Pat. 148.

(4) A. I. R. 1928 Pat. 420=111 I. C. 308=29 Cr. L. J. 804=7 Pat. 361.

must have been argued before the learned Sessions Judge on the footing that Nagina Singh had taken part in the dacoity. There is, therefore, no substance in the point raised by Mr. Sahay.

It has also been contended that instead of asking the jury to see how far the evidence of the approver was corroborated, and corroborated not merely in the general way, but in ways that would point "directly" to the accused concerned, the learned Sessions Judge should have pointed out to the jury that Nagina Singh was an out-and-out liar and that, therefore, corroboration was immaterial. It is impossible to accept this contention. How far to believe the approver was essentially a matter for the jury, and there was corroboration of his evidence for the jury to accept or reject. The learned Sessions Judge pointed out to the jury the grounds on which the evidence of an approver should be suspect—his criminality and low moral character on his own showing, and his :

"purchasing his own safety by betraying his own fellow criminals or perhaps his enemies,"

and added :

"In the present case there seems to be no reasons why you should not follow the general rule (requiring corroboration of the evidence of an approver). There was nothing about the evidence of Nagina Singh that could possibly impress one with the idea that he was a thoroughly truthful witness. . . ."

It has been urged that Nagina Singh, though he is from Kalyanpur, takes care not to implicate people from that village. This contention is not literally correct, because Nagina Singh does implicate Chotu Ahir, and Dukhanti Chamar from that village, though he does not actually send them inside the house of Biswanath Bania. In any case the learned Sessions Judge has expressly dealt with the point while considering the defence contention that the evidence of the approver proves four of the appellants to be guiltless of the dacoity. He says :

"You will, however, easily understand that if there is a risk of an approver falsely accusing persons who were not present, there is equally a risk that he may falsely deny the presence of the real criminals in order to save his friends."

In my opinion it was not open to the learned Sessions Judge to go beyond

this or to tell the jury that Nagina Singh was an out-and-out liar.

Exception has been taken to the next remark of the learned Sessions Judge:

"The fact therefore that the approver says that a certain one of the accused was not present at the dacoity does not prove that prisoner guiltless unless you are satisfied that the approver is really telling the truth."

It has been urged that this is an erroneous direction and that the learned Sessions Judge should have asked the jury to deal with the approver as a witness who was either truthful or untruthful. I am unable to agree; it is plain that the approver may have told the truth in some parts of his story, but not in others.

It has also been contended that the approver's story is inadmissible in evidence because he has said that when he was arrested the Sub-Inspector took his statement, and that before that the Sub-Inspector had said that if he should confess he would be made a prosecution witness. But the approver also says that he has deposed of his own free will and that what he has said is completely true. He also made a confession to the Sub-Divisional Magistrate which has been put in by the defence as Ex. C and which was recorded by that officer under S. 164, Criminal P. C., and certified as a voluntary confession. The approver's allegation that before he made his statement to the police he had been told that if he confessed he would be made a prosecution witness was not put, as it should have been put by the prosecution, to the Sub-Inspector concerned, but his statement in cross-examination, that Biswanath came to the thana while he and appellants Ramsarup and Chotu were there, is flatly contradicted by the Sub-Inspector and points to a distinct bias against the prosecution. I do not therefore think that the approver's evidence was as a matter of law inadmissible in evidence.

Coming now to individual appellants: it has been urged that in the case of Chotu Ahir and Ramsarup Singh it should have been pointed out to the jury that other members of the family were unable to recognize these men.* This contention was apparently advanced under the impression that with Bishwanath there lived not only his wife but also Bhrigu Bania and Ganesh Bania. Ganesh gives Hanuman Bania as his

father's name and so does Biswanath, but beyond this there is nothing to show that he is related to Biswanath. Bhriгу does not even share with Biswanath the same father's name. The sketch prepared by the Sub-Inspector (Ex. 21) does not show that Ganesh and Bhriгу were living with Biswanath, and the evidence does not show that either of them got so near the dacoits as did Biswanath. Biswanath's wife was prevented from giving evidence in the case by reason, it is said, and said without challenge, of her detention in hospital after a surgical operation. The evidence does not show that the two appellants who were holding Biswanath got close to his wife. It is therefore immaterial if the jury was not expressly asked to note that Biswanath is the only member of the family to identify the appellants. In dealing with the attack on Biswanath's evidence on the ground that he did not give to the chaukidar a description of these two appellants the learned Sessions Judge has remarked :

"You have seen the chaukidar and you will consider whether it is likely that he would carry in his head a description of two men given to him by Biswanath."

It has been urged that this is a mis-suggestion as it is not the case of the chaukidar that he had been given a description of the two men by Biswanath but had failed to carry it in his head. The chaukidar's capacity is however reflected in the fact that in his information at the thana he stated that Biswanath could identify the dacoits if he saw them, while he told the committing Magistrate that Biswanath had not said so and had said that he did not recognize any of the dacoits, and in the Sessions Court denied making such a statement. Biswanath himself says that he also told the chaukidar that he could identify two of the men and told him what they looked like. In my opinion therefore there was no mis-suggestion to the jury regarding the chaukidar. An attack has also been made on the following observation of the Sessions Judge :

"Next morning the Sub-Inspector took Biswanath's statement. Now it is reasonable to suppose that the Sub-Inspector would have asked Biswanath to describe the dacoits, but the defence have carefully avoided endeavouring to contradict Biswanath's evidence that he was able to describe two of the dacoits by means of his statement made to the Sub-

Inspector, and if you think proper you can from this omission infer that actually his statement in Court is correct and that there is nothing in his previous statement made to the police which can contradict it."

It has been urged that the learned Sessions Judge has in this passage improperly used Biswanath's statement to the police to corroborate his evidence in Court, contrary to the provisions of S 162, Criminal P. C., but that is not what the learned Sessions Judge has done in terms: he merely asked the jury, if they thought proper, to infer that his statement in Court is correct and uncontradicted by a previous statement. It has been urged that the learned Sessions Judge has really proved negatively that Biswanath had made the same statement before the police and that the law does not permit such an inference to be drawn from the omission of the defence to cross-examine the Sub-Inspector on the point and thus contradict Biswanath. It seems to me that the learned Sessions Judge could have told the jury that they were entitled to believe Biswanath, if they thought fit, unless the defence showed, as they had not even attempted to do, that he had on a previous occasion made a contradictory statement. The reference to the statement made to the police is at the most somewhat injudicious and is not, in my opinion, at all material enough to have led to a miscarriage of justice.

Every attack on the Judge's charge to the jury in respect of these two appellants, Chotu Ahir and Ramsarup Singh, thus fails.

Bishuni Kewat is the third appellant for whom Mr. Srinarayan Sahay has appeared. The contention in his case is that in the matter of the corroboration of the prosecution story by the find of the sugar there was misdirection, and by the find of the clothes, nondirection. Bishuni was named by the approver, and a search of his house led to the discovery of a large quantity of sugar and five articles of clothing which were claimed by Biswanath as stolen in the dacoity. It has been urged that sugar is not an identifiable article and that the learned Sessions Judge was in error in placing before the jury the find of the sugar as a corroboration when it could not in a reasonable view of the case be said to corroborate the approver's

story. The case of *Jamiruddi Masalli v. Emperor* (5) which was referred to recently in *Rebati Mohan Chakravarty v. Emperor* (6) was cited in support. That the sugar was not capable of identification is expressly mentioned in the heads of charge in the paragraph that deals with appellant Dukhanti Chamar immediately before the appellant Bishuni Kewat, if indeed it was necessary to detail such an obvious fact in the heads of charge. I am unable to accept as correct the contention that the find of sugar could not reasonably be a 'corroboration' of the prosecution story:

"Persons employed in carrying sugar and other articles from ships and wharves have been convicted of theft upon evidence that they were detected with property of the same kind upon them recently upon coming from such places, although the identity of the property as belonging to such and such persons could not otherwise be proved "Woodroff's Evidence, 8th Edition, p. 773, citing more than one authority."

As to the clothes, the contention is that the three lists of stolen property filed by Biswanath do not make even a remote approach to the identity of these articles, and that this should have been mentioned to the jury. That however seems to be a trivial circumstance in comparison with the fact that Biswanath's claim to the clothes was not at all challenged in cross-examination; nor was he asked to show where they were mentioned in his list. It is also obvious that the lists are by no means exhaustive, even though the third and last list was actually put in after the finds in the case; there are for instance the chaukidari receipts (Exs. 4 and 5) in Biswanath's name which were found at a place pointed out by the approver and which are not mentioned in any of the lists. In my opinion the charge against this appellant Bishuni is not defective, and there is no reason to interfere with the verdict of the jury against him.

Dukhanti Chamar and Dipan Pande have merely sent in petitions of appeal from jail, stating that they have been wrongly convicted. Mr. Sahay has argued their cases as *amicus curiae*. As regards Dukhanti Chamar, who was named by the approver and was stated by him to have carried away a large

quantity of sugar, and in whose house a suspiciously large quantity of sugar for a charmar was found besides two quilts and a dhoti with marks which have been identified by Biswanath and which are not claimed by Dukhanti Mr. Sahay has not suggested that there was any misdirection or non-direction in the charge to the jury. Dipan Pande has been convicted under S. 412, I. P. C., in respect of a big thali which was stolen in the dacoity and which (along with two unidentifiable articles wrapped up in a durrie) he was found concealing under the thatch of a house in a narrow blind lane. It has been urged that there can be no inference that the man knew that the thali had been stolen in the dacoity as distinguished from the minor offence of theft or robbery. According to Illus. (a) to S. 114, Evidence Act:

"The Court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession."

This illustration refers to cases of theft, though "stolen property" is defined in S. 410 P. C., as property "the possession whereof has been transferred by theft, or by extortion, or by robbery

But the provision in question is no more than an illustration, and authority is not wanting for the proposition that the presumption is not confined to charges of theft, but extends to all charges, however penal, not excluding even murder: vide *Queen-Empress v. Sami* (7). There is therefore no reason to interfere with the verdict of the jury in the case of Dipan Pande.

I now come to the appeal of Tribeni Tiwari and Ramsawarath Singh. Tribeni was found guilty of dacoity by 3 jurors against 2. He was not named by the approver, and the evidence against him consisted of two articles admittedly found in his house or on the person of his concubine—a cooking pot variously called a batlohi or batua and a pair of silver bracelets with tigers' heads on them. As regards the cooking pot the learned Sessions Judge has fairly placed before the jury the question whether the article is at all capable of identification by the owner after stating his opinion that it seems incapable of identification and after referring to a

(5) [1902] 29 Cal. 782.

(6) A. I. R. 1929 Cal. 57=115 I. C. 258=30 Cr. L. J. 435=56 Cal. 150.

(7) [1890] 13 M.d. 426.

discrepancy in Biswanath's story regarding the article. The learned Sessions Judge says that the weight of the bracelets does not agree precisely with the weight given in the complainant's list, and he leaves it to the jury to see whether such a loss of weight (from 16 to 13 bharis) might take place from constant use. He also refers to a mark, which he calls a dent, though the evidence points to a crack, by which it may be possible for the holder to recognize the article, and to the defence suggestion that Biswanath had had an opportunity of seeing the batua (this is obviously a clerical mistake for berua or bracelets) at the police station before the test identification. It has been urged on behalf of the appellant that the attention of the jury should have been drawn to the fact that at the test identification there was only one other pair of similar beruas and the contention is not without force in the circumstances.

Stronger exception has been taken to the following passage in the heads of charge:

"You will remember that the prisoner Tribeni makes a definite statement that he purchased this batua 18 months ago in Chandauli bazar, and he summoned the shopkeeper Rambadan and called for his books, yet he has not examined the shopkeeper although the witness was in Court. The accused is not of course expected to prove himself innocent but, when he makes a definite statement which ought to be capable of easy proof and he gives no evidence of it, it would not be unreasonable for you to draw some inference against him from the omission."

The contention is that it became unnecessary for the defence to examine Rambadan because Lakhmi Narain (P. W. 16) admitted in cross examination that in his jewellery shop in Chandauli Rambadan is a shareholder, that at that shop purjas are given to purchasers for cash payments, that Ex. A is a purja written by Rambadan, and that Ex. B is the account-book of the shop, and, further Kedar Tiwari (P. W. 27) said in cross-examination that he had seen Tribeni's concubine wearing beruas similar to the article in question for a year or a year and a quarter. The purja (Ex. A) refers to the sale of a pair of bracelets with tigers' heads in Baisakh 1984 (Sambat) and is supported by the account-book. Tribeni's case was that he had bought the bracelets from Rambadan 18 or 19 months before his exa-

mination in January 1929. It has been contended by Mr. Agarwala on behalf of the Crown that mere proof of the purja and the account-book does not establish the purchase and that, it was still necessary for the defence to call the seller Rambadan. It has on the other hand been urged on behalf of Tribeni that it was not to be expected that Rambadan would have any specific recollection of the sale of a particular article of jewellery so long ago, and that in any case, whether conclusive or not, the evidence of Lakhmi Narain and Kedar Tiwari should have been placed before the jury for what it was worth. In my opinion this contention must be accepted, and having regard to the divided verdict of the jury, it seems to me impossible to say that the result might not have been different if the evidence had been properly placed before the jury. Speaking for myself, I should certainly have found it difficult to say without hesitation that it had been established beyond reasonable doubt that the beruas belonged to Biswanath and not to Tribeni. I would therefore reverse the verdict of the majority of the jury against Tribeni on the ground that it is erroneous owing to misdirection by the learned Sessions Judge, such misdirection consisting in the remarks about the failure of the defence to examine Rambadan when coupled with the failure to refer to the evidence of Lakhmi Narain and Kedar Tiwari. Having regard to the exiguous character of the evidence against Tribeni, I do not think that this is a case for directing a retrial.

The only other appellant to be dealt with is Ramsawarath Singh. The learned Sessions Judge has pointed out how, according to the approver, Ramsawarath Singh refused to take part in the dacoity and went away, and how the man was seen concealing a bundle of articles in a shed of one Musafir Singh at the time of the house searches, two of the articles (a big thali of a mixture of metals known as phul and a bundle of yarn) being claimed by Biswanath as part of the stolen property. He has observed that the yarn appears to be incapable of identification, and he has left it to the jury to say whether the thali can be identified by the owner. He has also referred to the cross-examination of Bhabhuti Singh and the contradictions

in the evidence regarding the person who informed the Sub-Inspector and the place where he did so and the defence contentions, that being already under arrest Ramsawarath could not have concealed the property stolen, that the Sub-Inspector was in league with Bhabhuti Singh and others, etc. It has been contended that it should have been said to the jury that the Sub-Inspector must, in spite of his denial, have searched Ramsawarath's house before he left the tola, but that is only a defence contention—one of many defence contentions—on the evidence, and, as was observed in *Eknath Sahay v. Emperor* (2):

"The Judge is not bound to address himself in every particular and in every detail to every suggestion put forward by the defence. It is the duty of the Judge fairly and candidly to point out the main and salient features of the case from the points of view of the prosecution and of the defence, respectively. And in doing so he is entitled to take into consideration the speeches made upon both sides by the Crown and by the prisoners' counsel, in considering his presentation of the evidence to the jury."

One important circumstance does however seem not to have been put to the jury, namely, the fact that the thali found in the bundle weighs one seer 10 chataks (vide Ex. 14), while the phul thali mentioned in Biswanath's list is only one and a half seers in weight and was used for about one year. It has been urged by Mr. Agarwala that weights vary from village to village, but the answer to this is that there is no suggestion in the present case that Biswanath's standard of weight was different from that adopted at the house search. The omission to refer to the weight of the thali assumes importance from the fact that in the case of the beruas found on Tribeni's concubine the learned Sessions Judge mentioned the possible loss of weight while the weight of the thali is in excess of what was mentioned by Biswanath, and also from the fact that apart from the thali there is no evidence against Ramsawarath. On the evidence I cannot imagine how the thali can be positively said to be Biswanath's, and I doubt whether the jury would have said so if their attention had been drawn to the question of the weight. I would therefore set aside the verdict against Ramsawarath Singh on the ground that it is erroneous by reason of a non-direction amounting to a misdirection. In my opinion Ram-

sawarath's is also not a case for a retrial having regard to the evidence available.

The result is that I would allow the appeal of Tribeni and Ramsawarath, set aside their convictions and sentences, and acquit them. I would confirm the convictions of the five appellants in the other two appeals. The sentences passed upon them do not call for interference.

Macpherson, J.—I agree.

V.B./R.K. *Order accordingly.*

• 1930 Cr. Cases 1015

(Patna)

ROSS, J.

Bhuneswar Misra—Accused Petitioner.

Emperor—Opposite Party.

Criminal Revn. No. 395 of 1928, Decided on 30th July 1928, from order of Dist. Magistrate, Patna, D/- 23rd April 1928.

Criminal P. C., S. 514—Order forfeiting security must be in terms of bond.

An order passed against a security for production of accused released on bail, forfeiting his security cannot be sustained if it is not in terms of the bond. [P 1016 C 1]

Nandkeolyar—for Petitioner.

Government Pleader—for the Crown.

Order.—The petitioner stood surety for the production of three persons before the District Magistrate, who had been ordered by the High Court to be released on bail pending decision of their application in revision. Two of these persons surrendered after the decision by the High Court. The petitioner applied for fourteen days' time to produce the third who he said was engaged in some business in the interior of the Monghyr District where the case had arisen but the trial of which had been transferred to Patna, but his bail bond was forfeited forthwith by the Deputy Magistrate. An appeal against this order was dismissed by the same Deputy Magistrate who was then acting as District Magistrate.

It was conceded by the learned Government Pleader that the procedure was erroneous in two respects, first, that no notice to show cause against forfeiture was given to the petitioner, and secondly, because the appeal was heard by the Magistrate who had passed the order; and he prays that the case may be remanded in order that the facts may be gone into.

On behalf of the petitioner it is contended that no remand is necessary because the conditions of forfeiture in the bond had not been satisfied. It appears that the police was required to report as to the sufficiency of the security and they reported on 15th March last against the petitioner, and thereupon notice was issued on him to produce the accused persons on 27th March. This was before the application in revision had been disposed of by the High Court. Now the terms of the bond was to surrender the accused persons to the District Magistrate on the day of decision or within the three days after or any other such date as the District Magistrate might direct. The petitioner therefore apparently had three alternatives before his bond could be forfeited and the order passed against him was not in terms of the conditions of the bond. It is therefore unnecessary to have a further enquiry into the matter and the application must be allowed and the order of forfeiture of the bond must be discharged. Any sum realised from the petitioner under this bond must be returned to him.

V.B./R.K.

Petition allowed.

1930 Cr. Cases 1016

(Patna)

JAMES, J.

Krishna Pati, Brundaban Pati—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 26 of 1930, Decided on 25th April 1930, against order of D. E. Reuben, I. C. S., D/- 31st March 1930.

Criminal P. C., S. 421—Appellate Court summarily dismissing appeal under S. 421 takes risk that appeal should be remanded unless High Court is satisfied that appellate Court has considered arguments adduced.

Although it is not illegal to dismiss an appeal summarily under S. 421, still the appellate Court which thus summarily disposes of an appeal without discussing arguments of the advocate for the appellant takes a risk that the appeal should be remanded unless the High Court is satisfied that the appellate Court really has considered the arguments adduced on behalf of the appellant, or has applied his mind to the consideration of the facts of the case which can only be if facts are unusually clear: 48 I. C. 499, *Ref.* [P 1016 C 2]

Subba Rao—for the Crown.

C. M. Acharya—for the Crown.

Judgment.—The petitioners have been convicted of offences under S. 352

I. P. C., while one of them has been further convicted of an offence punishable under S. 448. The trying Magistrate in an elaborate judgment dealt with the evidence which had been adduced on behalf of the prosecution and of the defence, but the appeal from his decision was summarily dismissed by the District Magistrate under S. 421, Criminal P. C., by an order for which no reasons were given. Mr. M. Subba Rao on behalf of the petitioner suggests that the learned District Magistrate, since his order was open to revision, ought to have stated what arguments were put forward on behalf of the appellant and why they were not accepted. He does not suggest that the learned District Magistrate was obliged to admit the appeal merely because it was presented by a pleader, but he points out that the appellate Court after hearing the pleader and examining the record was actually in the position in which he would have been if after admitting the appeal and hearing arguments for the appellant, he had considered it unnecessary to call upon the Public Prosecutor to reply.

I think that this appeal must be remanded for rehearing. As was pointed out in the case of *Guru Bari Behera v. Emperor* (1) it is not illegal to dismiss an appeal in this way, but the appellate Court which thus summarily disposes of an appeal without discussing arguments of the advocate for the appellant takes a risk that the appeal should be remanded unless the High Court is satisfied that the appellate Court really has considered the arguments adduced on behalf of the appellant, or has applied his mind to the consideration of the facts of the case. For this the High Court has to depend upon the written record, and it is only where the facts are unusually clear that the Court can be satisfied in revision that a summary order under S. 421, Criminal P. C., was justified. For these reasons I must set aside the order of the lower appellate Court and remand the appeal to the District Magistrate for rehearing by himself or by any Magistrate who may be empowered to hear appeals.

S.N./R.K.

Case remanded.

(1) [1918] 19 Cr. L. J. 151=48 I. C. 499.

** 1930 Cr. Cases 1017

(Allahabad)

BOYS, J.

Emperor—Applicant.

v.

Nazir Husain—Opposite Party.

Criminal Ref. No. 233 of 1930, Decided on 17th June 1930, made by Sess. Judge, Dehra Dun, D/- 27th February 1930.

(a) Criminal P. C., Ss. 258 (1) and 259—Charge framed—Complainant and his witnesses absenting on day fixed for their cross-examination — Magistrate should either adjourn case or acquit accused.

A complaint was lodged against the accused charging him with having shoe-beaten the complainant. A charge was framed against the accused and a date was fixed for the complainant to attend with his witnesses for cross-examination. The complainant and also his witnesses failed to attend. On their failure to appear the Magistrate passed an order discharging the accused, purporting to act under S. 259, being unaware as to what other course he should have adopted.

Held: that there were two courses open to him: firstly, to adjourn the case; or secondly, if he felt that there were no good grounds for adjourning the case to find the accused "not guilty" and acquit him, acting under S. 258(1). [P 1017 C 2]

** (b) Criminal P. C., S. 258 (1) — "Not guilty," meaning explained—Words.

The finding "not guilty" is a technical expression and not necessarily equivalent to a finding that the accused did not commit the acts charged. [P 1018 C 1]

M. Wulullah—for the Crown.

Judgment.—This is a reference by the Sessions Judge of Dehra Dun asking this Court to order a re-trial, if it thinks fit, in a case where an accused person has been discharged, the Magistrate purporting to act under S. 259 although, a charge having been framed, he could not act under that section. The facts are simple. A complaint was lodged against the accused charging him with having shoe-beaten the complainant. The assault was in itself comparatively trifling but for the well-known fact that beating with shoes adds insult to any injury that may be inflicted. A charge was framed against the accused and a date was fixed for the complainant to attend with his witnesses for cross-examination. The complainant and also his witnesses failed to attend, and I may state immediately that I am not able to find on the record, nor is the Assistant Government Advocate able to show me, that the complainant has ever

explained his failure and the failure of his witnesses to attend. In this connexion the Magistrate in his final order pointed out that even if the complainant had missed his train he could have come by lorry as the Magistrate waited for him till 2 p. m. It is some indication that the complainant did not miss his train and, that the witnesses also failed to appear. There is room therefore for holding that there may be some substance in the accused person's petition to this Court that the complainant and his witnesses deliberately stayed away because they did not want the trouble of going out into the camp where the Magistrate was, and were quite willing to harass the accused and his witnesses by letting them go unnecessarily. However that may be, there is no explanation before me and apparently none available as to why the complainant and his witnesses failed to appear.

On their failure to appear the Magistrate passed an order discharging the accused, purporting to act under S. 259, Criminal P. C. He admits that he could not act under that section as the accused had been charged, but he quite properly states his difficulty that he is unaware what course should have been adopted and practically invites assistance on this point. There were two courses open to him: firstly, to adjourn the case. He has given good reasons for not wishing to adopt that course. Secondly, if he felt that there were no good grounds for adjourning the case he should have found the accused "not guilty" and acquitted him, acting under S. 258 (1). It is true that he had so far formed an opinion that the accused was guilty, in that he had framed a charge against the accused and there had been no subsequent evidence given to suggest that the charge had been wrongly framed, but the accused was entitled to a final judgment, not merely on the preliminary evidence of witnesses on examination-in-chief, but on that evidence after it had been submitted to cross-examination; and if the complainant himself, in the particular facts of the case, is adjudged responsible for the witnesses of the prosecution not being available for cross-examination, he is himself responsible for rendering that testimony unsafe to rely upon. The Magistrate should then have held

that in the circumstances of the case he had no alternative but to find the accused "not guilty" and have not acquitted him. The finding "not guilty" is a technical expression and not necessarily equivalent to a finding that the accused did not commit the acts charged.

I set aside the order of the Magistrate discharging the accused and for that order, there being no adequate grounds for ordering the case to be taken up afresh, substitute an order of acquittal. To this extent the reference is accepted. Let a copy of this order be sent to the Magistrate for his information.

B.V./R.K. 'Reference' accepted.

1930 Cr. Cases 1018

(Allahabad)

SULAIMAN AND NIAMATULLAH, JJ.

Riyazuddin—Applicant.

v.

Bar Association, Agra — Opposite Party.

Civil Revn. No. 54 of 1929, Decided on 25th April 1930, against order of Dist. Judge, Agra, D/- 3rd January 1929.

Legal Practitioners Act, S. 36—Notice to show cause served on person on 18th December—Application by him on 2nd January to issue summons to seven vakils—Summons declined and person asked to file affidavits of vakils—No affidavits filed and he was declared tout on 3rd January on resolution of Bar Association—Sufficient opportunity is not given to him to satisfy Court that he was not tout.

Notice to show cause was served on person on 18th December just a few days before Xmas holidays began. On the re-opening of the Court he applied on 2nd January for the issue of summons to a number of witnesses including seven vakils. The Judge instead of issuing summons and allowing him to take the risk if they were not served in time declined to issue the summons and directed him to produce affidavits from the vakils. As no affidavits were filed the Judge on the resolution of the Bar Association declared him to be a tout on 3rd January.

Held: that sufficient opportunity was not given to him to satisfy the Court that he was not a tout. [P 1018 C 2]

M. A. Aziz—for Applicant.

U. S. Bajpai—for the Crown.

Sulaiman, J.—This is an application in revision by Riyazuddin from an order of the District and Sessions Judge of Agra declaring him a tout. The notice to show cause was served on 18th December 1928 just a few days before the Xmas holidays commenced. The

affidavit filed before us shows that on that date his child was seriously ill and died on 22nd December 1928. On the re-opening of the Court he applied on 2nd January 1929 for the issue of summonses to a number of witnesses including seven vakils who were practising in the District Court. There is no doubt that he applied rather late, but the delay is now explained by his affidavit. The learned Judge instead of issuing summonses and allowing the applicant to take the risk if they were not served in time declined to issue the summonses and directed him to produce affidavits from these vakils. It is quite obvious that the applicant had no power to compel these vakils to swear affidavits although he could have easily got them summoned as witnesses. As no affidavits were filed the learned Judge on the resolution of the Bar Association declared him a tout on 3rd January. Subsequently he made an attempt to produce certificates of good character given to him by 12 vakils which he filed on 4th January. His request for a reconsideration of his case was refused. Even on the materials which were before the Judge it appeared that there were certificates of seven vakils granted to him in August 1928, just three months before the resolution of the Bar Association. Referring to the certificates the learned Judge remarked:

"Apparently the resolution of the Bar Association relates to the activities of Riyazuddin subsequent to that date."

We think that sufficient opportunity was not given to the applicant to satisfy the Court that he was not a tout. If the summonses had been issued and they were not served on the vakils, the matter would have been different. As they were practising in the Court there was a good probability of some of these vakils being actually served. We accordingly allow this revision and set aside the order of the Court dated 3rd January 1929 passed against Riyazuddin. This order does not of course preclude any further proceedings being taken against him.

P.N./R.K.

Revision allowed.

1930 Cr. Cases 1019

(Bombay)

MIRZA AND BROOMFIELD, JJ.

Mana Gendal and others—Accused—Appellants.

v.

. *Emperor*—Opposite Party.

Criminal Appeals Nos. 206 to 208 of 1930, Decided on 13th June 1930, from judgment of Sess. Judge, Kaira.

(a) Penal Code (1860), Ss. 325 and 304—Blows on head causing death—No uncertainty as to responsibility for offence—Sentence of five years rigorous imprisonment held proper.

The accused had caused death by blows on head of the deceased with sticks. It had been proved that the accused were the assaulters and were aware of the result of their action. There was no uncertainty as to responsibility for the offence by which death was caused.

Held: that under the circumstances the sentence of five years' rigorous imprisonment was reasonable whether the offence be under S. 304 (2) or S. 325: 29 *All. 282, Dist.* [P 1020 C 1]

(b) Penal Code (1860), S. 326—Person causing injury as to endanger life—He is presumed to know that he would cause death.

A person who voluntarily inflicts injury such as to endanger life must always, except in the most exceptional and extraordinary circumstances, be taken to know that he is likely to cause death: 42 *I.C. 754, Ref.* [P 1019 C 2]

P. B. Shingne—for the Crown.

Broomfield, J.—The three appellants in this case were committed to the Sessions Court of Kaira on a charge under S. 304, I. P. C., the allegation being that they caused the death of one Dula Galab by inflicting injuries on his head and elsewhere in such circumstances that the offence constituted culpable homicide not amounting to murder. The Sessions Judge altered the charge to one of murder under S. 302, but convicted the accused of the offence of grievous hurt and sentenced Nos. 1 and 2 to five years' rigorous imprisonment under S. 325, and No. 3, who had used a knife, to seven years' rigorous imprisonment under S. 326.

The appeals have been admitted by this Court as regards the sentences only; but, before dealing with the question of sentences, we think it desirable to make some preliminary remarks as to the propriety of the finding that the offence amounted to grievous hurt and nothing more. It appears that there is a growing tendency among Sessions Judges to convict of the offence of grievous hurt in cases of offences against the person

which have resulted fatally. The description of grievous hurt contemplated is practically never stated. In the great majority of cases, it could only be that mentioned in Cl. 8, S. 320, viz., "any hurt which endangers life." That was so, for instance, in the case of *Emperor v. Khoda Samta* (1). A person who voluntarily inflicts injury such as to endanger life must always, except in the most extraordinary and exceptional circumstances, be taken to know that he is likely to cause death. If the victim is actually killed, the conviction in such cases ought ordinarily to be of the offence of culpable homicide. In that connexion I may refer to *Emperor v. Bai Jiba* (2). The case before us now is a case of fracture of the bones of the skull. The evidence of the doctor who held the post-mortem on the deceased shows that there were contusions, one on the right side of the forehead and one on the left side of the scalp, and on dissection beneath these contusions, it was found that the frontal and both the parietal bones were fractured into several pieces, and the skull cap was depressed at various places pressing the substance of the brain. There was also an incised wound on the forehead, but the Doctor's opinion was that death was due to the fracture of the skull bones and the consequent injuries to the brain.

Now, if we consider the provisions of S. 322, I. P. C., which gives the definition of the offence of voluntarily causing grievous hurt, it is clear that the conviction of the accused of the offence of grievous hurt when analyzed implies a finding that they intended or knew themselves to be likely to smash their victim's skull. But if that is found, how can one stop short of finding that they knew that they were likely to cause the death of the victim? In our opinion the offence established by the evidence in this case in respect of the injuries inflicted by accused 1 and 2 is culpable homicide not amounting to murder, and these accused should have been convicted of that offence.

The Sessions Judge has justified his conviction of the accused of the offence of grievous hurt only by reference to

(1) Criminal Appeal No. 198 of 1930, decided on 11th June 1930 by Mirza and Broomfield, JJ.

(2) [1917] 42 I.C. 754=19 Cr. L.J. 1010.

Emperor v. Bhola Singh (3). The facts there were that three persons attacked a fourth with lathis and one of the assailants struck a blow which fractured the skull of the person attacked and caused his death; but the evidence left it in doubt which of the three assailants struck the blow. Under these circumstances it was held that none of the accused could be convicted of the offence of culpable homicide, and the Court convicted them all of grievous hurt on the ground that having regard to the fact that lathis were used by all the three assailants, and that the probable result of the use of lathis was at least grievous hurt, the common intention of the assailants might be deemed to have been to cause grievous hurt. In the present case we have carefully considered the medical evidence and we find no such uncertainty as to the cause of death or as to the responsibility of the several accused for it. As I have stated, the doctor's evidence makes it clear that death was due to the blows on the head which fractured the skull of the deceased, and the evidence of the witnesses makes it clear that those blows on the head were struck by accused 1 and 2. The case of *Emperor v. Bhola Singh* (3) is therefore clearly distinguishable. Moreover that case is a doubtful authority in view of *Emperor v. Gulab* (4). There has been no appeal by Government against the acquittal of an offence under S. 304, and we do not propose in this appeal by the accused to alter the finding. In our opinion the sentence of five years' rigorous imprisonment imposed on accused 1 and 2 is reasonable sentence, whether the offence be under S. 304, part 2, or under S. 325. We certainly do not consider it excessive.

Coming to the case of accused 3, the Sessions Judge has not given any reason for inflicting a more severe sentence on him than on his companions. It is true that he was armed with a knife, whereas accused 1 and 2 had only sticks, but as we understand the medical evidence, the incised wound on the forehead inflicted by accused 3 was not responsible for the death of Dula. We are not

altogether satisfied with the trial Judge's reasons for holding that S. 34, I. P. C. does not apply in this case. We are disposed to think that on the evidence all the three accused, as they were really acting in concert, could properly have been convicted of an offence under S. 304. However we leave the conviction as it is under S. 326 and reduce the sentence imposed on accused 3 to five years' rigorous imprisonment as in the case of the other two accused.

Mirza, J.—I agree.

B.V./R.K. Sentences confirmed.

1930 Cr. Cases 1020

(Bombay)

MIRZA AND BROOMFIELD, JJ.

D. R. Guru—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 141 of 1930, Decided on 15th April 1930, from order of Sess. Judge, Poona.

[Criminal P. C. (1898), S. 497—Vague allegations against prisoner are not enough to refuse application to enlarge prisoner on bail.

When the allegations against a prisoner are of a vague and general character and are not better defined or substantiated, they are not a sufficient ground for refusing an application to enlarge a prisoner on bail: *A. I. R. 1926 Rang. 51 and 1927 Rang. 205 (F.B.)*, *Foll.* [P 1022 O 1]

Jayakar and V. B. Karnik — for Applicant.

W. B. Pradhan—for the Crown.

[**Mirza, J.**—The applicant, along with four others, is being prosecuted before the City Magistrate, First Class, Poona, for offences punishable under Ss. 406, 120-B, and 163, I. P. C. On 24th March 1930 he applied to the City Magistrate, First Class, Poona, for being released on bail. The Magistrate refused the application on the ground that he had not then before him the charge sheets which were to be submitted by the police. The applicant then applied to the Sessions Judge. The Sessions Judge refused to grant bail. This was on 29th March 1930. The charge sheet was filed in the Magistrate's Court on 3rd April 1930. The applicant thereupon again applied to the City Magistrate for being released on bail. On this application the Magistrate made an order releasing the applicant on bail in his personal recognizance for Rs. 20,000 with three appointed sureties each in the sum of Rs. 7,000. The prosecution applied to the

(3) [1907] 29 All. 282=(1907) A.W.N. 51=4 A.L.J. 207=5 Cr.L.J. 180.

(4) [1928] 40 All. 686=47 I.C. 805=19 Cr.L.J. 953.

Sessions Judge against the order of the Magistrate releasing the applicant on bail. On 5th April 1930 the Sessions Judge heard the parties on the application of the prosecution, cancelled the order of the City Magistrate, and ordered that the applicant be recommitted to custody. From this order of the Sessions Judge the applicant has applied to this Court for being released on bail. The reasons given by the Sessions Judge for cancelling the order of the City Magistrate are that five accused persons are involved in this case and further investigations in connexion with the offence are still in progress; that the offences charged relate to the misappropriation by the five accused of Rs. 15,000 belonging to certain miners. The Sessions Judge proceeds to state :

"It is still urged by the learned Public Prosecutor and I consider with some justification, that if the accused are released on bail the evidence is likely to be tampered with. I do not think that this is a fit case for allowing bail to the accused."

When the application first came before us on 10th April we allowed it to stand over to enable the Government Pleader to ascertain from those instructing him as to the exact nature of the apprehension on the part of the Public Prosecutor that if the accused is released on bail he is likely to tamper with the prosecution evidence. Sayad Usman Dagdoo, the Sub-Inspector of Police in charge of the investigations, has now made an affidavit in which he sets out the following grounds. He states that in the course of investigations, it has come to his knowledge that the applicant's co-accused, one Jaibai Karale, had pledged a gold ornament with the applicant and the same cannot now be traced. He apprehends that if the applicant is let out on bail it would be difficult for the prosecution to trace the ornament. He says in his affidavit that the applicant is a wealthy and influential man in Poona and if he is let out on bail he might win over the witnesses for the prosecution. He further alleges that a sum of Rs. 2,676 in respect of the price of certain milk supplied to the Sassoon Hospital, instead of being paid to one Mulik who was the milk contractor at the time, was paid to one Mahadu Martand who was a peon in the Sassoon Hospital and was attached at the time to the applicant who was the

Hospital Steward. The Sub-Inspector states that if the applicant is freed from custody the peon Martand may not possess courage enough to say what he knows against the applicant.

With regard to the first one of these allegations the prosecution have not been able so far to trace the ornament which they allege was pledged with the applicant by his co-accused Jaibai. It is not clear how they would be hindered in tracing it if the applicant is let out on bail. The second allegation, viz. that the applicant is a wealthy and influential man in Poona and is therefore likely to win over the prosecution witnesses does not appear to us to be sufficiently cogent or convincing. It is common ground that there is no previous conviction against the applicant and that he has retired from Government service on a pension of Rs. 100 per month. We have no materials before us which would show that the applicant is a man of bad character or is likely to intimidate or otherwise win over the prosecution witnesses to his side. With regard to the third allegation it is shown that the applicant retired from his post of steward in the Sassoon Hospital two years ago and the peon Mahadu Martand has since continued in Government employment in the Hospital. There is no sufficient reason for us to suppose that Mahadu Martand would be under the influence of the applicant when he comes out on bail and would not be forthcoming to give true evidence against him at the trial. It is stated before us that Mahadu Martand has already made a statement before the police as to what he knows with regard to these alleged offences.

The principle on which the Courts act in refusing bail in such matters is stated by Doyle, J., in *Maomed Yusoof v. Emperor* (1) as follows (p. 542 of 3 Rang.) :

"Again, while mere vague allegations that the prisoner, if released, will tutor witnesses should not be taken into account, the Magistrate may well refuse to enlarge on bail where the prisoner is of such a character that his presence at large will intimidate witnesses, or where there are reasonable grounds for believing that he will use his liberty to suborn evidence."

Those remarks were endorsed by Sir Guy Rutledge, C. J., in the Full Bench case of *Emperor v. Nga San Ht.*

(1) A.I.B. 1926 Rang. 51=93 I.O. 65=27 Cr. L.J. 401=3 Rang. 538.

wa (2). In the case before us the allegations on which the learned Sessions Judge has acted in cancelling the applicant's bail appear to us to be of a vague and general character and they have not been better defined or substantiated since. In our opinion this is a fit case in which we should, in the exercise of our jurisdiction, set aside the order of the Sessions Judge and restore that of the City Magistrate, Poona.

The result will be that the applicant will be released on bail in his personal recognizance for Rs. 20,000 with three appointed sureties each in the sum of Rs. 7,000 to the satisfaction of the special First Class Magistrate, Poona; to whose Court we understand the case has since been transferred.

Order to be communicated by wire at the applicant's cost.

B.V./R K. *Application granted.*

(2) A.I.R. 1927 Rang. 205=104 I.C. 101=28
Cr. L.J. 773=5 Rang. 276 (F.B.).

1930 Cr. Cases 1022

(Bombay)

MADGAVKAR, AG. C. J. AND BARLEE, J.

In re *Usman Haji Mahomed*

Criminal Revn. Appln. No. 156 of 1930, Decided on 18th June 1930, from order of Ch. Presy. Magistrate, Bombay.

(a) Appeal—Statute must expressly give right—Criminal P. C., S. 439.

Jurisdiction by way of appeal or revision will not be inferred, but must be expressly given by statute. [P 1022 C 2]

(b) Bombay City Police Act (1902), S. 45—S. 45 does not deal with criminal Courts or their powers—Special power of Chief Presidency Magistrate is as persona designata.

The Act does not generally, nor does S. 45 in particular deal with criminal Courts or their special powers. The special power of the Chief Presidency Magistrate, under S. 45, is not as a criminal Court, but as a persona designata: 38 Mad. 581; 21 Bom. 279; A. I. R. 1923 Bom. 421; 36 Bom. 47 and A. I. R. 1930 Bom. 281, Ref. [P 1022 C 2]

Mahale and *V. N. Chhatrapati* — for Applicant.

P. B. Shingne—for the Crown.

Madgavkar, Ag. C. J.—The question in this appeal is whether this Court has jurisdiction to set aside an order of the Chief Presidency Magistrate dismissing the claim made by the petitioner on behalf of a widow for compensation under S. 45, City of Bombay Police Act 1902, for absence and refusing to take the matter back on his file.

The question necessarily depends on whether the order in question was

passed by the Chief Presidency Magistrate sitting as a Court, or whether it was passed by him as a persona designata. It is argued for the petitioner that under S. 15 of the Charter this Court has jurisdiction and that it is not expressly excluded by virtue of any other enactment. Jurisdiction however by way of appeal or revision will not be inferred but must be expressly given by statute.

On the main question as to whether the order was passed by a Court or by the Chief Presidency Magistrate as a persona designata, reliance is sought to be placed by the petitioner on the corresponding provisions in England, e. g., Halsbury's Laws of England, Vol. 22, Arts. 1044 and 1047. Even there it is to be observed that if the claimant is aggrieved by a refusal on the part of the police authorities, the appeal lies to the Home Secretary and not to the criminal Courts, without prejudice, it may be, to his right of action by way of a civil suit. With this last matter we are not now concerned.

Confining ourselves to the question above, the position, in our opinion, is analogous to that of a Presidency Magistrate under the Madras City Municipal Act: *Vijiaraghavalu Pillai v. Theagaroya Chetti* (1), or of District Judges in the case of Municipal elections: *Balaji Saktharam v. Merwanji Nowrtji* (2) and *Chunilal Virchand v. Ahmedabad Municipality* (3) or the Chief Judge of the Court of Small Causes under S. 33, City of Bombay Municipal Act: *Bhaishankar v. Municipal Corporation of Bombay* (4) and *Navalkar v. Sarojini Naidu* (5) and the recent decision regarding Municipal assessment in *Ahmed Sulleman v. Municipal Commissioner of Bombay* (6).

The City of Bombay Police Act 4 of 1902 does not generally nor does S. 45 in particular deal with criminal Courts or their powers. The conclusion therefore is that the special power under S. 45 of the Chief Presidency Magistrate is not as a criminal Court but as a persona designata. If so, no application by way of revision lies to this Court, not even to an order made refus-

[1914] 38 Mad. 581=25 I. C. 845.

[1895] 21 Bom. 279.

[1911] 36 Bom. 47=12 I. C. 540.

[1907] 81 Bom. 604=9 Bom. L.R. 417.

A. I. R. 1928 Bom. 421=78 I. C. 188.

A. I. R. 1930 Bom. 281=125 I. C. 448.

ing to take the petition back on the file for decision of the claim on the merits.

The application fails and is dismissed.

B.V./R.K. • *Application dismissed.*

1930 Cr. Cases 1023

(Bombay)

* . . MIRZA AND BROOMFIELD, JJ. •

Gulabmiya Dagumiya — Accused — Applicant.

• v. •

Emperor—Opposite Party.

Criminal Revn. Appln. No. 72 of 1930, Decided on 13th June 1930, from order of 1st Cl. Magistrate Nasik City.

(a) Criminal P. C. (1898), S. 197—Organizer of Co-operative Credit Societies appointed by Registrar as liquidator—Misappropriation while liquidator—Two posts being quite distinct, no sanction under S. 197 is required for prosecution.

An organizer of Co-operative Societies was appointed a liquidator of "M. Seed Society" by the Registrar. There was misappropriation of a certain sum of money by the liquidator.

Held: that the posts of the organizer and that of the liquidator, being quite distinct, no sanction under S. 197 is required for the prosecution of the liquidator on a charge of misappropriation. [P 1023 C 2]

(b) Penal Code (1860), Ss 408 and 409—Misappropriation by liquidator is not act in discharge of his official duty.

A liquidator who misappropriates money, which has come into his custody as liquidator, cannot be said to be acting or purporting to act in the discharge of his official duty: 7 B. H.C. (Cr.) 61 and A.I.R. 1929 Bom. 375, *Rel. on*; 33 I. C. 646; A. I. R. 1927 Mad. 566 and A. I. R. 1923 Bom. 352, (F.B), *Ref.*; A.I.R. 1929 Mad. 659, *Diss. from*. [P 1024 C 1, 2]

D. S. Varde and K. N. Koyajee—for Applicant.

T. N. Valvalkar—for Complainant.

P. B. Shingne—for the Crown.

Broomfield, J. — The applicant in this case is an honorary organizer of Co-operative Credit Societies and was appointed as such by Government. The Registrar of Co-operative Credit Societies appointed him liquidator of the Malgaon Seed Society, this appointment being made under S. 47, Bombay Co-operative Societies Act 7, 1925. It is alleged that he misappropriated a sum of Rs. 100 which came into his possession as liquidator and he has been prosecuted for an offence under Ss. 408 and 409, I. P. C.

A preliminary objection was raised that the sanction of Government was necessary before he could be prosecuted under S. 197, Criminal P. C. It was contended, firstly, that as organizer of

Co-operative Credit Societies he was appointed by Government and was not removable from the office, except by or with the sanction of Government, and therefore sanction for the prosecution was required on that ground. Secondly, it was argued that as liquidator he was a Judge within the definition in S. 19, I. P. C. This objection has been overruled by the trial Magistrate and also in revision by the Sessions Judge. The applicant now comes to this Court for revision of the Sessions Judge's order.

There is clearly no force in the argument that sanction is required under S. 197 by reason of the applicant's position as organizer. That point has been quite convincingly dealt with by the Sessions Judge. He says:

"It is not necessary to labour the point. The most simple test is to raise the question if removal from his office of organizer would automatically remove the applicant from his post of liquidator. Clearly the Registrar would be entitled to retain him in his post of liquidator even if Government should decide to remove him from his post of organizer; it would be a matter for the Registrar alone to remove or retain him. It is not necessary to discuss this issue any further."

On that point we fully agree with the Sessions Judge.

The other point as to whether the liquidator appointed under the Bombay Co-operative Societies Act is a Judge as defined in S. 19, I. P. C., is more difficult. The definition is as follows:

"The word 'Judge' denotes not only every person who is officially designated as a Judge, but also every person who is empowered by law to give in any legal proceeding, civil or criminal, a definitive judgment, or a judgment which, if not appealed against, would be definitive, or a judgment which, if confirmed by some other authority, would be definitive, or who is one of a body of persons, which body of persons is empowered by law to give such a judgment."

The Sessions Judge has drawn a distinction between acts which are final only on the sanction of a higher authority and acts which are subject to the confirmation of a higher authority. In the latter case he says the act, when confirmed by a higher authority, still remains the act of the lower authority; in the former case the act ceases to be an act of the lower authority on sanction being given and becomes an act of the higher authority. Under S. 50 of the Act the liquidator is given power to conduct legal proceedings of various

kinds, but that can only be done with the sanction of the Registrar. That being so, the Sessions Judge's view is that the liquidator's acts are really the acts of the Registrar, that the Registrar so to speak acts through the liquidator, and the liquidator therefore is not a Judge within the definition. Unfortunately, there is nothing in the record before us to show at what stage of the proceedings or in what terms the sanction of the Registrar referred to in S. 50 is given. If it were necessary to decide the point we should have had to remand the case in order that evidence might be taken to clear up this point.

We do not consider, however, that it is necessary for the purpose of this case to decide whether a liquidator is a Judge or not. Assuming, for the sake of argument, that he is a Judge within the meaning of S. 19, sanction is only required in respect of any offence alleged to have been committed by him, "while acting or purporting to act in the discharge of his official duty." In our opinion a liquidator who misappropriates money which has come into his custody as liquidator cannot be said to be acting or purporting to act in the discharge of his official duty. This point also is not free from difficulty, but the view we take is in accordance with previous decisions of this Court, viz. *Reg. v. Parshram Keshav* (1) and *Emperor v. Hanmant* (2), and see also *Narayan v. Yeshwant* (3). This view is also supported by *Abdul Kadir Saheb v. Emperor* (4) and *Raja Rao v. Ramaswamy* (5). In the latter case it was held that :

"the privilege of immunity from prosecution without sanction accorded to public officials only extends to acts which can be shown to be in discharge of official duty, or fairly purporting to be in such discharge. A prosecution for an offence arising out of an abuse of official position by an act not purporting to be official does not require sanction under S. 197, Criminal P. C."

We have been referred to an authority to the contrary effect in *Ganga-*

raju v. Venki (6). There Waller, J., dissents from the view which has been taken in some earlier cases that the fact of the accused being a Judge or a public servant must be a necessary element in the offence. He nevertheless made it perfectly clear that sanction cannot be required unless the act in respect of which the prosecution is brought was committed by a public servant acting or purporting to act as such in the discharge of his official duty. The facts in that case are thus stated in the judgment (p. 608 of 52 *Mad.*) :

"The complainant's story is that the village Magistrate sent his talayari to fetch her in connexion with a case before him, in which she had not appeared, told her that for not appearing when summons was sent to her he sentenced her to imprisonment in the chavadi and he confined her in his chavadi, the place where the persons he sentences are by law to be confined."

The prosecution was for an offence of wrongful confinement. As the Court said, it is clear that under those circumstances the accused was purporting to act in the discharge of his duty as a village Magistrate. We do not consider however that a liquidator who simply appropriates to himself money coming into his custody as liquidator can be said even to purport to act in the discharge of his duty. We hold therefore that sanction for the prosecution of the accused was not necessary under S. 197. That being so there is no need to interfere with the Sessions Judge's order.

The rule and the interim stay are discharged.

Mirza, J.—I agree.

B.V./R.K.

Rule discharged.

(6) A. I. R. 1929 *Mad.* 659=1929 *Cr. C.* 140=
118 *I. C.* 102=30 *Cr. L. J.* 864=52 *Mad.*
602.

1930 Cr. Cases 1024 (Bombay)

BEAUMONT, C. J. AND MADGAVKAR, J.
Sitabai Purshottam—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 167 of 1930,
Decided on 8th July 1930, from order of
Chief Presy. Magistrate, Bombay.

Penal Code (1860), S. 378—Contract to deliver barge on payment—Only part payment made—Failure of vendee to pay balance—Vendor after giving notice taking away barge commits no theft.

A woman contracted to deliver a barge to certain person on payment of money. Some

(1) [1970] 7 B. H. Cr. 61.

(2) A. I. R. 1929 *Bom.* 975=1929 *Cr. C.* 322=
122 *I. C.* 118=31 *Cr. L. J.* 358.

(3) A. I. R. 1923 *Bom.* 352=114 *I. C.* 246=
30 *Cr. L. J.* 278=52 *Bom.* 832 (F.B.).

(4) [1916] 17 *Cr. L. J.* 168=33 *I. C.* 648.

(5) A. I. R. 1927 *Mad.* 586=102 *I. C.* 847=28
Cr. L. J. 539=50 *Mad.* 754.

earnest money and part payment were made and the barge was brought over to the place of its delivery. The vendee failed to pay the balance. After notice to the vendee the woman took away the barge.

Held: that under the circumstances there was no dishonest intention in seizing the barge and no theft was committed by the woman, when she took away her barge on giving notice to the vendee. [P 1025 C 2]

V. Ainkar and V. D. Limaye—for Petitioner.

Coltman and V. N. Chhatrapati—for Complainant.

P. B. Shingne—for the Crown.

Beaumont, C. J.—This is a revision application against the order of the Chief Presidency Magistrate of Bombay convicting the three accused who are a sister and two brothers of stealing a barge named Gharapuri. Now it appears that an agreement for the sale of the barge was entered into between accused 1 Sitabai and the complainant Dharsey Mulji on 29th July 1929 Ex.A. The agreement provided that the barge should be sold for Rs. 1,051 of which Rs. 300 were to be paid as earnest money, i. e., as deposit, that the vendor should give delivery of the barge to the purchaser at Sewree Bunder, that the vendor should paint, repair or cause to be repaired any defects in the said vessel and should give delivery in a perfectly sound and seaworthy condition on the same being certified to be so by a competent and certified Surveyor, that the costs of painting, surveying and harbour charges after the barge came to Sewree Bunder should be borne by the purchaser, that until the surveyor certified the barge to be in a sound and seaworthy condition the barge should not be considered to have passed to the purchaser and the purchaser should be at liberty to rescind this contract of sale and the purchaser should have a lien on the barge for all his costs incurred and including the earnest money paid, and that the vendor should complete the contract within three weeks from the execution of that agreement, time being of the essence of the contract. The barge was subsequently brought to Sewree Bunder and in August 1929 the purchaser, at the request of the vendor, paid another Rs. 100 for the purpose of enabling the barge to be so brought. It is extremely probable that the rights of the parties under that agreement will be litigated in a civil Court and, I do not, therefore,

express any definite opinion as to what the true effect of the agreement is. But in a letter dated 11th October 1929, to the complainant, the vendor's pleader set out what the contentions of the vendor were. After referring to the agreement he says:

"My client has thereafter on 20th September 1929, brought the barge to Sewree and has done everything that she has had to do in order to perform her part of the contract. In spite of many demands and promises on your part, you have as yet failed to pay her the remaining balance of the purchase money, viz., Rs. 651. I have to remind you that if you fail to do so, the contract will stand cancelled by your breach of the same and the earnest money and part payment made by you will be forfeited. I hereby call upon you to pay the aforesaid balance of Rs. 651 within 24 hours from the receipt hereof by you; in default please note that the contract will stand cancelled . . . and my client will also sue you for damages for breach of your contract."

From this it will be seen that the vendor's pleader was taking up the position that the purchaser was in default and he called upon the purchaser to complete the contract within a limited time—rather a short time I am bound to say—and in default threatened to forfeit the deposit and part payment and to file a suit for damages. Whether that position is legally right or not under the agreement, I do not propose to consider, but I think that it is a position which a pleader was quite honestly entitled to advise his client to adopt. I see no reason why the vendor should not honestly consider that those were her rights.

The learned Magistrate in the Court below has held as a fact that delivery of the barge was given to the purchaser soon after it reached Sewree Bunder. I am not altogether satisfied that that finding is correct. I find it very difficult to suppose that the vendor can have intended to give legal delivery of the barge without getting payment of the balance of the purchase money. It is quite possible that there may not have been any delivery in law, and it is even more possible that the vendor may have believed that there had been no delivery in law, and if the vendor believed that and that the possession of the barge was still in her in law, then, I think, she cannot be convicted of theft because she has not been shown to have had any dishonest intention in seizing possession of the barge. In my view this is really a matter which ought to have

been litigated in a civil Court, and I think that the criminal law was invoked too hastily. That being so, the conviction must be quashed.

Conviction set aside. Fine paid to be refunded. We direct delivery of the barge to the accused vendor, but we suspend the operation of this part of our order for a month on the undertaking of the purchaser's pleader to file a civil suit, and our order for delivery is to be without prejudice to any order as to the custody of the barge which may be made in the civil suit.

B.V./R.K. *Revision allowed.*

*** * 1930 Cr. Cases 1026 .**
(Bombay)

Full Bench

BEAUMONT C. J., AND MADGAVKAR
AND BAKER, JJ.

In re Jivandas Savchand

Criminal Revn. Appln. No. 101 of 1930, Decided on 18th July 1930, from order of Addl. Presidency Magistrate, Bombay.

* * (a) Criminal P. C. (1898), Ss. 179 and 181 (2)—Offence of criminal breach of trust—Venue of trial is determined by S. 181 (2) and not S. 179, and further failure to render accounts at different place does not take away that jurisdiction—Penal Code (1860), S. 405; 46 Bom. 641=65 I. C. 637=A. I. R. 1922 Bom. 39, *Overruled*.

Although loss to the principal or employer may be the usual and the normal result of criminal breach of trust, it is neither the necessary ingredient nor even the necessary consequence of the offence of criminal breach of trust. It is the act itself which in law amounts to the offence apart from any such consequence and therefore the jurisdiction to try an offence of criminal misappropriation or criminal breach of trust is governed by S. 181 (2) and not by S. 179. Further, if there is a further duty enjoined upon the agent or the factor to render accounts at another place, the failure in rendering such accounts or rendering false accounts at such place does not confer jurisdiction under S. 179 upon the Magistrate at latter place: 46 Bom. 641=65 I. C. 637=A. I. R. 1922 Bom. 39, *Overruled*; 19 All. 111 and 35 All. 29, *Diss. from*; 44 Cal. 912; 38 Mad. 639 and A. I. R. 1925 Cal. 618, *Ref.*; *Rex v. Oliphant*, (1905) 2 K. B. 67, *Dist.*

[P 1027 C 1; P 1031 O 2]

Per Madgavkar, J.—The matter entirely depends upon where the act of criminal misappropriation including dishonest intent is complete as far as the knowledge and belief of complainant go. [P 1031 O 2]

* (b) Criminal P. C. (1898), S. 179—For S. 179 person must be accused of commission of offence by reason of act done and consequence which has ensued.

What S. 179 provides is that when a person is accused of the commission of any offence by

reason of two things; by reason, first, of anything which has been done, and secondly of any consequence which has ensued, then jurisdiction is conferred on the Court where the act has been done or the consequence has ensued. The offence therefore must be charged by reason of the two things, the act done and the consequence which ensued; and the consequence therefore forms the necessary part of the offence. S. 179 does not refer to an offence charged by reason of an act done, from which act any consequence has ensued. [P 1028 C 1]

(c) Interpretation of Statutes—Procedure—One section dealing with particular crime—For applying more general section strong words are necessary.

When there is a section for dealing with a particular form of crime, it requires strong words to show that any section of more general application was intended to deal also with that particular crime. [P 1028 C 2]

M. P. Amin—for Applicant.

Velinkar and G. N. Thakor—for Complainant.

Beaumont, C. J.—This is an application in revision, which raises an important question of jurisdiction. The accused were placed on trial before the Additional Presidency Magistrate in Bombay charged with criminal breach of trust under S. 406, I. P. C., and falsification of accounts under S. 477-A. They took a preliminary objection that the Magistrate had no jurisdiction to deal with the case, since the offences took place in Rangoon. The learned Magistrate held that he had jurisdiction, relying on the decision of this Court, *Emperor v. Ramratan Chunilal* (1). The accused then applied to this Court in revision, and on 15th May 1930 the case came before Mirza, J., and Broomfield, J. They considered they were bound by the case of *Emperor v. Ramratan Chunilal* (1), but as other High Courts had come to a conclusion different from that which this Court had taken in the case referred to, they thought it desirable to have the case argued before a Full Bench.

The complainant alleges that the complainant in October 1928 entered into partnership with the accused in the business of merchants and commission agents in rice carried on at Rangoon. Accused 1 was to manage and conduct the business at Rangoon according to the instructions that might be issued to him, and was allowed to draw monthly expenses at a certain sum. There were partnership articles between the par-

(1) A. I. R. 1922 Bom. 39=65 I. C. 637=46 Bom. 641.

ties, under which the head office was to be at Bombay, and under Cl. (12), accused 1 was to send weekly statements on account of the partnership as well as business transacted on behalf of the partnership to the head office in Bombay, and by Cl. (16) the accounts of the partnership were to be made up once a year, the profit and loss account to be forwarded by accused 1 to the head office in Bombay immediately after the accounts were made up, and the distribution of profits and losses were to be entered up thereafter in accordance with the instructions received from the head office. Now, in short, the charge made against the accused is that they misappropriated the firm's moneys in Rangoon and falsified the accounts in Rangoon, and the question is whether they can be tried for those offences in Bombay. We were referred to a very large number of cases, I think to all the cases on the subject.

I do not propose to go through them in detail, because no useful purpose will be served by so doing. It is quite clear that they are not reconcilable with each other. Putting it shortly, two rival views have been put forward, one of which has appealed to some of the High Courts and the other to other High Courts. The first view is that a loss to the principal is a normal, if not a necessary, consequence of criminal breach of trust, and that the accused can therefore be tried either where the offence was committed or the loss was incurred, and for that reliance is placed on S. 179, Criminal P. C. The alternative view is that loss is not a necessary ingredient of the charge of criminal breach of trust, and that S. 179 of the Code has no application, the case falling only within S. 181, sub-S. (2). Putting it quite shortly, I think in three cases the High Court of Allahabad has taken the first of those two views, and that is the view which was taken in *Emperor v. Ramratan* (1). The second view has been taken by the High Courts of Madras, Calcutta, Lahore, Patna and Rangoon.

In that state of the authorities one has to look at the section of the Code in order to form an opinion as to the right construction. The first provision, which it is necessary to look at, I think, is S. 405, I. P. C., which defines criminal breach of trust. That section provides :

"Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits criminal breach of trust."

Now it seems to me clear from that definition of "criminal breach of trust" that loss to the principal or anybody else is not a necessary ingredient. Indeed, I can conceive of cases in which no loss would in fact be incurred. If a principal in Bombay entrusts an agent in Rangoon with the collection of moneys with directions to place the moneys in the account of the agent, but not to draw on that account except for the purpose of paying over the balance to the principal on the first of each month then in such a case, if the agent improperly draws moneys out of the account and place them in the name of a third party at another bank, with the dishonest intention of robbing his principal, and before the month expires the act is discovered and the agent then restores the money and the whole balance is paid over to the principal on the first day of the next month, I am unable to see that the principal has suffered any loss at all, although, I think it is clear that the agent has committed criminal breach of trust. However no doubt loss to the principal is the normal consequence of a criminal breach of trust, though, as I have said, the loss is not, under the definition in S. 405, an essential part of the charge.

Now one has to look next at the sections of the Code of Criminal Procedure dealing with the venue of trials. S. 177 provides that:

"every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed."

That is a provision of general application, and is based on the view of English law that all crime is local, and that jurisdiction to deal with it depends on the place where the crime is committed and not on the nationality of the criminal. Then the next material section is S. 179, which is the section which we have to construe. That provides:

"When a person is accused of the commission of any offence by reason of anything which has been done, and of any consequence

which has ensued, such offence may be inquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done, or any such consequence has ensued."

Now I must confess that but for the fact that many eminent Judges have taken a different view I should have thought that the language of that section was perfectly plain. What it provides is that when a person is accused of the commission of any offence by reason of two things, by reason first of anything which has been done, and, secondly, of any consequence which has ensued, then jurisdiction is conferred on the Court where the act has been done or the consequence has ensued. But the offence must be charged by reason of those two things, the act done and the consequence which ensued. If that is so the consequence is necessarily part of the offence. It does not matter whether you say, as some of the Courts have said, that the consequence must be an integral part of the offence or whether you say, as others of the Courts have said, that it is a necessary ingredient of the offence, the point is that the consequence must be part of the offence charged. The section does not refer to an offence charged by reason of an act done, from which act any consequence has ensued. When you look at the illustrations, they show clearly the meaning of the section. Take the first illustration. A is wounded within the local limits of the jurisdiction of Court X, and dies within the local limits of the jurisdiction of Court Z. The offence of culpable homicide of A may be inquired into or tried by X or Z. In that case the offence charged is culpable homicide. The mere act done of wounding is not by itself enough to constitute a charge of culpable homicide. It may no doubt be ground for another charge, but that is immaterial. It does not constitute a charge of culpable homicide, unless it is followed by the consequence of death. So that taking S. 179 alone, and reading it without the help of any authority, I should have thought it was plain that the consequence referred to is a consequence which forms part of the offence, and a consequence which does not form part of the offence does not attract jurisdiction under S. 179. Then, when you come to look at the other material

section, viz. S. 181, sub-S. (2), that provides:

"The offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person, or the offence was committed."

So that you get there a section dealing with the particular offence of criminal misappropriation or criminal breach of trust, and you are given an option either to take proceedings in the place where the property was misappropriated or in the place where the property was received. When you find a section dealing with a particular form of crime I think it would require strong words to show that any section of more general application was intended to deal also with that particular crime.

Before I leave this part of the case, I should like, out of deference to the learned Judges who decided the case of *Emperor v. Ramratan Chunilal* (1) to refer a little more in detail to that case. The judgment was delivered by Sir Norman Macleod, C. J.

Apparently the case was not argued for the respondents, although undoubtedly cases on both sides were referred to. The learned Chief Justice sets out S. 179 and he states the fact and he says at p. 643 (of 46 Bom.):

"Now it seems clear that one of the consequences of criminal breach of trust, if committed by an agent, would be loss to the person to whom the property entrusted to the agent belonged, and therefore, as the complainant would be entitled to get the proceeds of the cotton sent to Bombay paid to him in Ahmednagar, if the proceeds were not paid to him, loss would be incurred at Ahmednagar and therefore the Court at Ahmednagar would have jurisdiction."

I have already pointed out that loss seems to me to be not a necessary ingredient, and not even a necessary consequence, of breach of trust. Then the learned Chief Justice refers to conflicting cases which had dealt with this point, and to the case of *Empress v. O'Brien* (2) which is one of the decisions of the Allahabad High Court in which it was held that S. 179 did apply, and then he says at the bottom of p. 645:

"In my opinion; the argument of the learned Chief Justice should be preferred to the arguments of the learned Judges in *Simhachalam v.*

(2) [1896] 19 All. 111=(1896) A. W. N. 191.

Emperor (8) and *In re Rambilas* (4). The decision in *Empress v. O'Brien* (2) was followed by the Allahabad High Court in *Langridge v. Atkins* (5). The whole question seems to me to depend on whether we must give to the word 'consequence' in S. 179 its ordinary grammatical meaning, or whether we are bound to restrict it to meaning a consequence which is a necessary ingredient of the offence. I see no justification for holding, that the ordinary meaning should not be given to the word 'consequence' in S. 179, and the argument in *Empress v. O'Brien* (2) seems clearly pertinent in reference to this point."

With great deference to the learned Chief Justice, it seems to me that the question is not: What is the natural and grammatical meaning of the word 'consequence' per se; the question is: What is the natural and grammatical meaning of the word "consequence" in the context in which it appears in S. 179? and as I have already pointed out, in my view, having regard to the context there, the consequence is to be part of the offence. Then the learned Chief Justice goes on (p. 645):

"For instance, an agent might be given goods by his employer to sell at various places, and if he performed the trust imposed upon him he would be bound to pay the proceeds of the goods which had been sold to his employer. If he did not, and if his employer charged him with criminal misappropriation, it would be exceedingly difficult to prove at what place he had sold any part of the goods and misappropriated the proceeds. It seems to me that S. 179 was intended to apply to such cases so as to enable an employer to file his complaint in the Court within whose jurisdiction the loss was alleged to have been incurred."

Well, that is a difficulty which impressed itself upon several learned Judges who held that S. 179 applied to cases of criminal breach of trust, but to my mind the answer to it is provided by S. 181, sub-S. (2). It may be difficult to prove the place at which the misappropriation took place, because misappropriation depends upon the intention of the accused, and it may be difficult to prove at what moment of time and at what place he assumed a dishonest intention; but then you are given the option by S. 181, sub-S. (2), to take proceedings in the Court in which the money was received, and there can be no difficulty in proving where the money was received, or if that fact cannot be proved, then the charge must necessarily fail because you cannot con-

vict a man of misappropriating money unless it is first shown that he received the money. Therefore it seems to me that the difficulty suggested by Sir Norman Macleod does not really arise. In my view this case of *Emperor v. Ramratan Chumilal* (1) is based on a wrong view of S. 179, and we ought to overrule it; and this Court should come into line with the High Courts of Calcutta and Madras, and hold that S. 179 has no application to cases of criminal breach of trust.

Mr. Velinkar then took a second point which is open to him in this case. He says that the accused were bound to render accounts in Bombay, to send their accounts to Bombay, and he says that the misappropriation was not complete until after those accounts were delivered in Bombay which for the first time showed the complainant that he was being robbed, and he says that the delivery of false accounts in Bombay for the first time disclosed a dishonest intention which amounted in itself to a dishonest user of the money in Bombay, a dishonest user, that is, within part 2 of S. 405, I. P. C. For that proposition he has referred us to a case of the Calcutta High Court, *Gunananda Dhone v. Lala Santi Prokash Nanley* (6). In that case the learned Judges held in the first instance that criminal breach of trust fell within S. 181, sub-S. (2), and not within S. 179, and so far of course they are in accord with the view which I have suggested is the right view, but then they go on to discuss the difficulties which may arise in proving when a dishonest intent first arose. They point out that an agent may mix trust moneys with his own money without any intention of dishonesty, and he may then some time afterwards acquire the dishonest intention of using the money of the employer as his own money. After pointing out those difficulties, they say at the bottom of the first column in p. 436:

"Mr. Chatterjee has contended that these overt acts (i. e. delivery of false accounts) are but evidence of the fact that the offence of criminal breach of trust has already been committed by the accused, and from these acts his dishonesty may very well be inferred; but that these acts are not essential ingre-

(3) [1916] 44 Cal. 912=18 Cr. L. J. 762=41 I. C. 138.

(4) [1914] 38 Mad. 639=15 Cr. L. J. 688=26 I. C. 138.

(5) [1912] 35 All. 29=13 Cr. L. J. 856=17 I. C. 792.

(6) A. I. R. 1925 Cal. 613=36 I. C. 213=26 Cr. L. J. 725.

clients of the offence itself which must have been complete before the acts are done. There is, in my opinion, considerable force in the contention; but at the same time, looking to the words of S. 405, I. P. C., I am disposed to take the view that if there is a contract that the accused is to, render accounts at a particular place and fails to do so as a result of his criminal act in respect of the money, he can, without unduly straining the language of the section, be said to dishonestly use the money, at that place as well, in violation of the express contract which he has made touching the discharge of the trust by which he came by the money, and so commits the offence of criminal breach of trust at that place also."

With very great respect to the learned Judges who decided that case I am quit unable to follow the line of reasoning. It seems to me to involve a confusion between the place where the offence was committed and the place where the complainant first acquired evidence that the offence had been committed. I can see nothing in S. 405, I. P. C., to justify the contention that when a man in Rangoon delivers false accounts in Bombay, he is thereby making a dishonest use in Bombay of money or property which has never left Rangoon. If the principle contended for is sound it might have far-reaching consequences. A banker or a factor in Bombay may have in his hands moneys belonging to thousands of customers or clients, and he may deliver false accounts to these customers or clients in a hundred different towns in India, and it seems to me that if the view of the Calcutta Court is right, he could be sued for criminal breach of trust in any one of the hundred towns in which he has delivered false accounts. That would be a very serious inroad upon the general provision of S. 177, which requires offences to be tried by a Court within the local limits of whose jurisdiction they were committed. I think that general provision is one which is founded on considerations of principle and expediency, and that Courts ought not to be astute in finding reasons for assuming jurisdiction to deal with crimes committed outside their jurisdiction. I am not prepared to follow the view expressed by the Calcutta High Court in the latter part of their judgment.

*Then Mr. Velinkar takes a third point. He says that even if he is not entitled to charge the accused in Bombay with criminal breach of trust, he can charge them with falsification of accounts.

Now the accounts were really falsified by the accused in Rangoon, but Mr. Velinkar says that the false accounts were sent from Rangoon to the head office in Bombay with the intention that they would be, and the effect that they were, written into the accounts at the head office, and therefore the falsification of the accounts in Rangoon and the sending of them to Bombay with the intention that they should be used to falsify the accounts in Bombay amounts itself to a falsification of accounts in Bombay, and for that proposition he relies on the English case, *Rex v. Oliphant* (7). That was a case which turned on the construction of an English Act, and can be no authority on the construction of the Criminal Procedure Code; but apart from that I do not find in the complaint any allegation that accounts were falsified in Rangoon for the purpose of procuring a falsification of the accounts in Bombay, i. e., that the accounts in Bombay were falsified. That being so I think that that point also is not open to the complainant.

In my judgment therefore this application succeeds and we must hold that the learned Magistrate had no jurisdiction to deal with this case.

Madgavkar, J.—The question in this application is whether S. 179 applies, as held in *Emperor v. Ramratan Chuni-lal* (1) and whether the Bombay Courts have jurisdiction. On the first point I agree with the conclusion formulated by my Lord the Chief Justice. On the three arguments for the complainant, in the definition of S. 405, I. P. C., whether the conversion is to his own use or contrary to any legal agreement, the element of dishonesty is equally necessary. That dishonest intent is complete when the intention of causing wrongful gain or wrongful loss occurs under S. 24, and not necessarily when the wrongful loss or gain itself results. Therefore, even though such a loss may be a normal and usual result, S. 179, Criminal P. C., does not, in my opinion, apply, because from the initial words it can only apply when a person is accused of the commission of any offence by reason of anything which has been done and of any consequence which has en-

(7) [1905] 2 K. B. 67=74 L. J. K. B. 591=21 Cox. C. C. 192=21 T. L. R. 416=53 W. R. 556=94 L. T. 824=69 J. P. 230.

sued, whereas criminal misappropriation is complete with the conversion plus the dishonest intent and quite apart from any loss. Thus the loss, whether a consequence or otherwise, is not an ingredient of that offence, and therefore S. 179 has no application, but rather S. 177 and S. 181, sub-S. (2).

In regard to the cases on this point, in the three decisions of the Allahabad High Court, *Queen-Empress v. O'Brien* (2) followed in *Emperor v. Mahadeo* (8) and *Langridge v. Atkins* (5), where it was held that the loss entailed by the criminal breach of trust was a consequence that completed the offence, it is to be noted that they were all three cases in which it was doubtful where the misappropriation really took place. For the reasons stated above I agree rather with the view in *Ganeshi Lal v. Nand Kishore* (9), that unless the consequence such as the loss is an ingredient of the offence charged, S. 179 has no application. The Madras cases, *Re Rambilas* (4) and *Krishnamachari v. Messrs. Shaw, Wallace & Co.* (10), are to the same effect. At the same time it can hardly be said that S. 179 is controlled by S. 181. On that point I agree with the contention for the complainant that S. 177 is the general section, and the particular sections which follow, extend jurisdiction and venue, so that where S. 179 has application under the initial words S. 181 does not necessarily come in the way.

Ganeshi Lal v. Nand Kishore (9) is followed, and the other Allahabad cases, *Queen-Empress v. O'Brien* (2) and *Langridge v. Atkins* (5), dissented from in *Simhachalam v. Emperor* (3). The decision which appeals to me most is the judgment of Mukerji, J., in *Gunananda Dhone v. Lala Santi Prokash Nanley* (6), followed in *Yacoob Ahmed v. V. M. Abdul Ganny* (11). I agree entirely with the view of the learned Judge that criminal breach of trust is not an offence which counts as one of its factors the loss, which is the usual consequence of the act, and that it is the act itself

which in law amounts to the offence, apart from any such consequence; and therefore the jurisdiction to try an offence of criminal misappropriation or criminal breach of trust is governed by S. 181, sub-S. (2), and not by S. 179. The only doubt in my mind is as regards the class of cases referred to in the concluding portion of the judgment, where by reason of the secrecy observed by the accused doubt exists as to the exact manner, point of time or place where the misappropriation and conversion, etc., takes place, all matters within the special knowledge of the accused himself and not of the complainant, who can only judge from any overt act of the accused showing the dishonesty, which is essentially necessary to be proved. In such cases, if and where the accused is under liability to render accounts at a particular time and fails to do so, such failure may be the first overt dishonest act to the complainant's knowledge and the Court within the local limits where such failure takes place may have jurisdiction. But where the offence is completed at one place, the further liability to render accounts at another place and failure in rendering such false accounts at the second place does not confer jurisdiction under S. 179 upon the Magistrate at the latter place since the offence is already completed at the former place. At the same time, as is conceivable, where the offence is not completed as far as the knowledge and belief of the complainant goes in the place where the money was first sent, but the dishonest intent which is a necessary ingredient is only completed not merely as evidence but actually as factum of dishonesty by some act such as the rendering of accounts, then I am unable to say that even under S. 181, sub-S. (2), the criminal Courts in the latter place are excluded from jurisdiction. In my opinion the matter entirely depends upon where the act of criminal misappropriation including the dishonest intent is completed as far as the knowledge and belief of the complainant according to the complaint go. In such a case I agree with Mukerji, J., that the Courts in the place where the act is completed may have jurisdiction even though they may be different from the place where the money has been originally sent by the complainant.

(8) [1910] 32 All. 397=11 Cr. L.J. 372=6 I.C. 568.

(9) [1912] 84 All. 487=18 Cr. L. J. 479=15 I. C. 319.

(10) [1915] 39 Mad. 576=16 Cr. L. J. 491=29 I. C. 331.

(11) A. I. R. 1928 Rang. 217=111 I. C. 860=29 Cr. L. J. 940=6 Rang. 880.

Coming to the Bombay decisions, the decisions on cheating, such as *Emperor v. Jamnadas Vasanji* (12), have no bearing on the present question. *Emperor v. Ramratan Chunilal* (1) has been followed in *Emperor v. Gafur Karimbax* (13), in which *Re Ramlilas* (4) is distinguished. Without adding to the reasons of my Lord the Chief Justice, it appears to me that the question of grammatical meaning of the word "consequence" does not arise at all. By reason of the initial words and sentence of S. 179, unless the offence of which the person is accused is an offence not only by reason of something which he has done, but also of some consequence which has ensued, S. 179 has no application, and it is not necessary to distinguish the grammatical and the other meaning of the word "consequence," nor to distinguish between consequence direct and indirect, immediate and remote. As I have already stated above, criminal misappropriation is not an offence in which the ingredient of loss enters. S. 179 is therefore excluded, in my opinion, and I agree that in this view we must overrule the view and the decision in *Emperor v. Ramratan Chunilal* and *Emperor v. Gafur Karimbax* (13), in so far as it is based on the former case.

Applying the law as stated above to the facts of the present case, after reading the agreement and the complaint as it is now formulated, I am of opinion on the complaint itself the criminal breach of trust appears to have been completed in Rangoon. As regards the falsification of the accounts, the falsification alleged in the complaint is the falsification of the account in Rangoon. There is no explicit averment of abetment or of falsification of accounts in Bombay. The case of *Rex v. Oliphant* (7) was different, depending on the construction of the Falsification of Accounts Act, and it is therefore of no avail. On the complaint as it stands, and in the view of the law which I have ventured to formulate above, I agree that the Presidency Magistrate in Bombay had no jurisdiction, as he held, relying on *Emperor v. Ramratan Chunilal* (1). As we are overruling the view of the law formulated in that case, it

follows necessarily that on the complaint as at present filed, the Court of Bombay has no jurisdiction. I agree with the order proposed by my Lord the Chief Justice.

Baker, J.—I agree with the view taken by the learned Chief Justice and the conclusion at which he and my learned brother have arrived. I will add only a very few words to what has already been said. The definition of "dishonestly" in S. 24, I. P. C., shows that all that is necessary is the intention to cause wrongful gain or wrongful loss. It is not necessary that such wrongful gain or wrongful loss should, as a matter of fact ensue, and therefore it is not necessary that the offence of criminal breach of trust should actually involve wrongful gain or wrongful loss, although as a matter of fact in almost every case or in the majority of cases it does so. If I may say so with respect, the variance between the views taken by different High Courts on the question of the jurisdiction in cases of criminal breach of trust appears in some cases to be due to the theory that knowledge of loss is the same as loss. Now the offence of criminal breach of trust is an offence which is complete at the moment when the agent disposes of the property in violation of his trust, and the loss occurs at that moment. The Calcutta High Court has taken the same view in one of the cases quoted, and that at that moment the owner loses the money in the hands of his agent, and the question of when that loss comes to his knowledge seems to me to be perfectly immaterial for purposes of jurisdiction. So far as regards S. 179, Criminal P. C., it seems to me clear on the wording of the section as it stands that the consequence is part of the offence. In a case of the present character the consequence of the offence is loss to the owner. That loss takes place at the place, where the criminal breach of trust is committed, and not at the place where knowledge of that loss comes to the owner, which may be anywhere else. I, therefore, agree with the view that has been taken that the Magistrate in this case had no jurisdiction.

• V.B./R.K.

Rule made absolute.

(12) [1915] 16 Cr. L. J. 433=29 I. C. 65.
(13) A. I. R. 1930 Bom. 358=1930 Cr. C. 790.

1930 Cr. Cases 1033

(Madras)

WALLACE AND JACKSON, JJ.

K. Ramaraju Tevan and another
Accused—Appellants.

v.

Emperor—Opposite Party.

Referred Trial No. 155 of 1929, and Criminal Appeal No. 556 of 1929, Decided on 11th February 1930, from judgment of Sess. Judge, Ramnad Division, in Sessions Cases Nos. 42 and 49 of 1929.

(a) Criminal P. C., S. 233—Misjoinder of charges is cured by S. 537 when it does not result in injustice to accused—Criminal P. C., S. 537.

It cannot be assumed that if a mandatory provision of the Code has been infringed in framing the charge, the Court must of necessity be held to have failed in administering justice to the accused. S. 537 affords no real grounds for any such assumption. The impugned procedure must be one that is not only prohibited by the Code but also works actual injustice to the accused: *A. I. R. 1927 P. C. 44, Foll.* [P 1034 C 1]

(b) Penal Code, S. 149 — Preparation towards common object is prosecution.

After people have formed themselves into an unlawful assembly and decided upon their common object, preparation towards that common object is prosecution or following up, and if the preparation happens to be an offence then they are all equally liable. [P 1035 C 1]

(c) Criminal P. C., S. 239 (4) — Common object is not necessary to validate joint trial of offences committed in the same transaction.

Where persons are accused of different offences committed in the course of the same transaction, it is not necessary that all such persons must have a common object in order to render their joint trial valid. [P 1034 C 2]

Nugent Grant and U. Somasundaram
—for Appellants.

Public Prosecutor—for the Crown.

Judgment.—The sixteen appellants do not dispute the lower Court's findings of fact.

On 11th April 1929 at Khansapuram twenty to thirty persons came from the north armed with guns and sticks with the common object of shooting Sangiah Tevan and looting his house. When they were fifty yards off the house one Sundara Tevan, P. W. 10, tried to dissuade them, and Krishna Tevan, P. W. 11, who belongs to Sangiah's faction abused them. Krishna Tevan was hit on the head by accused 13 and then two more of the opposite faction Alagu and Sangiah, ran up. Appellant 1 shot Alagu, and the third shot Sangiah. Then the fourth fired into seven persons who came to help them, after which there

was a general stampede. Alagu was shot through his heart and died immediately. Sangiah had his leg broken and died of gangrene on the 14th.

The learned Judge has found that the shooting and the assault upon Krishna were the sudden outbreaks of individual members of the assembly, and therefore presumably were not in prosecution of its common object. Accordingly he has acquitted all the appellants of rioting. But he has found them all guilty of being members of an unlawful assembly under S. 143, I. P. C., and inasmuch as the men who fired (appellants 1, 3 and 4) undoubtedly had guns, he has found all guilty either directly or constructively by the provision of S. 149 of being armed with deadly weapons while being members of an unlawful assembly, the offence under S. 144, I. P. C.

Accused 1 and 3 are found guilty of murder, S. 302, I. P. C., and accused 4 guilty of attempted murder, S. 307, I. P. C.

Accused 13 is found guilty under S. 323. It is argued by Mr. Nugent Grant that none of those convictions can stand because the two murders, the attempted murder and the hurt were several and independent transactions which had no real connexion with the unlawful assembly. For every distinct offence of which any person is accused there must be a separate charge (S. 233) unless they are so connected together as to form the same transaction (S. 235), and the misjoinder of charges in this case has in fact occasioned a failure of justice.

To this plea there would seem to be three sound answers. In the first place it cannot be said that there has been failure of justice. Supposing that the murders and assaults were quite unconnected with the object of the unlawful assembly, a Court which had joined them all together in one trial might well have been led to attribute to the assembly force and violence of which it was entirely innocent, and so might have found it guilty of rioting; and had this case terminated in a conviction of rioting it would be impossible to say that the irrelevant consideration of the extraneous offences had not influenced the mind of the Court. But the charge of rioting was dismissed, and it must be said that the

mind of the Court, though dangerously exposed to infection, proved absolutely immune.

No doubt ever since the pronouncement of the Judicial Committee in *N. A. Subramania Iyer v. Emperor* (1) it has been the general practice to assume that if a mandatory provision of the Code has been infringed in framing the charge the Court must of necessity be held to have failed in administering justice to the accused. S. 537 affords no real ground for any such assumption, and the Judicial Committee itself when it had occasion to refer to *Subramania Iyer v. Emperor* (1), in *Abdul Rahman v. Emperor* (2), clearly indicated that the impugned procedure must be one that is not only prohibited by the Code, but also works actual injustice to the accused. In the latter case the Code was clearly infringed, but the curative provision of S. 537 was considered a sufficient remedy.

In the second place, whatever conclusion was finally arrived at by the learned Judge, it is clear that, before evidence was heard, it must have been a very open question whether the shooting was or was not in prosecution of the common object. It is a question of degree. If the men who protested had been ranged on the doorstep of Sangiah's house it would be hard to say that shooting them was not in prosecution of the looting. What if they were five, ten, fifty yards away? It is a matter that could only be decided after most careful consideration of the evidence as a whole; and it cannot be said that to have accused these persons of shooting in prosecution of the common object was in any way frivolous. If the charge could be postponed till after the conviction a more perfect symmetry might be attained, but unfortunately that cannot be, and the charge of necessity must be founded upon the accusation: cf. *Abdul Salim v. Emperor* (3), at p. 596 (of 49 Cal.) It cannot be said therefore that there has been any misjoinder in contravention of S. 233, Criminal P. C.

In the third place, even supposing

(1) [1902] 25 Mad. 61=29 I. A. 257 = 8 Sar. 160 (P.C.).

(2) A. I. B. 1927 P. C. 44=100 I. C. 227 = 23 Cr. L.J. 259=54 I. A. 96=5 Rang. 53 (P.O.).

(3) A. I. B. 1922 Cal. 107 = 69 I. C. 145 = 23 Cr. L. J. 657=49 Cal. 573.

that the ultimate findings govern the charge, so that the Court was precluded from charging as though the shooting had been in prosecution of the common object, still it cannot be said that the whole affair was not in the course of the same transaction. The accused formed themselves into a body with the intention of looting and shooting Sangiah Tevan and frightening away anyone who tried to prevent them, otherwise there is no explanation for such a display of force. It has never been held that in a transaction all the persons engaged must have a common object. Taking the transaction to be the adventure of private war upon which the appellants embarked on 11th April a historian of that transaction would hardly omit all mention of the shooting as belonging to a totally different transaction. As Benson, J., observes in *Choragudi Venkatadri v. Emperor* (4):

"It is neither necessary nor advisable to attempt to define the expression 'the same transaction' which the legislature has left undefined."

Each particular case must be tried by common sense and common knowledge of language, and if these tests be applied the whole affair from the formation to the disruption of this assembly seems obviously to be one transaction.

Therefore the plea of misjoinder is not sustainable. It is next argued that the appellants who are not found to have been armed cannot be constructively held guilty under S. 144 by the provision of S. 149. There can be no doubt that if a member of an unlawful assembly, liable under S. 143, I. P. C., to six months rigorous imprisonment is armed with a deadly weapon he is punishable with two year's rigorous imprisonment under S. 144. Therefore being so armed is a thing made punishable by the Penal Code and consequently, under S. 4), an offence.

Now, is the offence so committed by the member of the unlawful assembly in prosecution of the common object of that assembly. Prosecution in plain English is following up. They assembled and formed the common object of shooting a man. What did they do to follow it up? Some of them came to the assembly with guns, or stayed in

(4) [1910] 38 Mad. 502 = 5 I. C. 847 = 11 Cr. L. J. 258.

the assembly with guns, and at any rate took care not to be parted from their guns. That seems to be clear following up. Mr. Grant would say that it was mere preparation, but after people have formed themselves into an unlawful assembly, and decided upon their common object preparation towards that common object is prosecution or following up, and if the preparation happens to be an offence then they are all equally liable. Suppose they burst in a door; that is not mere innocent preparation for the intended looting. It must be held therefore that this plea also fails.

There remain two pleas *ad misericordiam* on behalf of the murderers sentenced to death. It is clear from the medical evidence that accused 1 shot Alagu Tevan with various pellets through the heart and thigh. He may be taken to have aimed at his stomach and it cannot be said that he did not intend his death. Accused 3 shot Sangiah five inches below the knee and shattered the bones. He had said: Why do you shoot him who was keeping quiet and for that innocent protest was shot. Mr. Nugent Grant says that the murderer only hoped to maim him; only hoped perhaps to cripple him for life. It was a murderous act, without the smallest justification and it resulted in murder. We see no reason to interfere. It cannot be said that any of the appellants has been treated with undue severity, and we dismiss their appeals.

P.R.S./K.N.

Appeals dismissed.

1930 Cr. Cases 1035

(Madras)

PANDALAI, J.

Kalia Goundan and others—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 963 of 1929, and Criminal Revn. Petn. No. 867 of 1929, Decided on 21st March 1930, from judgment of Sess. Judge, Madura, in Criminal Appeal No. 49 of 1929.

(a) Criminal P. C., (1898), Ss. 107 and 112—Magistrate having territorial jurisdiction under S. 107 making order under S. 112—District Magistrate can transfer it to one competent to try it but without territorial jurisdiction.

Where a Magistrate having jurisdiction according to S. 107 has made an order under

S. 112, the District Magistrate has power to transfer the case as initiated to another Magistrate competent to try the case though not qualified under S. 107 as regards territorial jurisdiction. 41 *Mad.* 246 and 31 *Cal. Ref.* [P 1036 C 2]

(b) Criminal P. C. (1898), Ss. 107 and 112—Preliminary order under S. 112 for proceedings under S. 107 must state facts of charge.

A preliminary order under S. 112 on which proceedings under S. 107 were initiated must state the facts upon which the Magistrate charges the person proceeded with: *A. I. R.* 1925 *Mad.* 189, *Ref.* [P 1036 C 2]

V. L. Ethiraj and Somasundaram—for Petitioners.

Public Prosecutor—for the Crown.

Order.—This is a petition to revise an order under S. 118, Criminal P. C., made by the Joint Magistrate of Dindigul requiring the petitioners, 12 in number, to furnish security for keeping the peace for one year. The order was on appeal confirmed by the learned Sessions Judge of Madura.

Two objections are taken to the order complained against: (1) that the Joint Magistrate of Dindigul had no jurisdiction to make it; (2) that the preliminary order under S. 112, on which the proceedings were initiated was defective in that it did not contain the substance of the information received.

To understand the first objection the facts necessary are that the petitioners and the place where the alleged breach of the peace was apprehended are within the jurisdiction of the Sub-Divisional Magistrate of Usilampatti. The proceedings against the petitioners and others under S. 107 were instituted before that Magistrate, and he on 29th December 1928 made the preliminary order under S. 112 calling upon the petitioners and others complained against to show cause. The District Magistrate then transferred the case to the Joint Magistrate of Dindigul. The latter Magistrate for some reason drew up another preliminary order under S. 112 making formal changes in the order passed by the Usilampatti Magistrate but substantially in the same terms as that order. The petitioners showed cause, one of their objections being that the order under S. 112 was not definite enough as it did not contain any particulars. The Magistrate brushed this aside as a technical objection and stated that in his opinion the order does give particulars of the dispute and the

reasons for apprehending a breach of the peace, and he added that the further details appeared as the prosecution unfolded its case. To return to the objection as to the jurisdiction: it is argued that the Joint Magistrate of Dindigul had no jurisdiction to proceed with the enquiry against the petitioners because neither were the petitioners living within the jurisdiction of that Magistrate, nor was the place where the breach of the peace was apprehended within his jurisdiction.

It is contended that according to S. 107, Magistrates other than a Chief Presidency Magistrate or District Magistrate are not only incompetent to initiate proceedings against persons residing beyond their jurisdiction in respect of breach of the peace beyond such jurisdiction, but they are also incompetent to hear cases under S. 107 transferred to them by the District Magistrate where the persons and the places affected are not in their jurisdiction. For this contention no direct authority was forthcoming. But the decision in *Nagi Reddi Konda Reddi, In re* (1) was referred to. That case is not on all fours with this. There the Magistrate before whom the proceedings under S. 107 were initiated had not passed the preliminary order when the District Magistrate transferred the case to another Magistrate, and it was held that there having been not even an initiation or commencement of proceedings under S. 107 before the Magistrate competent according to the terms of that section, the order of transfer did not confer jurisdiction on the Magistrate to whom it was transferred and that therefore the proceedings before him were incompetent. That case did not decide, because the facts were not so, that where a Magistrate having jurisdiction according to S. 107 has made an order under S. 112 the District Magistrate is not empowered to transfer the case so initiated to another Magistrate competent according to his grade or class to try this class of cases, although not qualified by the requirements of S. 107 as regards territorial jurisdiction. On that limited proposition there appears to be no decision of this Court. But the point is covered by

an authority, namely *Surjya Kanta v. Emperor* (2), which was referred to in *Nagi Reddi Kondi Reddi, In re* (1) with approbation. In the Calcutta case the precise point arose and it was decided in 1904

"that the intention of the legislature was to limit the jurisdiction in regard to the institution of proceedings to a Chief Presidency or District Magistrate; but that when such Magistrate has, in the exercise of his discretion, directed institution of proceedings, there is nothing in the law to prevent him from transferring the case to a Magistrate otherwise qualified to complete the proceedings."

This decision has stood the test of subsequent amendments of S. 107 and there is nothing in the amendment of 1923 to show that this view was not accepted as correct or that the legislature intended to alter it in any way. The result is that the Usilampatti Magistrate having first drawn up the preliminary order under S. 112 the subsequent transfer of the case to the Dindigul Magistrate by the District Magistrate was authorized and the proceedings before the Dindigul Magistrate were competent. The first objection therefore fails.

The second objection relates to the defect in the order under S. 112 and the objection is that that order does not, as it is required by S. 112 of the Code to do, set forth "the substance of the information received." Upon the decisions on this topic there is no reasonable doubt as to what the intention of these words is. It is to give in substance an abstract of the facts upon which the Magistrate charges the persons proceeded against with being likely to commit a breach of the peace so as to give them notice of what they have to meet and be prepared to meet it. There are many instances of the practical application of this general rule, of which a very good one is found in *Kutti Goundan, In re* (3). The general rule being as stated the question is whether in this particular case the order satisfies the requirements. Other decisions cannot be of much help on that point. The order upon which the Dindigul Magistrate proceeded was one drawn up by himself on 4th April 1929 after the case was transferred to him. In one sense this was not the order on which he ought to

• (2) [1904] 31 Cal. 850.

(1) [1916] 41 Mad. 246=18 Cr. L. J. 878=41 I.O. 990.

(3) A. I. R. 1925 Mad. 189=86 I. C. 49=26 Cr. L. J. 673.

have proceeded because the proceedings having been already initiated he could not initiate them over again and the order which he should have started upon was the order passed by the Usilampatti Magistrate on 29th December 1928. If there had been any material difference between the two orders that might alone have been a sufficient irregularity to invalidate all that followed. But as it happens, the order drawn up by the Dindigul Magistrate, is, apart from formal changes, necessitated by the change of venue, substantially the same as the order passed by the Usilampatti Magistrate, and therefore no more need be said about it. The new order drawn up was merely superfluous. The substance of both orders is this:

"That you . . . formed yourselves into a faction espousing the cause of counter-petitioner, 1, against Kamatchi Goundan of the same village in regard to the possession and enjoyment of a tamarind tope situated in S. No. 1392 of Odaipatti village and by the inimical attitude of yours against the said Kamatchi Goundan's faction, you are likely to commit breaches of peace or disturb the public tranquility or do wrongful acts that may probably occasion breaches of peace or disturb the public tranquility."

It will be noticed that no other fact is mentioned here except that there are two factions in the village and a dispute between them about a tamarind tope and that the counter-petitioners are on one side. It gives absolutely no indication as to what the information was upon which the counter-petitioners were believed to be threatening breaches of the peace. It would have left the counter-petitioners just as well informed on that point as if they were told:

"You are wicked men. You have got enemies and therefore you are likely to commit breaches of peace."

In my opinion not only was there no attempt to state in substance the information received against the counter-petitioners, but the order contained nothing from which they could know the case that they would have to meet. The order therefore was clearly defective. This was not, as the Dindigul Magistrate thought, a merely technical defect that it did not give the particulars or the reasons for apprehending a breach of the peace. On that ground the order is liable to be set aside. But it has been argued for the Public Prosecutor that this defect does not

vitiating the proceedings because it did not occasion a failure of justice. I do not question, at any rate I do not now want to question, whether a defect of this character is curable. But the question whether failure of justice has been occasioned in every case is one of fact. In this case the objection was taken before the Magistrate himself, and that according to S. 537, is always a circumstance from which failure of justice may be inferred. Whether it was in fact occasioned in this case cannot be disputed because the counter-petitioners did not have the information they were entitled to possess in the early stage of the proceedings, and if they had possessed it at that time they might have met it successfully. The order therefore must be set aside and the bonds given by the petitioners will be cancelled. I come with all the more confidence to this conclusion because this order passed in May 1929 will in any case expire in two months more.

P.R.S./V.B.

Order accordingly.

1930 Cr. Cases 1037

(Madras.)

PANDALAI, J.

Veeraragava Mudaliar and another—
Accused—Petitioners.

Chairman, Municipal Council, Vaniyambadi—Complainant—Respondent.

Criminal Revn. No. 809 of 1929 and Criminal Revn. Petn. No. 725 of 1929, Decided on 7th March 1930, from order of Joint Magistrate, Tirupattur, D/- 9th August 1929, in Civil Appeal No. 35 of 1929.

Madras District Municipalities Act (5 of 1920), S. 362—"Other materials" include trees when cut.

Trees standing on the land vested in the Municipal Council when cut become "other materials" so as to constitute the removal of the same an offence under S. 362 [P 1083 C 1]

G. Krishnaswami Iyer—for Petitioners.

A. Narasimha Iyer—for the Crown.

A. Suryanarayana—for Complainant.

Order.—The petitioners, the Mittadar of Devasthanam Mitta and his son, seek to revise the conviction recorded against them under S. 313 read with S. 362, District Municipalities Act, by the Sub-Magistrate, Vaniyambadi, which was confirmed by the Joint Magistrate, Tirupattur.

They were fined Re. 1 each. The offence charged against them was that they had cut and removed trees from four town survey numbers, namely 1166, 1227, 1225 and 1228. The Municipal Council claimed those properties as vested in it. Therefore the petitioners were charged with having violated S. 362, District Municipalities Act, by cutting and removing trees therefrom. Both the Magistrates found that the four survey numbers above mentioned were properties which vested in the Municipal Council of Vaniyambadi. The argument of the learned advocate for the petitioners in this Court is twofold: (1) that the acts charged do not amount to an offence under S. 362 (2); that the properties from which the trees were cut have not been shown to be properties vested in the Municipal Council.

Section 362 says:

"No person shall, without authority in that behalf, remove earth, sand or other materials from any land vested in the Municipal Council, or river, estuary, canal, back water or water course (not being private property)."

The argument is that trees do not come within the expression "other material" in this section. I am unable to see how trees growing upon land are to be excluded from the expression "other materials" which is quite general. To exclude trees growing upon the land vested in the Municipal Council from this section would enable anyone to cut and remove trees from Municipal land and plead that they had not contravened the section although, according to the words immediately preceding, to remove a basket of earth or a load of sand from the foot of such trees, would be an offence. I do not think that this is a reasonable construction. I must say that trees when cut are "other materials" which are upon land vested in the Municipal Council.

As to the question whether the survey numbers from which the trees were cut were or were not vested in the Municipal Council it was not disputed in either of the Courts below that Survey Nos. 1166 and 1227, which are registered respectively as "road margin" and Government river poramboke, belonged to and vested in the Municipal Council. I do not see how the petitioners can now be heard to re-open that question.

As regards the other two Survey Nos. 1225 and 1228 the survey register produced shows that they were classed as "river poramboke within devasthanam limits." The learned advocate for the petitioners argues, that this shows that these properties are the private property of the Mittadar and, that therefore S. 125, which was relied upon to show that the beds of water-courses and lands adjacent thereto belong to the Municipality, is not applicable.

But there is evidence that the classification of property as "river poramboke within devasthanam limits" means that such property is not within the mitta proper but outside, and this is made clear from the facts referred to by the Sub-Magistrate in para. 7 of his judgment. Certain other properties were wrongly classed as patta lands. On the application of the Municipality the Director of Survey classed them as "river poramboke within devasthanam limits." The predecessor-in-title of the present petitioners sued the Government and the Municipal Council to have this classification altered and those properties classified as patta lands. That dispute was settled by a compromise the result of which was that the lands the subject of dispute were declared according to the request of the Municipality as river poramboke, but the Mittadar was compensated by the peshkush being reduced proportionately and by the arrears which had been collected being refunded and by his being permitted to cut and remove the trees which were growing upon those properties before the floods of 1874. This shows that the classification of property as river poramboke, although within the devasthanam limits, indicates that it is not part of the mitta, and this answers the objection of the learned advocate for the petitioners founded upon the decision in *Venkata Lakshmi Narasamma v. Secy. of State* (1) that, in the absence of proof to the contrary, the presumption, which may be strong or weak, is that the soil of non-navigable rivers vests in the owners on either side. Here there was proof to the contrary. The river in question is the river Palar, an important river of considerable size although not navigable. Therefore the

(1) [1918] 41 Mad. 840=47 I. C. 606.

conclusion of the Magistrate was right that the properties in question are not the private properties, and the conviction was therefore right. The petition is dismissed.

P.R.S./V.B.

Petition dismissed.

1930 Cr. Cases 1039

(Madras)

PANDALAI, J.,

Kolapalli Narasimhamurti and others
—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 864 of 1929 and Criminal Revn. Petn. No. 775 of 1929, Decided on 14th March 1930, from judgment of Joint Magistrate, Rajahmundry in Criminal Appeal No. 73 of 1929.

Criminal P. C. (1898), S. 421—Provided pleader of appellant had reasonable opportunity of being heard at hearing of appeal, hearing appeal when presented is not improper.

In the great majority of cases when an appeal is presented, neither the appellant nor the pleader may be in a position to straightaway argue in support of the appeal and therefore it may be a wise rule in proceeding under S. 421 to give sufficient time to the appellant or his pleader and to inform him that he will be heard on a particular day in support of the appeal with a view to action being taken under S. 421, and consequently provided the pleader had a reasonable opportunity of being heard, hearing the appeal when presented is not improper: *A. I. R. 1924 Mad. 895, Expl.*

[P 1040 C 1]

M. Appa Rao—for Petitioner.

A. Narasimha Iyer—for the Crown.

Order.—The petitioners five in number, were convicted by the Second Class Magistrate of Amalapuram under S. 323 I. P. C. and sentenced to a fine of Rs. 20 each or one month's rigorous imprisonment in default. Out of the fine P. V. 1 was awarded Rs. 30 as compensation. They appealed to the Joint Magistrate of Rajahmundry. The petition of appeal and a copy of the judgment of the Sub-Magistrate were presented to the Joint Magistrate on 5th August 1929, when he was on tour by a pleader on behalf of the petitioners. The Magistrate having heard, as he reports, the pleader in support of the appeal, dismissed it under S. 421, Criminal P. C. His judgment is brief. After stating that the judgment of the Sub-Magistrate sets out the evidence fully it goes on to say that the attack on the complainant took place in daylight in the

open and that the defence of alibi was a tissue of falsehood and winds up with the remark that the appellant's pleader has shown no grounds for interference. For the petitioners it was represented at the time this petition came on for admission that according to the petitioner's pleader who presented the appeal, the Joint Magistrate personally perused the judgment and the grounds of appeal and asked him whether he conducted the case in the lower Court to which he said that he did not conduct it throughout, that then the Magistrate asked if he had anything to say in support of the appeal, that the pleader then asked for time to argue the case as he had not fully gone through the record, that no time was granted and the appeal was summarily dismissed under S. 421. This representation for the petitioner was communicated to the Joint Magistrate who has sent a report dated 6th December 1929 that the appeal was presented to him at the Amalapur Traveller's Bungalow in the morning, that on perusing the judgment of the lower Court he informed the pleader who presented it that it appeared to fall into the class of appeals which he usually dealt with under S. 421, Criminal P. C., that the pleader voluntarily launched into the merits of the appeal rather fully and was heard for at least half an hour, that no application for further opportunity to argue the case was made to him, that if such application had been made it would have been granted and that finally the Magistrate intimated his intention of dismissing the appeal summarily.

The question before me is whether the procedure adopted by the Joint Magistrate was in the circumstances substantially in accordance with the provisions of S. 421, in other words whether the petitioners or their pleader had a reasonable opportunity of being heard in support of the appeal.

On this point a decision of *Ramesam, J.*, has been brought to my notice, namely *Turka Hussain Saheb, In re* (1). That decision seems to lay down as a rule of law that a criminal appeal should not be heard at the time of presenting the papers even for the purpose of dismissal under S. 421, Criminal P. C., and that there must be a special

(1) *A. I. R. 1924 Mal. 895 = 48 Mad. 385.*

posting of the appeal after a reasonable time for the purpose of hearing under S. 421. It also appears to lay down as a rule that an appeal raising questions of fact ought not to be disposed of under S. 421 without the original records being called for from the lower Court. If either of these two requirements was a necessary condition before action under S. 421 could be lawfully taken there would be no further question in this petition, because neither of these was done. The appeal was dismissed on the very day it was presented and it was not posted a week later for the purpose of hearing. Also the records were not sent for. Without entering into the matter more fully, because in the nature of the conclusion at which I have arrived in this petition it is not necessary to do so, I do not think that the learned Judge intended to do more than indicate that as a rule of caution and sound procedure it is better to post an appeal for being heard even under S. 421 and to send for the original papers. So far as the section itself is concerned, neither of those requisites would seem to be laid down by the words. The section says explicitly that:

"on receiving the petition and copy under Ss. 419 and 420 the appellate Court shall peruse the same and if it considers that there is no sufficient ground for interfering may dismiss the appeal"

summarily and then the proviso says that:

"an appeal presented under S. 419 should not be dismissed unless the appellant or his pleader had a reasonable opportunity of being heard in support of the appeal. In sub-Cl. 2 it is distinctly said that before dismissing an appeal under the section the Court may call for the record in the case but shall not be bound to do so."

In the face of this express declaration that the Court shall not be bound to send for the papers I do not think it was intended to be laid down in the decision cited by the petitioners that the Court was bound to send for the papers before taking action under S. 421. No distinction is made in the section between appeals relating to facts and appeals raising questions of law. The provision is perfectly general. Similarly as to posting the case to a subsequent date after the presentation for the purpose of being heard under S. 421, the words of sub-S. 1 seem to me to be plain that so long as a reasonable oppor-

tunity is given to the appellant or his pleader to be heard in support of the appeal there is no legal requirement, as to any postponement of the hearing after the presentation of appeal. I quite appreciate that in the great majority of cases when an appeal is presented, neither the appellant nor the pleader may be in a position to straightaway argue in support of the appeal and therefore it may be a wise rule in proceeding under S. 421 to give sufficient time to the appellant or his pleader and to inform him that he will be heard on a particular day in support of the appeal with a view to action being taken under S. 421. More than that I do not think that the section really requires; nor do I think that Ramesam, J., intended to lay down.

In this case the question really is whether the petitioners' pleader had a reasonable opportunity of being heard in support of the appeal, although undoubtedly he was allowed to address some argument to the Joint Magistrate. On the whole I have come to the conclusion that the pleader had not the required opportunity for the simple reason that he had not got all the records with him and had not fully conducted the case himself. It is not necessary to go into the slight discrepancies as to what happened between the accounts respectively given by the pleader and the Joint Magistrate. One thing however is clear that, whatever the pleader said might be, the Joint Magistrate conceived the idea that the occurrence took place in open daylight, whereas in fact it took place after 8 p. m. Such a hearing could not have been well informed on the part of the pleader or anything but casual on the part of the Joint Magistrate. Holding that the petitioner's pleader had not the opportunity given to him to which he was entitled under the section the dismissal of the appeal will be set aside and the appeal will be sent back to the District Magistrate of East Godavari to be heard by him or by some other competent Magistrate other than the one who disposed of it.

P.R.S./V.B.

Case sent back.

1930 Cr. Cases 1041

(Lahore)

BHIDE, J.

Sundar Singh—Petitioner.

v.

Emperor—Opposite Party.Criminal Misc. Petn. No. 107 of 1930,
Decided on 19th June 1930.

(a) Criminal P. C., S. 491—A arrested and remanded to police custody on suspicion of being connected with offence under S. 302 read with S. 120-B—Order of Magistrate not sufficiently clear—Existence of grounds for believing that A was connected with serious conspiracy—Custody in which A was detained held not to be "illegal."

A was arrested on suspicion of being connected with the offence under S. 302 read with S. 120-B of Penal Code and remanded to police custody by the Magistrate under S. 167, Criminal P. C. The order of the Magistrate was not sufficiently clear, no reasons having been given for remanding the prisoner to police custody. But there were some grounds for believing that the prisoner was concerned in a serious conspiracy.

Held: that in the circumstances the Magistrate's order could not be treated as more than an irregularity. The Magistrate had jurisdiction to pass the order. The custody in which the prisoner was detained could not therefore be considered illegal. [P 1041 C 2]

(b) Criminal P. C., S. 167—Magistrate acting under S. 167 has to weigh evidence with respect to the offence—He does not therefore act purely in executive capacity.

A Magistrate acting under S. 167 has to weigh evidence to decide whether the prisoner should be detained in custody or not. Weighing of such evidence is essentially a judicial function. A Magistrate acting under S. 167 cannot therefore be said to be acting in executive capacity. [P 1042 C 1]

(c) Criminal P. C., Ss. 167 and 340—Proceedings under S. 167 fall within provisions of S. 340—Interview with legal adviser should not be refused to prisoner remanded to custody under S. 167.

Proceedings before a Magistrate under S. 167 fall within the provisions of S. 340. It is in the interests of justice that an accused person should have access to legal advice even while he is in police custody during the course of an investigation. An interview with the legal adviser should not therefore be refused to a prisoner who is remanded to police custody under S. 167: *A. I. R. 1926 Bom. 551, Foll.*

[P 1042 C 2]

A. R. Kapur—for Petitioner.*R. C. Soni*—for the Crown.

Order.—This is an application by one Sundar Singh under S. 491, Criminal P. C., for the release of his son, Dhurydev, who is said to be "illegally" or "improperly" detained in custody by the police. In the alternative there is a prayer for bail and also for the legal adviser and relations of Dhurydev being

permitted to see him, the police having refused to allow such interviews.

The first question for consideration is whether Dhurydev is being "illegally" or "improperly" detained within the meaning of S. 491, Criminal P. C. It appears that he was arrested at Delhi on suspicion of being concerned in an offence under S. 302 read with S. 120-B, I. P. C., and was thereafter remanded to police custody by a Magistrate under S. 167, Criminal P. C. It was urged that the order of remand was illegal as the Magistrate has given no reasons for remanding the prisoner to police custody as he was required to do, by sub-S. 3 of the aforesaid section. The order of the Magistrate is, no doubt, not sufficiently clear in this respect. Although he was not expected to pass any elaborate order, he should certainly have briefly indicated his reasons for remanding the prisoner to police custody. However it appears that there were some grounds for believing that the prisoner was concerned in a serious conspiracy and further information has been since obtained during the course of the investigation. In the circumstances, the defect in the Magistrate's order cannot be treated as more than an irregularity. The Magistrate had jurisdiction to pass the order and it is not for me to go into the merits of the evidence at this stage for the purpose of this petition under S. 491, Criminal P. C. The custody in which the prisoner is detained at present cannot therefore be considered to be "illegal".

It may be noted here that the prisoner when produced before me in Court did not complain of any ill-treatment by the police. It was urged by his counsel that the police custody became "improper" as the police refused to allow even the prisoner's legal adviser to have access to him. This is however a somewhat debatable point, and although I have come to the conclusion that the police were not justified in refusing the prisoner to be interviewed by his legal adviser, I think, this cannot, by itself, be considered to be a sufficient ground for setting him at liberty at once in the circumstances of the case.

As regards bail the police enquiry is still incomplete and I do not wish to anticipate its result. When the period of the present remand is over (as it will

be shortly), it will be for the Magistrate to consider very carefully the evidence obtained and to decide whether there is any justification for further detention of the prisoner or whether he should be released forthwith on bail or otherwise.

The last and the most important point raised is the right of a prisoner in the custody of the police to have access to legal advice. There is no specific provision in the Code in this respect. The learned counsel for the petitioner who claims his right for his client has relied upon a Division Bench ruling of the Bombay High Court, viz. *Crawford Bayley & Co., In the Petition of (1)* which is certainly in his favour. The learned counsel for the Crown was unable to cite any authority to the contrary, but submitted that the Bombay ruling does not lay down the law correctly. His contention was that a Magistrate acts under S. 167, Criminal P. C., in his executive capacity and that S. 340, Criminal P. C., which gives the right to an accused person to be defended by a pleader, has no application to such proceedings. After carefully considering the matter I am unable to accept this contention. S. 167 requires a police officer to submit his diaries to the Magistrate within 24 hours of the arrest of an accused person and it is left to the latter to decide whether the accused should be detained in custody (whether of the police or any other custody) any longer. In deciding this question the Magistrate will presumably be guided by the evidence already available and the prospect of getting further relevant evidence as regards the alleged offence. The weighing of such evidence with respect to an alleged offence seems to me to be essentially a judicial function and it seems to be precisely for this reason that the matter is left to a Magistrate and not a police officer. If the matter were purely executive it could easily have been left to the decision of the investigating officer or his superiors in the Police Department. It will appear further from other provisions of the Code (see S. 497, Criminal P. C.) that from the very time of the arrest of an accused person by the police, Magistrates have power to consider the question of his release on bail and their

orders in this respect are subject to revision by superior Courts. The position taken up by the learned counsel for the Crown that a Magistrate acts in a purely executive capacity until a formal police report regarding an offence is submitted under S. 173, Criminal P. C., cannot therefore, be sustained. There seems therefore no good reason why the proceedings before a Magistrate under S. 167, Criminal P. C., should not be considered to fall within the provisions of S. 340, Criminal P. C., as held by the Bombay High Court in *Crawford Bayley & Co., In the petition of (1)*. S. 340, Criminal P. C., gives an accused person the right to be defended by pleader and this right necessarily implies right to previous consultation and advice. The learned Judges of the Bombay High Court have discussed the whole question fully and shown that it is in the interests of justice that an accused person should have access to legal advice even while he is in police custody during the course of an investigation. I would respectfully express my entire concurrence in that view. A similar view appears to have been taken by a single Judge of this Court (Fforde, J.) in Criminal Miscellaneous Case No. 99 of 1929, though detailed reasons have not been given in that order.

As pointed out by the learned Judges of the Bombay High Court in *Crawford Bayley & Co., In the Petition of (1)* the days are long gone by when the State deliberately put obstacles in the way of the accused defending himself and the present day trend is entirely in the opposite direction. A prisoner is remanded to police custody merely to facilitate investigation and there can be no justification for curtailing the liberty of an accused person except so far as this may be necessary in the interests of justice and for the purposes of investigation. Prima facie, it does not appear how the interests of justice could be defeated by allowing a prisoner to have access to legal advice. On the contrary the presumption is just the other way. It was suggested that in serious cases there is risk of the privilege being abused by a member of the legal profession. But it can be urged with equal justification that there is also risk of the abuse of their powers by the police. Justice and fair play ob-

(1) A. I. R. 1926 Bom. 551=97 I. C. 801=27
plain Cr. L. J. 1169=50 Bom. 741.

viously require that an accused person should have access to proper legal advice when he is accused of a criminal offence.

The right of a prisoner to have access to legal advice must of course be subject to such legitimate restrictions as may be necessary in the interests of justice in order to prevent any undue interference with the course of investigation. For instance a legal adviser cannot claim to have interviews with a prisoner at any time he chooses. Similarly, although ordinarily a member of the Bar may be presumed to understand his responsibility in the matter, if there are any good reasons to believe that a particular pleader has abused or is likely to abuse the privilege, that pleader may be refused an interview. But, in such cases the police must of course be prepared to support their action on substantial grounds.

As regards interviews with friends and relations the police have expressed their willingness to allow reasonable opportunities for such interviews in the presence of a police officer and I do not consider it necessary to pass any further order in this respect. The interview with a legal adviser must however for obvious reasons be allowed in the presence but not within the hearing of a police officer. I accept this petition to the extent of directing that the prisoner Dhruvdev shall be allowed reasonable opportunities for interviews with his legal adviser in the manner stated above so long as he remains in custody.

R.M./R.K. *Order accordingly.*

* 1930 Cr. Cases 1043 (Lahore)

SHADI LAL, C. J. AND AGHA HAIDAR, J.
Dogar Mal-Amir Chand—Petitioner.

v.

P, a pleader — Respondent.

Civil Revn. Petn. No. 696 of 1929,
Decided on 13th May 1930.

* (a) Legal Practitioners Act (18 of 1879), S 13—It is duty of applicant in proceedings under this section to go into witness box to substantiate his allegations and submit himself to cross-examination.

The proceedings under S. 13, Legal Practitioners Act (18 of 1879), are of a quasi criminal nature, and in the event of the charge of professional misconduct being established, the consequences to the legal practitioner concerned are very serious indeed. Such being the case it is the duty of the applicant who is more or less in the position of a complainant to go into the witness box and substantiate

his allegation before producing any other witnesses, and what is more important, to submit himself to cross-examination. [P 1044 C 1]

(b) Civil P. C., O. 10—Statement of party unless substantiated by evidence of party in witness box cannot be treated as evidence against opposite party.

The statement under O. 10 cannot be treated as evidence in the case against the opposite party who has no opportunity of cross-examining his opponent who made the statement. The party to a suit must give evidence as a witness in respect of matters which are directly within his knowledge. [P 1044 C 2]

(c) Legal Practitioners Act, S. 13—Charge must be clearly established.

Charges of professional misconduct must be clearly established and should not be inferred from mere ground for suspicion however reasonable, or what may be mere error of judgment or indiscretion: *A. I. R. 1930 P. C. 144, Foll.* [P 1046 C 1]

(d) Legal Practitioners Act, S. 13 — Pleader's duty when client putting off settlement of fees stated.

When the client is, for some reason or other, putting off the settlement and payment of fee, a legal practitioner would be well advised if he served a registered notice upon him in good time intimating to him that if the client did not settle and pay his fee he would repudiate all his responsibility as a pleader: *37 Mad. 238 (F. B.) and A. I. R. 1929 Pat. 337, Expt.*

[P 1046 C 2]

(e) Legal Practitioners Act, S. 13—Vakalatnama signed on distinct understanding of settlement of fees—If client fails to settle fees, pleader is not bound to defend case.

Where a pleader signs a vakalatnama on the distinct understanding that a sum paid to him is really in the nature of a part payment, and that the client will settle the proper fee afterwards, and if the client fails to do so, it follows that mere acceptance of vakalatnama cannot cast upon the pleader the duty of defending the case. [P 1046 C 1]

Naval Kishore—for Petitioner.

Ghulam Mohyuddin—for Respondent.

Judgment.—The parallel suits were proceeding against the firm Dogar Mal-Amir Chand, who were represented by Kishori Lal, applicant. One of the suits was valued at Rs. 700 and the other, with which we are concerned, at Rs. 2,000. As regards the former suit the complaint of the applicant Kishori Lal was that his pleader closed the evidence on his behalf without any authority from him and was thus guilty of professional misconduct within the meaning of S. 13, Legal Practitioners Act (18 of 1879). As regards the latter suit the complaint of Kishori Lal was that, in spite of his engagement as a pleader and the receipt of Rs. 15 in full payment of the fee agreed upon, *P* did not attend to the case and allowed it to

be decreed *ex parte* against the applicant, the defendant in that case.

The learned District Judge sent the application of Kishori Lal, under the Legal Practitioners Act, to the Subordinate Judge, Third Class, Ferozapore, and called for a report from him. The report of the Subordinate Judge is a full and detailed document and the conclusion at which he arrived is that the charge of professional misconduct has not been proved against the pleader in either of the two cases. The matter came up again before the District Judge and he agreed with the conclusion of the Subordinate Judge. The applicant, Kishori Lal, filed an application for revision in this Court which has ultimately come up for hearing before us. No objection has been taken by the opposite party as to the maintainability of this revision and, therefore, we need not consider this aspect of the question.

The learned *vakil*, who argued the case on behalf of the applicant, did not raise any arguments as regards the suit for Rs 700. He, however, strenuously urged that the pleader had duly accepted and signed the *vakalatnama* on 28th May 1926, and on the same date had received a sum of Rs. 15 in full payment of his fee for conducting the case. It was further stated that on the same date the pleader prepared a draft (*jawabidawa*), and obtained the signatures of the applicant on a blank judicial paper on which the *jawabidawa* was to be subsequently written out, and that accordingly the *jawabidawa* was engrossed on the judicial paper and bore the signatures of the pleader, that 11th June 1926 was the date fixed for filing the *jawabidawa*, but the said *jawabidawa* was neither filed by the pleader nor did he himself put in an appearance. Reliance was also placed upon certain alleged acts of the pleader and his clerk as the trial of the case proceeded in order to prove that the pleader had accepted the duties and responsibilities of his office, and it is argued that on 7th August 1926 the clerk of the pleader attempted unsuccessfully to place the *vakalatnama* on the record of the Court, and that on 26th

October 1926 the pleader himself went into the Court and tried to file the *vakalatnama* in order to conduct the case, though he was not permitted to do so by the Court and that his clerk took notes of evidence in the case. On 28th October 1926 the suit was decreed *ex parte* against the applicant. He made an application on 8th November 1926 for setting aside the *ex parte* decree, but the said application was granted upon certain terms, the applicant being ordered to furnish security to the satisfaction of the Court. The applicant, however, never gave any security and the conditional order, which the Court had passed in his favour, automatically became an order dismissing the application. The applicant did not take any further steps in the matter.

It may be noted here that the applicant had no strong defence to the suit and, in fact, the only instructions that he gave to the pleader for preparing the written statement was that there were other persons also who were liable for the debt for which he was being sued and that a greater part of it had been repaid. No attempt was made to prove this last allegation and the learned District Judge was perhaps right in thinking that the applicant himself considered his position to be "hopeless" and apparently was not very anxious to contest the suit.

We may observe that the proceedings under S. 13, Legal Practitioners Act (18 of 1879), are of a quasi-criminal nature, and in the event of the charge of professional misconduct being established the consequences to the legal practitioner concerned are very serious indeed. Such being the case it was the duty of the applicant, who was more or less in the position of a complainant, to go into the witness-box and substantiate his allegation before producing any other witnesses, and what is more important, to submit himself to cross-examination. The applicant however did not adopt this obvious course and contented himself by making a statement as a party apparently under the provisions of O. 10, Civil P. C. Such a statement is on the same footing as pleadings in the case and is, in fact, intended to explain or amplify them. The statement, however, cannot be treated as evidence in the case against the opposite party who had no opportunity of cross-examining his opponent who made the statement. In adopting this procedure the applicant acted contrary to the observations repeatedly

made by their Lordships of the Privy Council that the party to a suit must give evidence as a witness in respect of matters which are directly within his knowledge. He further adopted the reprehensible and embarrassing course of citing his opponent *P* as his witness. This action was also in defiance of the opinion of their Lordships of the Privy Council. As the applicant put *P* into the witness-box as his own witness, there is no sufficient reason why his evidence against the applicant should not be accepted unless, of course, it is found to be false in the light of other evidence on the record. No reliable evidence, oral or documentary, has been brought to our notice to falsify the statement on oath of *P* who was examined at length on behalf of the applicant in the present proceedings. *P* has stated that the sum of Rs. 10 was paid to him not on 28th May 1926, as stated on behalf of the applicant, but on 9th June 1926, and that this sum of Rs. 10 was not in full settlement of his fees, and that as the applicant did not settle the fees as promised, he (the pleader) neither attempted to file the vakalatnama on his behalf nor took any other steps to conduct the case for him. He further stated that the applicant saw him on 3rd August 1926, and again on 25th October 1926 in connexion with the other case. In this he is supported by Kamal Din, and Nadir Khan, witnesses. We do not see any reason why we should not accept the evidence of *P* who is a witness for the applicant himself. The applicant cannot have any grievance if we accept the evidence of the witness produced by him.

Reliance was placed on behalf of the applicant on the case reported as *Muni Raddi v. Venkata Rao* (1). In this case the pleader had undertaken the defence of a client in the Sessions Court and, having received his full fee, had deliberately absented himself without making any arrangement for the case, and had further put forward the false plea that he had not agreed to conduct his client's defence in the Sessions Court. This was rightly considered by the Court to be fraudulent conduct on behalf of the pleader and therefore highly unprofessional within the meaning of

S. 13, Legal Practitioners Act. In the present case it appears that the engagement of the pleader was not complete and although he had promised to do so the applicant never settled the fee in spite of his seeing the pleader on various occasions after 9th June 1926. Reliance was placed upon the observations of Sankaran Nair, J., that a vakil was bound to appear and conduct his case even if the fee or a portion thereof, was not paid, in the absence of any evidence to the contrary. But these observations are more or less in the nature of obiter dicta, seeing that in the case, which was before the learned Judge, the pleader's fee had been admittedly paid. The learned vakil for the applicant also relied upon *In the matter of P.*, a mukhtar, A. I. R. 1929 Pat. 337. That was a case in which a mukhtar, on the conviction of his client, had undertaken to file an appeal on his behalf on the understanding that the client's relations would pay him his remuneration. The mukhtar's remuneration was never paid and he filed the appeal long after the period prescribed by law had expired. It was held by the Special Bench of the Patna High Court that it was professional misconduct on the part of the mukhtar in not filing the appeal within time and that, when his fee was not paid, he ought to have communicated direct with his client and repudiated his obligation as a mukhtar. It may be observed that the application against the mukhtar arose out of criminal proceedings in which the duties and responsibilities of a lawyer stand on a different footing from those in an ordinary civil litigation. Besides, from the very nature of the case the movements of the client were restricted in that he was confined in jail and therefore it was incumbent upon the legal practitioner to put himself in direct communication with him when the friends and relations of his client failed to pay the fees. In the present case the facts are entirely different. There were no restrictions upon the movements of the applicant and, in fact, we are satisfied that on 3rd August 1926 and again on 26th October 1926, two days before the decree was passed ex parte against him, the applicant saw the pleader and there was nothing whatsoever to prevent him

(1). [1914] 87 Mad. 298 = 17 I. C. 544 = 13 Cr. L. J. 800 (F.B.).

from settling the fee and paying it to him.

Emperor v. Rajani Kanta Bose (2) was also cited on behalf of the applicant, but that case is clearly distinguishable. There certain pleaders, who had received their fees, had boycotted the Court in view of a certain political hartal which had been observed in the locality. There is no similarity between the facts of that case and the present one. In fact at p. 793 of the Report there are observations by Woodroffe, J., to the effect that mere acceptance of the vakalatnama does not bind the pleader to appear in Court when such vakalatnama may be accompanied by special terms. In the present case we are satisfied that the pleader signed the vakalatnama on the distinct understanding that the sum of Rs. 10 which was paid to him was really in the nature of a part payment, and that the applicant would come and settle the proper fee afterwards. The applicant not having done so, it follows that mere acceptance of the vakalatnama could not cast upon the pleader the duty of defending the case. The pleader has produced his fee book, and we find an entry on 9th June 1926, showing the payment of Rs. 10 and not Rs. 15 as stated by the applicant. The learned Judge of the lower appellate Court appreciated the frankness and good faith of the pleader who returned to the applicant all the documents which are now being used against him to substantiate the charge of professional misconduct. As already stated we are satisfied that the applicant was not very enthusiastic in defending the suit for the very good reason that he knew that there was no real defence and that he did not care to spend money by paying the pleader a fee in addition to the decree which he fully anticipated would be passed against him. We fully realize the weight of the observations of their Lordships of the Privy Council in *A Pleader v. Judges of the High Court, Madras*. A. I. R. 1930 P. C. 144 which runs as follows :

"Charges of professional misconduct must be clearly established and should not be inferred from mere ground for suspicion however reasonable, or what may be mere error of judgment or indiscretion."

(2) A. I. R. 1922 Cal. 515=71 I. C. 81=24 Cr. L. J. 33=40 Cal. 782 (S.B.).

We are satisfied on a full consideration of the material on the record that the applicant has failed to substantiate the charge of professional misconduct against P. At the same time we must point out that in a case when the client is, for some reason or other, putting off the settlement and payment of fee, a legal practitioner would be well advised if he served a registered notice upon him in good time intimating to him that if he, the client, did not settle and pay his fee he would repudiate all his responsibility as a pleader.

We therefore affirm the order passed by the learned District Judge and dismiss the application. The applicant is ordered to pay the costs of the respondent up to a sum of Rs. 50 in case there is a certificate of fee filed by the counsel in this Court.

V.B./R.K. *Application dismissed.*

1930 Cr. Cases 1046 (Lahore)

SHADI LAL, C. J. AND AGHA HAIDAR, J.
Fatteh Khan—Accused—Appellant.

V.

Emperor—Opposite Party.

Criminal Appeal No. 452 of 1930, Decided on 12th July 1930.

(a) Penal Code, Ss. 302 and 326—Blow with spear on fleshy part of body is not necessarily fatal and offence does not fall under S. 302 but under S. 326.

A, B, C, D assembled together, three of them armed with spears with the intention of attacking another party of men. A gave only one blow with a spear on fleshy part of the body of one of his opponents.

Held : that such injury was not necessarily fatal and A could not be convicted under S. 302 and his case fell within the purview of S. 326, but as there had been a loss of life in the fight, a severe sentence was called for. A's companions having been acting in furtherance of a common intention were also guilty under S. 326 read with S. 34. [P 1048 C 2]

(b) Penal Code, Ss. 324 and 326—Simple injury caused by cutting weapon falls under S. 324 not under S. 326.

Where the injury caused is simple but is caused with a cutting weapon, it falls under S. 324 and not under S. 326. [P 1049 C 1]

Anant Ram Khosla—for Appellant.

D. R. Sawhney—for the Crown.

Agha Haidar, J.—*Fatteh Khan*, Ghulam Hussain, Gul Khan and Muhammad Khan, Pathans of Daud Khel in the District of Mianwali, have been convicted and sentenced by the Sessions Judge as follows:

Fatteh Khan has been convicted under S. 302, I. P. C., for the murder of one

Azim Khan and sentenced to death. He has also been convicted under Ss. 326 and 324, I. P. C., and sentenced to ten years' and two years' rigorous imprisonment respectively under these sections. It is provided that the sentence of imprisonment in the case of Fattah Khan shall be executed only if the sentence of death is not confirmed. The remaining three accused have been sentenced to rigorous imprisonment for a period of ten years and two years under S. 326 and S. 324, I. P. C., respectively. These sentences are to run concurrently. Fattah Khan has appealed to this Court through his counsel Mr. Anant Ram Khosla while the remaining three accused have preferred their appeal to this Court through Mr. Mohsin Shah.

The two parties to the fight seem to be on terms of bitter enmity towards each other. It is not necessary to enter into detailed account of this enmity in order to trace the motive of the occurrence. We may only mention here that one Mt. Munnare appears to have been the immediate cause of the present tragedy. A reference to the pedigree at p. 11 of the paper book would show that one Muzaffar is the son of Abdulla (P. W. 8). One of the pedigrees at p. 14 of the paper book would show that Mt. Munnare is the daughter of Amir Khan. It appears that she had been married to Muzaffar when she was a child of tender years, but six or seven months before the occurrence her father proposed to marry her to Muhammad Khan accused. Mt. Munnare however did not like the idea of being married to Muhammad Khan and went to the house of Muzaffar to whom she had been already married. This was resented by the party of Muhammad Khan, the disappointed candidate for the hand of Mt. Munnare. It may be mentioned here that Fattah Khan and Ghulam Hussain accused are the first cousins while Gul Khan is the uncle of Muhammad Khan. The question of relationship in the present case is not very important as it appears that the parties and some of their witnesses seem to be more or less related to each other. There is no doubt whatsoever that about the time of this occurrence feelings between the two parties were running high over the recent escapade of Mt. Munnare. In fact the party of the ac-

cused treated the action of Mt. Munnare in going to live with Muzaffar as an act of abduction on his part. The pedigree-table at p. 11 would show that Khawj Muhammad, Azim Khan, deceased and Muhammad Khan the injured party were close relations.

The case for the prosecution is that on 31st December 1929 while Azim Khan, Khawj Muhammad and Muhammad Khan were taking their cattle for watering purposes to Afzal Khanwala well, they were attacked by the accused in a body near the Salaranwala mosque. Muhammad Khan accused was armed with a dang while the remaining three accused carried spears. The attack seems to have been a sharp and short one in the course of which Muhammad Khan accused gave two dang blows to Khawj Muhammad who also received a spear wound from Ghulam Hussain. Gul Khan gave a spear blow to Muhammad Khan which struck his abdomen while Fattah Khan gave a single spear thrust to Azim Khan deceased which fell on his left buttock. Khawj Muhammad fell down and became unconscious. Azim Khan also fell down. The prosecution is silent about the five injuries received by Muhammad Khan, accused. They were all simple injuries and seem to have been inflicted by a blunt weapon like a lathi.

Abdullah (P.W. 8) lodged the first information report at the police chauki, Daud Khel, soon after and it is important to observe that in this report he mentioned the names of all the four accused persons. The police arrived at the spot soon afterwards and the injured persons were ultimately sent to the Civil Hospital at Mianwali.

Khawj Muhammad was examined by Dr. Rahmat Ali on 1st January 1930. He noticed an incised wound on the left side of his back 2" from the middle line and just below the last rib measuring $1\frac{1}{2}$ " x $\frac{1}{2}$ " x $2\frac{1}{2}$ ". At first he seems to have considered that this injury might prove dangerous but it turned out that the man was cured and discharged from the hospital on 15th January without any complications supervening, with the result that the doctor described the injury as simple. Azim Khan was examined by Dr. Gian Chand (P.W. 3), Sub-Assistant Surgeon, Daud Khel, at about 12 on 31st Decem.

ber 1929 soon after the fight. He found only one incised injury on the left buttock. Dr. Rahmat Ali also examined Azim Khan on 1st January 1930, and found the incised wound on the left buttock. The Civil Surgeon, Dr. A.R.D. Abreu (P.W. 1) was recalled before the Sessions Judge and stated that the wound on the buttock was dangerous to life and that Dr. Rahmat Ali, who described the injury as simple in his note dated 1st January might have been easily mistaken about the depth of the injury. The spear wound on Muhammad Khan, complainant appears to have been simple. He was cured and discharged on 5th January 1930. Azim Khan's wound took a dangerous turn and the unfortunate man died in the Civil Hospital on 10th January 1930.

All these facts are abundantly proved by the evidence of the five eyewitnesses, namely, Khawj Muhammad (P.W. 6) Abdullah (P.W. 8), Fatteh Khan (P.W. 9), Muhammad Khan (P.W. 10), and Isab Khan (P.W. 11). It may be mentioned here that Khawj Muhammad (P.W. 6) and Muhammad Khan (P.W. 10) are the two complainants who received injuries in the fight at the hands of the accused and therefore there cannot be any doubt that they were present and saw the fight with their own eyes.

Fatteh Khan, Gul Khan and Ghulam Hussain have each set up the plea of alibi. Fatteh Khan has examined no less than nine witnesses in support of his alibi. His witnesses state that the daughter of Alam Khan (D.W. 3) had died early in the morning on the day of the occurrence and that Fatteh Khan paid a visit of condolence to Alam Khan and remained with him till Peshiwala. This kind of evidence is hardly satisfactory for the purposes of proving an alibi. Alam Khan lived in the village Daud Khel where the occurrence took place, and even if the evidence of the witnesses for the defence on the question of alibi be accepted it cannot be said that Fatteh Khan, in spite of his visit of condolence to Alam Khan, could not be present at the scene of the occurrence and take part in the attack. Ahmed Khan, D.W. 1, and Shah Wali, D.W. 2, the witnesses for Fatteh Khan, put up a counter-story and state that Muhammad Khan accused was taking his bullocks towards his fields when

Khawj Muhammad, Muhammad Khan, Azim Khan, deceased and Muzaffar Khan who were standing armed with spears near the Salaranwala mosque, fell upon him. They say that they used only the shafts of the spears and not the spear-head and thus caused injuries to Muhammad Khan. According to them Muhammad Khan ran towards his house and brought with him Gul Khan, accused, together with some other persons and a fight ensued. The evidence in this point ends in obscurity and we are left without any explanation whatsoever as to how Azim Khan and Khawj Muhammad came by their injuries. The fact of the matter is that this counter-story is contrary to all the probabilities of the case and we are not prepared to believe it.

The evidence of alibi adduced by Ghulam Hussain and Gul Khan is of the ordinary type and we need not discuss it beyond observing that it is wholly insufficient to prove the plea of alibi.

The only point which remains for decision is, what offence was committed by each of the accused. There can be no doubt that the four accused persons assembled near the Salaranwala mosque and that three of them were armed with spears. Thus, there cannot be any question that their gathering together was in furtherance of a common intention which in this case consisted of attacking their opponents. Fatteh Khan gave only one blow with a spear on a fleshy part of Azim Khan's body. Such an injury is not necessarily fatal, and we do not think that Fatteh Khan ever intended to cause the death of his victim or to cause such bodily injury as he knew to be likely to cause his death, or that his intention was of causing bodily injury, sufficient in the ordinary course of nature, to cause death. In our judgment, his conviction under S. 302, I. P. C., cannot be maintained and his case properly falls within the purview of S. 326. But unfortunately there has been loss of life and the sentence, therefore, must be commensurate with the gravity of the offence. We therefore, while setting aside the conviction of Fatteh Khan under S. 302, I. P. C., convict him under S. 326, I. P. C., and sentence him to a term of seven years' rigorous imprisonment. In view of our finding that all the accused were acting

in furtherance of a common intention, the remaining accused, namely, Ghulam Hussain, Gul Khan and Muhammad Khan also are guilty under S. 326, I.P.C., read with S. 34, I. P. C., of causing grievous hurt with a cutting weapon to Azim Khan. But as the blow which caused the fatal injury was struck by Fattah Khan, we would sentence the remaining three accused to a term of five years' rigorous imprisonment each.

Ghulam Hussain gave a spear blow to Khawj Muhammad, but, as already stated, Dr. Rahmat Ali had at first only a false alarm and Khawj Muhammad was in fact cured and discharged from the hospital on 15th January, 1930. The Court below is obviously in error when it holds that because Dr. Rahmat Ali at first thought the injury to be dangerous, it should continue to be considered dangerous even though subsequent events have established that it was nothing more than a simple injury. The injury was, therefore, simple, but as it was caused with a cutting weapon it fell under S. 324, I. P. C. In these circumstances we set aside the conviction of all the prisoners under S. 326, I. P. C., and convict them under S. 324, read with S. 34, I. P. C., for causing injury to Khawj Muhammad, and sentence each of them to three years' rigorous imprisonment.

Gul Khan had given a spear wound to Muhammad Khan, but the injury has been certified by Dr. Rahmat Ali as simple and he was cured and discharged from the hospital as early as 5th January 1930. Therefore, we confirm the conviction of all the accused, and the sentence imposed upon them, under S. 324, read with S. 34, I. P. C.

All these sentences are to run concurrently. The net result is that the punishment which the accused will have to suffer will be seven year's rigorous imprisonment in the case of Fattah Khan and five years' rigorous imprisonment in the case of each of the remaining three accused, namely, Gul Khan, Ghulam Hussain and Muhammad Khan.

The convictions and sentences passed by the Court below are hereby set aside and in lieu thereof the convictions and punishments noted above are substituted. To this extent the appeal is allowed.

R.M./B.K.

Order accordingly.

1930 Cr. Cases 1049

(Lahore)

AGHA HAIDAR, J.

Fakir Mohammad and others—Accused—Petitioners.

v. .

Emperor—Opposite Party.

Criminal Petn. No. 139 of 1930, Decided on 4th August 1930, for transfer of the case.

(a) Criminal P. C. (1898), S. 343—Accused is not in duty bound to produce his absconding co-accused—Court of justice should not bring pressure on accused to produce his absconding co-accused—Criminal trial.

It is not the duty of the accused person to produce his absconding co-accused persons before the Court, and a Court of justice is not justified in exercising any pressure upon an accused person before it with the object of coercing him to produce persons who are fugitives from justice. [P 1050 C 1]

(b) Criminal P. C. (1898), S. 526—Adjournments by trying Court to bring pressure on accused person to produce his absconding co-accused is sufficient ground for transfer.

Where adjournments are repeatedly made by a trying Court to bring pressure on the accused person to produce his absconding co-accused persons, the accused must have had reasonable apprehensions in their mind that their case would not be tried in that calm and judicial atmosphere and with that detachment which every accused person is entitled to in a Court of justice. Therefore this is a sufficient ground for transfer of the case. [P 1050 C 2]

Aziz Ahmad—for Petitioners.

D. R. Sawhney—for the Crown.

Judgment.—This is an application for the transfer of a case from the Court of the District Magistrate of Rawalpindi to some other district. The three applicants before me have been charged with serious offences. They were taken into custody by the police on 30th January 1930 and produced before a Tahsildar Magistrate on 2nd February 1930 who remanded them till 10th February 1930. The case was repeatedly adjourned and remanded. These adjournments are at least seven in number. The District Magistrate in para. 1 of his explanation observed that the further adjournments had been granted in the hope of arresting two absconders. This reasoning may appeal to the learned District Magistrate but I regret to say it does not appeal to me. It is all very well for the District Magistrate to say that the prosecution had reasons of their own for obtaining these adjournments in the hope of arresting the ab-

sconders, but the result of this procedure, to say the least, is that an accused person, even if ultimately acquitted, is financially ruined, leaving aside the question of mental worry and trouble.

Then the learned Magistrate in para. 4 of his explanation says that he had taken certain drastic steps as executive measures against the total population of the village who are believed to have been assisting the continued absence of the absconders. This may explain the steps taken by the authorities, but I doubt very much whether it would be considered a satisfactory explanation in the present case. But the learned Magistrate as he goes on, neutralizes the effect of this explanation for what it was worth by observing that it was carefully explained to and thoroughly understood by the accused and their counsel that the steps were taken in order to secure the attendance of the absconding accused which could not be secured by Ss. 87 and 88, Criminal P. C. In my judgment this is not a proper explanation and in fact it goes a long way to support the arguments of the counsel for the applicants that the accused cannot expect to have a fair and impartial trial in the District of Rawalpindi. The Magistrate may have reasons of his own for cancelling licenses and adopting other administrative measures. I am not concerned with them. But certainly he is not justified in adopting measures with a view to bring pressure to bear upon the accused in the hope of their producing the absconders. It is not the duty of the accused person to produce his absconding co-accused persons before the Court and I am perfectly clear in my mind that a Court of justice is not justified in exercising any pressure upon an accused person before it with the object of coercing him to produce persons who are fugitives from justice.

The concluding sentence of the explanation of the learned Magistrate embodies a very laudable sentiment when he says that he would leave no means untried by which fugitives from the Courts can be induced to abandon their absconding. This is very commendable indeed. But the question is whether after employing such means in the shape of pressure upon the accused persons whom he is trying, as a Magistrate

he should be permitted to go on with the trial of the case, however open his mind may be. In my judgment on the affidavit filed by the applicants read with the explanation of the learned District Magistrate the accused must have had reasonable apprehensions in their minds that their case would not be tried in that calm and judicial atmosphere and with that detachment which every accused person is entitled to expect in a Court of justice. I therefore order that this case should be transferred to the neighbouring District of Attock at Campbellpur. The District Magistrate of Attock may either try the case himself or send it for trial to any other Magistrate subordinate to him and competent to try it.

There is an application for bail on behalf of one Suleman who had been absconding and who after the presentation of the application now under consideration has been arrested. I understand the three accused persons had been let out on bail at a very early stage of the proceedings. I do not see any reason why the same privilege should not be extended to Suleman who has now been produced before the Court as an under-trial prisoner. I therefore order that Suleman should be released on bail provided he gives security to the satisfaction of the District Magistrate. This security should not under any circumstances exceed the sum of Rs. 2,000 on which his co-accused have already been let out.

B.V./R.K.

Application granted.

1930 Cr. Cases 1050

(Lahore)

TEK CHAND, J.

Roshan Lal and others—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Misc. Appeal No. 125 of 1930,
Decided on 16th July 1930.

Criminal P. C. (1898), S. 526—Cases of importance should be tried in calm and quiet atmosphere—Where incidents occur raising apprehension in minds of accused that they would not have fair trial, their cases should be transferred to another district.

Cases which assume an importance of their own should be tried in a calm and quiet atmosphere where all proper and legitimate facilities can be provided both to the pro-

execution and the defence. Where certain incidents take place in a district, which raise a reasonable apprehension in the minds of the accused that they cannot have a fair and impartial trial there, then the accused are entitled to have their case transferred to another district: *A. I. R. 1923 Lah. 264*; *A. I. R. 1925 Lah. 351* and *A. I. R. 1928, Lah. 1, Rel. on.* [P 1054 C 1]

Shamair Chaudhri—for Petitioners.

Addl. Govt. Advocate—for the Crown.

Order.—In this and the connected petitions, Criminal Misc. Nos. 126 to 130 of 1930, the various petitioners apply for transfer to another district of certain criminal cases pending against them in the Court of Mr. W. Jackson, Magistrate, First Class, Gurgaon. As all these cases are closely connected with one another and the petitions have been argued together by counsel for both sides, they will be disposed of in this judgment.

The petitions are supported by a large number of lengthy affidavits and in reply several counter-affidavits and written statements have been filed by the learned Additional Government Advocate. These documents contain numerous allegations and counter-allegations of a serious nature, but I do not think it necessary to deal with most of them. Some of these allegations appear to be irrelevant to the questions which require decision by me at this stage, while others relate to matters which are likely to form the subject of investigation at the trial, and on which for obvious reasons, it is not desirable to express any opinion at present. I shall therefore confine myself to those points, only which I consider are absolutely essential for the proper disposal of these petitions.

It is common ground between the parties that in March last disputes relating to the question of kine slaughter arose between the Hindu and Mahomedan residents of Majra Jharsa, which is situate at a distance of about one mile from the civil station of Gurgaon. These disputes are alleged to have increased in intensity early in April, and as a breach of the peace was apprehended, proceedings under S. 107, Criminal P. C., were started against certain members of each community in the Court of Mr. Said Zaman Khan, Magistrate, 1st Class. Some of the persons proceeded

against moved this Court for transfer of the cases and by order of Currie, J., (Cr. R. No. 83 of 1930) they were transferred to the Court of Mr. W. Jackson, Special Magistrate, Gurgaon. It is stated that Mr. Jackson has examined most of the evidence which the parties intended to produce in these cases and they are now nearing completion. It may be made clear that in the petitions before me we are not concerned with those cases.

It is alleged that soon after proceedings under S. 107 had been started in the aforesaid cases, a number of lawyers and other citizens of Gurgaon including the President and Secretary of the District Bar Association, the Vice-President and two members of the Small Town Committee, two Kursi Nashins and a Bazar Chaudhri, constituted themselves in a "defence committee" in order to arrange for the defence of the Hindu accused and to make representations to the authorities in connexion with disputes at Jharsa. Some of the lawyer members of this committee appeared as counsel for the accused in the security case and others joined in deputations which waited upon the Commissioner and other officers to support the position which had been taken up by the Jharsa Hindus. The Commissioner passed orders early in May 1930, permitting the slaughter of kine in the village on certain conditions, and also the construction of a new slaughter-house near the Government Agricultural Farm for the supply of beef to the civil station. These orders are stated to have become known at Gurgaon on 9th, one day before the Id celebrations. It is alleged that on the night between the 9th and 10th a new slaughter-house was actually constructed near the Farm, which certain Hindus attempted to demolish the next day. Against these persons five different cases were started: one under Ss. 307-332-149, I. P. C., another under Ss. 332-353 and the remaining three under Ss. 447, 143 and 147, respectively. Besides this certain other persons were prosecuted under S. 34, Police Act, and proceedings under S. 107, Criminal P. C. were taken against the members of the defence committee including the lawyers, as, (so it is alleged) information had been received that they were

"instigating the members of the Hindu public to destroy the slaughter-house," and that this was likely to give rise to a breach of the peace. All these cases were assigned to Mr. Jackson for trial.

About this time Lala Raghubar Dyal, Advocate and President of the Bar Association, who is one of the accused in the S. 107 case, filed a criminal complaint under Ss. 342-500-504 against Mr. Said Zaman Khan, E. A. C., and Munshi Karar Hussain, Tahsildar. This complaint has since been dismissed in limine by the District Magistrate on the ground that sanction under S. 197, Criminal P. C., had not been obtained beforehand. A petition for revision of this order of dismissal is stated to be pending before the Sessions Judge.

Of the other lawyer members of the defence committee who had been proceeded against in the security case Messrs. Anand Jiwan, Roshan Lal and Har Swarup, pleaders, were engaged to defend the accused in the case under Ss. 307-147 which, as stated already, had been instituted against some persons who were alleged to have taken part in the incidents of 11th May. Before much progress could be made with this case a fresh case under Ss. 307-117 was instituted against these lawyers (Anand Jiwan, Roshan Lal and Har Swarup) on 17th June 1930, on the allegation that they had abetted the commission of the very offences for which their clients had been challaned originally. In this case three other lawyers, Messrs. Raghubar Dyal, Pokhar Das and Gajraj Singh, and two Kursi Nashins, Janki Das and Shanker Lal, who were all members of the defence committee, were also made accused persons.

In order to defend themselves in the newly started case under Ss. 307-117 the aforesaid persons engaged two other local pleaders, Lala Din Dyal and Thakur Anand Pal, who were neither members of the defence committee nor are they alleged to have been concerned in any other way in the incidents of 11th May. But on 30th June 1930, after the house of the three lawyers accused, Roshan Lal, Anand Jiwan and Har Swarup, had been searched, the police proceeded to the house of these two pleaders, Anand Pal and Din Dyal, and after searching them and the office of Anand Pal carried away a number of

documents, including those which their clients had entrusted to them for the conduct of the case.

The learned counsel for the petitioners has urged that the local authorities have acted in a "high-handed manner" in first proceeding under S. 107, Criminal P. C. against the members of the defence committee, then instituting a fresh case of abetment against such members of the committee as persisted in defending the accused in the S. 307 case, and lastly in searching the houses of Messrs. Anand Pal and Din Dyal who had undertaken to defend the lawyer accused in Ss. 307-117 case, removing therefrom papers connected with their defence. He has argued that all this was done deliberately, and of set purpose, to hamper the defence of the accused persons and of "striking terror" amongst those who were rendering legitimate assistance to them. He has also pointed out certain irregularities in the searches, and has asserted that it has now become practically impossible for his clients to secure adequate legal advice at Gurgaon.

On behalf of the Crown the learned Additional Government Advocate has denied that these acts were done with any such sinister object and has contended that the security proceedings against the defence committee and the case under Ss. 117-307 against the lawyer accused, were started as a result of information received during the investigation into the incidents of 11th May. He has also stated that the house of Messrs. Anand Pal and Din Dyal were searched for the reasons explained by Mr. Hopkins, Superintendent of Police, in his affidavit, dated 13th July 1930, that in the course of search of Har Swarup's house information was received that some papers relevant to the

"case might be found in the possession of Thakur Anand Pal. The house of this pleader was therefore searched and information was duly sent to the Ilaga Magistrate."

The learned Additional Government Advocate argued that all this took place "in the ordinary course."

It is not necessary for me at this stage to express any final opinion on these two rival suggestions, or on the legality or otherwise of these prosecutions and searches. But accepting for the moment

the case for the Crown, that all was done innocently and "in the ordinary course."

I think there can be no room for doubt that the acts enumerated above are sufficient to raise a reasonable apprehension in the minds of the petitioners that they cannot have a fair and impartial trial at Gurgaon. Whatever the explanation might be, the broad fact remains that most of the persons who had taken upon themselves the duty of defending the accused persons in these cases had been either themselves prosecuted or otherwise disgraced. All this might be mere coincidence, but the sequence of events is calculated to create an impression in the mind of an ordinary citizen that it is not safe to assist these accused persons in their defence. There seems to be no doubt that the action of the police in searching the houses of Anand Pal and Din Dyal was very hasty and ill-advised, even if it was not illegal, a matter on which I desire to express no opinion. Even if any relevant documents were believed to have been in the possession of these pleaders, and the police had the right to insist on their production, the proper course to adopt would have been to ask them to produce them rather than to subject them to the indignity of a search. It would be a sad state of affairs, indeed, if the impression were to get abroad that every time a legal practitioner has been engaged to defend an accused person and is entrusted by his clients with papers which are relevant to his defence, he has to run the risk of his house being searched by the police without any warning and the papers seized.

Another matter on which there has been much argument before me relates to certain conversations which are alleged to have passed between Mr. Said Zaman Khan, Ilaqa Magistrate, and certain lawyers at the house of the former on 12th May, one day after the alleged riot. In this connexion five affidavits sworn to by Lala Prabhu Dyal, advocate, and Messrs. Pearey Lal, Shiv Narain Mathur, Nagar Mal Gupta and Prabhu Dyal Garg, pleaders, have been filed before me, stating that in the course of these conversations, Mr. Said Zaman Khan stated that the authorities had 'enough material against 20 Hindu lawyers' and that they would be proceeded against

"if they showed any interest in the case put up by the police against the accused in connexion with the alleged occurrence of 11th May 1930."

Counsel for the petitioners has strongly relied upon these affidavits as suggesting that the lawyers-petitioners were prosecuted because they continued to defend the accused implicated in the "alleged occurrence." In reply the learned Additional Government Advocate has drawn my attention to a statement which had been sent by Mr. Said Zaman Khan denying that any such conversations took place. He has also placed on the record three letters purporting to have been written by three other pleaders Messrs. Pohap Singh, Mashtaq Ahmad and Pandit Shiv Narain in reply to demi-official letters sent to them by the District Magistrate on 4th July 1930. In two of these letters it is stated that no such conversation took place in their presence, while the writer of the third does not pretend to remember everything that was said on the occasion. Mr. Shamair Chand has emphasized the fact that where as on other points sworn affidavits have been filed even by the District Magistrate, the Superintendent of Police and the Special Magistrate, Mr. Jackson, the denials relating to these conversations are contained in unsworn statements, and in unproved letters which are stated to have been written to the District Magistrate in reply to the demi-official letters sent by him. He therefore says that these documents should be left out of consideration, and the affidavits of his clients accepted without further investigation. He has also stated that of the pleaders, whose letters are produced by the Crown, one is Pohap Singh, and that the petitioner Gajraj Singh had stated before Mr. Jackson, two months earlier, that this false case had been instituted against him at the instance of the faction to which Pohap Singh belongs. As stated already I do not propose to express any opinion on the merits of the alleged incident at Said Zaman Khan's house as it was admitted that this matter would be raised at the trial. It is however of importance for one of the present purposes as indicating the seriousness of the allegations which require investigation.

What has been stated above is sufficient to show that these cases have as-

sumed an importance of their own, and that they should be tried in a calm and quiet atmosphere where all proper and legitimate facilities can be provided, both to the prosecution and the defence. Certain incidents have unfortunately taken place at Gurgaon, which rightly or wrongly lend colour to the idea that such an atmosphere does not exist at Gurgaon. These petitions therefore fall within the rule laid down in *Sardari Lal v. Emperor* (1), *Amar Singh v. Sadhu Singh* (2) and *Chitranji Lal v. Emperor* (3), and I am constrained to hold that they must be tried in another district.

But while I think that the cases should be transferred to another district, I wish to make it clear that the allegations made in the petition against Mr. Jackson are without substance. The allegation that he had been entertained at certain "parties" with a view to influence him was withdrawn by Mr. Sharmair Chand on seeing Mr. Jackson's affidavit, and as to his findings in the judgment in the S. 34 case, I do not find that they have any direct bearing on the cases against the petitioners or are likely to prejudice them in their trial. I therefore wish to place it on the record that should Mr. Jackson be posted to the district to which these cases will be sent for trial he shall not be debarred from trying them.

Of the places suggested for the trial of these cases I consider that taking all things into consideration Hissar is the more suitable.

I therefore accept these petitions, and direct that the criminal case mentioned therein shall be tried at Hissar by such Magistrate as may be nominated by the District Magistrate, and that if Mr. Jackson happens to be posted there he shall not be debarred from trying them.

R.M./R.K.

Petitions accepted.

1930 Cr. Cases 1054

(Lahore)

AGHA HAIDAR, J.

Takaya Ram—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Appln. No. 137 of 1930, Decided on 4th August 1930, for transfer of the case.

Criminal P. C., S. 576—Accused applying for transfer without knowledge of Magistrate—Magistrate examining 12 prosecution witnesses and the accused—Accused, in answer to questions, disclosing his application for transfer to High Court—Magistrate making order refraining from further proceedings till order of High Court—At the end of the order Magistrate cancelling bail bond of the accused holding that there was prima facie case against accused—Case was fit for transfer.

Where an accused applied for transfer of his case to the High Court without informing the trying Magistrate and where the Magistrate examined a number of witnesses for the prosecution and examined the accused and the accused in answer to one of the questions disclosed that he had applied for transfer and the Magistrate made an order stating that he refrained from taking further proceedings until the order of the High Court, but at the same time cancelled the bail, holding that there was prima facie evidence against the accused.

Held: that this was not either a correct or a consistent attitude for the learned Magistrate to adopt. Once having correctly expressed an opinion that he "refrained from further proceedings" in view of the application made to the High Court, he ought to have stayed his hands completely for the time and certainly he ought not to have taken the serious and drastic step of cancelling the bail bonds of the accused and that this proceeding was likely to produce a reasonable apprehension in the mind of the accused that he would not have a fair and impartial trial before the Court, and this was therefore a fit case for transfer. [P 1055 O 1, 2]

M. L. Puri and Chandra Gupta—for Petitioner.

D. R. Sawhney—for the Crown.

Judgment.—This was an application for the transfer of a case pending in the Court of Mr. Lincoln, the District Magistrate of Muzaffargarh. So far as the affidavit accompanying the application is concerned, on a perusal of the allegations contained therein, I do not think that it makes out any case for the transfer.

It appears that on 11th July 1930 a notice was issued on the application by a learned Judge of this Court and further proceedings were stayed. Before 11th July the Magistrate however does not appear to have been informed that an application for transfer had been made to this Court, and on 11th July 1930 in

(1) A. I. R. 1933 Lah. 261=71 I. O. 1006=8 Lah. 418.

(2) A. I. R. 1925 Lah. 361=86 I. O. 703=26 Cr. L. J. 858=8 Lah. 396.

(3) A. I. R. 1928 Lah. 1=111 I. O. 319=29 Cr. L. J. 815=3 Lah. 537.

the ordinary course a number of witnesses for the prosecution were examined. It must have taken the best part of the day inasmuch as no less than 12 witnesses were examined on 11th July. At the conclusion of this fairly voluminous evidence the statement of Takaya Ram accused was taken down, and in answer to one of the questions put to him he stated that he had applied to the High Court for the transfer of the case. After this statement the Magistrate passed an order dated 11th July 1930 in which he clearly stated that in view of the statement of Takaya Ram that he had applied to the High Court for the transfer of the case from his Court, he refrained from taking further proceedings until the next hearing by which time he thought that the order of the High Court would be communicated to him. It is quite clear that he had no knowledge of this application for transfer before the accused Takaya Ram made his statement.

The learned counsel for the applicant has admitted that no application under S. 526 (8), Criminal P. C., had been made to the Magistrate. The Magistrate made this mistake that while observing that he "refrained from further proceedings" he, at the conclusion of his order cancelled the bail which had been allowed by the Sub-Divisional Officer, Alipur, holding that there was *prima facie* evidence against both the accused and remanded the accused to the lock-up. This was not either a correct or a consistent attitude for the learned Magistrate to adopt. Once having correctly expressed an opinion that he "refrained from further proceedings" in view of the application made to the High Court, he ought to have stayed his hands completely for the time and certainly he ought not to have taken the serious and drastic step of cancelling the bail bonds of the accused and sending them to the lock-up.

I do not propose to take any action on the present application on the basis of the affidavit which has been filed along with it, but having regard to the somewhat inconsistent attitude adopted by the learned Magistrate in the matter I think it would be expedient for the ends of justice if the case were to be transferred to some other competent Magistrate in the same district. The evidence which has been so far recorded would

stand and it would not be open to the accused to insist upon the witnesses for the prosecution being examined afresh. In making this order I do not cast any reflection upon the impartiality or integrity of the learned Magistrate. I fully realize that the applicant has not acted in a frank and straightforward manner in not informing the Court, early in the day on 11th July 1930, that he had made an application for transfer in the High Court and that he reserved this information until after a number of witnesses for the prosecution had been examined; but this procedure of cancelling the bail bond of the applicant after the Court has already decided to refrain from all further proceedings was something like a parthian shot which might have produced a reasonable apprehension in the mind of the accused that he would not have a fair and impartial trial before the Court. Under all these circumstances I order the transfer of the case from the Court of the District Magistrate.

Mr. Khaliq Dad Khan, Sub-Divisional Officer, has himself shown a disinclination to try the case. If there is no other competent Magistrate in the district to whom the case might be transferred, in that case it will be necessary to transfer the case to the neighbouring District of Multan. The District Magistrate of Multan may either try the case himself or place it on the file of any other competent Magistrate in the District. In the meantime the order of the District Magistrate cancelling the bail bond of the accused will be vacated. It would, of course, be perfectly competent to the Magistrate to whom the case is transferred for trial, to make such order as he deems necessary having regard to the materials on the record. His discretion in the matter shall not be hampered in any way.

K.N./R.K. *Order accordingly.*

1930 Cr. Cases 1055
(Madras)

WALLACE AND JACKSON, JJ.

Ekambara Mudali — Accused — Petitioner

v.

Alamelammal — Respondents.

Criminal Revns. Nos. 571 and 572 of 1929 and Criminal Revn. Petns. Nos. 519 and 520 of 1929, Decided on 27th March 1930.

Criminal Trial—No subordinate Court can decide whether its proceedings should be treated as null—if it is thought that there is mistake matter must be referred to High Court.

It must be taken as the procedural law in the Presidency of Madras that no subordinate Court can sit in revision upon its own record, and decide whether upon a certain view of the facts its proceedings should be treated as null. If it is thought that a mistake has been committed, the matter must be referred to the High Court: 42 Cal. 365, not foll.; 2 Weir 307 Expl.; 11 Weir 308, Ref. [P 1056 O 2]

A. Ramswami Aiyar—for Petitioner.

P. Govinda Menon—for Respondents.

Public Prosecutor—for the Crown.

Judgment.—The petitioner has been sentenced to a fine of Rs. 15, in default two weeks' rigorous imprisonment under S. 352, I. P. C., in the following circumstances. The case was filed before the First Class Bench, Vellore, on 19th February 1929 and posted to 26th February. On 26th February, according to the diary extract, it was adjourned to 1st March. On 1st March the complainant was absent, and the accused, the present petitioner, was acquitted under S. 247, Criminal P. C. On the 5th March the complainant's vakil represented that the posting to the 1st was a mistake for the 5th. Thereupon an entry was made in the diary for the 5th March:

"Alamelu Ammal prefers a complaint against Ekambara Mudali. Her sworn statement is recorded. The case is taken on file under S. 352, I. P. C., and posted to 19th March 1929."

This was merely a revival of the old complaint dismissed on 1st March 1929. There was, as a matter of fact, no fresh stamped complaint and no sworn statement on 5th March. There was a complaint on plain paper dated 5th March and a sworn statement dated 26th March. The petitioner complains that having once been acquitted he cannot be retried for the same offence. The President thinks that his Court can act as a Court of revision and decide which of its decisions may or may not be quashed. In any circumstances there is no legal authority for making false records in the Court's diary. If the President thought he could treat the order of acquittal as a nullity, he should have done so, proceeding with the case of 19th February on 5th March as though nothing had happened on 1st March. But such procedure is quite contrary to the Code, which has never

contemplated a Court sitting in revision upon its own completed and pronounced judgments. The President, if he thought there had been a miscarriage of justice, should have referred the matter to the District Magistrate, who, if so advised, could have acted under S. 438.

A case very similar to the present case is considered in *Achambit Mandal v. Mahatab Singh* (1), and there it is held that the acquittal following upon a mistake about the posting date is a nullity, and the trial may proceed as if it had never been pronounced. This ruling is in terms based upon High Court proceedings, 17th August 1875 No. 1793 (2), but the Madras decision is no authority for the Court acting in revision upon its own proceedings. A Third Class Magistrate posted a case to a certain date without informing the parties, and on their non-appearance acquitted the accused. The District Magistrate ordered him to restore the case to file. The Sessions Judge questioned the legality of his order and this Court, holding that the Third Class Magistrate's procedure was substantially irregular, set aside the order of acquittal. It did not confine itself to returning the record with the observation that there was no cause for interference, which it would have done if it had held, as the Calcutta case assumes, that the Third Class Magistrate could himself restore the case. That the District Magistrate has no jurisdiction to order a retrial was ruled in the next case but one in *Weir's Collection*: see 11 *Weir* 308 C. P. 342. It must be taken as the procedural law in this province that no subordinate Court can sit in revision upon its own record and decide whether, upon a certain view of the facts, its proceedings should be treated as null. If it is thought that a mistake has been committed the matter must be referred to the High Court. The petition is allowed; the sentence is cancelled; the fine is ordered to be refunded; and the President is enjoined that his diary must be a plain record of fact and not a pious adaptation to circumstances.

P.R.S./S.N.

Petition allowed.

(1) [1915] 42 Cal. 365=16 Cr. L. J. 148=27 I. C. 212.

(2) 2 Weir 307.

1930 Cr. Cases 1057 (1)

(Calcutta)

CUMING, J.

S. C. Nandi—Accused—Petitioner.

Corporation of Calcutta—Complainant
—Opposite Party.

Criminal Revn. No. 1419 to 1422 of 1929, Decided on 14th January 1930, from order of Presy. and Municipal Magistrate, Calcutta D/- 26th September 1929.

Criminal P.C., S. 206—Conservancy Overseer of Calcutta Corporation is public servant—On written complaint by such officer it is not necessary to examine complainant before issuing process—Calcutta Municipal Act, S. 554—Penal Code S. 21.

A conservancy officer of the Corporation of Calcutta is a public servant within the meaning of S. 21, I. P. C. and as such on the written complaint of such officer made in the discharge of his official duties it is not necessary to examine the complainant before issuing process. [P 1057 C 2]

Suresh Chandra Talukdar and Mohendra Kumar Ghose—for Petitioner.

Mr. Nurul Huq Chowdhury—for Opposite Party.

Order.—These four rules arise out of four separate prosecutions for putting up scaffoldings in a public lane belonging to the Corporation of Calcutta without obtaining licenses for so doing from the Corporation. The petitioner was apparently charged with obstructing this lane on four separate occasions. For each of these obstructions he was convicted and fined Rs. 20.

The ground which has been urged on his behalf by Mr. Talukdar is that the separate prosecutions and convictions were not maintainable and illegal, because the obstruction was one and the same in each of these cases and therefore he could not be tried and convicted four times for the same offence. Whether the obstruction for which he was prosecuted was the same in all the four cases or was a different obstruction is obviously a question of fact. When the petitioner was prosecuted on these four charges he never alleged in his defence that the obstructions complained of were one and the same. This point obviously turns upon a question of fact which was not raised by the petitioner when the cases were tried, and I have no material before me on which I can possibly decide whether

the cases referred to the same obstruction or different obstructions.

Mr Talukdar had then argued that the convictions and sentences are bad in law, because the learned Magistrate did not examine the complainant according to the mandatory provisions of law before he issued the processes. The answer to this contention lies in proviso (aa) to S. 200, Criminal P. C. which provides:

"when the complaint is made in writing nothing herein contained shall be deemed to require the examination of a complainant in any case in which the complaint has been made by a Court or by a public servant acting or purporting to act in the discharge of his official duties."

The person who made the complaints was a Conservancy Overseer and purported to act in the discharge of his official duties. He was clearly a Municipal officer or a servant of the Corporation and therefore under S. 554, Calcutta Municipal Act, 1923 he is a public servant within the meaning of S. 21, I. P. C. There is therefore no substance whatever in this contention.

Lastly Mr Talukdar has argued that in the facts and circumstances of the case the conviction is improper. As far as I can understand Mr. Talukdar he would seem to urge that as the building is now finished and the whole occurrence took place some time ago the prosecution was improper. He does not suggest that it was illegal. Why it would in such circumstances be considered improper I entirely fail to understand. The mere fact that the building the construction of which caused the obstructions has been finished would be no reason for condoning the offence of obstructing the road during the construction of the building.

These are the only points which Mr. Talukdar has argued. The result is all four rules stand discharged.

R.M./R.K.

Rules discharged.

1930 Cr. Cases 1057 (2)

(Calcutta)

C. C. GHOSE AND PEARSON, JJ.

Harbhorsha Mahommed and another—Petitioners.

v.

Jhapuran Bibi—Opposite Party.

Criminal Revn. No. 1311 of 1929, Decided on 10th December 1929, from order of Sess. Judge, Jalpaiguri, D/- 29th August 1929.

Penal Code, S. 363—Enticing away minor girl whose mother had lost right to guardianship by virtue of marriage—Accused must be given benefit of doubt.

Where a minor daughter of a woman who has married an outsider and so lost her right to lawful guardianship of her daughter has been enticed away, the enticer cannot be convicted under S. 363. [P 1058 C 2]

Probodh Chandra Chatterji and Bireswar Chatterjee—for Petitioners.

Satindra Nath Mukherjee—for the Crown.

C. C. Ghose, J.—This matter was argued before us on Friday last and has been argued today. We have had the advantage of hearing Mr. Satindra Nath Mukherjee on behalf of the Crown. But having examined the record we are of opinion that the case against the accused is not a clear one. The matter really depends upon this : as to whether Jhapuran Bibi had lost her right to the lawful guardianship of her minor daughter Amiran Bibi. If she has lost her right then the accused must be given the benefit of the doubt and their conviction set aside. If however she has not lost her right then the conviction and sentence must remain. Now, Mr. Mukherjee has gone into the matter and has, with great candour, admitted before us that Jhapuran Bibi had married a person who was not related to the infant within the prohibited degrees as laid down under the Mahomedan law. In other words Mr. Mukherjee admits that Jhapuran Bibi had married a person who was an outsider so far as the family were concerned. It follows therefore that Jhapuran Bibi had lost her right to be the lawful guardian of Amiran Bibi. If that was so then the conviction of the accused under S. 363, I.P.C., cannot be sustained at all. Mr. Mukherjee had addressed to us a lengthy argument with the object of showing that although Jhapuran Bibi might have ceased to be the lawful guardian of the infant Amiran Bibi she was still entitled to the lawful custody of Amiran Bibi, she having entrusted herself with the lawful custody of the infant before she married an outsider. This is a specious, ingenious and attractive argument. But having regard to the facts in this case the whole point is whether, in the circumstances, the accused should or should not have been given the bene-

fit of the doubt. We are of opinion that the circumstances were and are such that it is our primary duty to examine the case of the accused with very great scrutiny and if, as we have come to the conclusion that Jhapuran Bibi has ceased to be the lawful guardian of Amiran Bibi on her marriage with an outsider, the accused must be given the benefit of the doubt. It follows therefore that the conviction and sentence must be set aside.

The accused who are on bail will be discharged from their bail bonds.

V.B./R.K. *Conviction set aside.*

1930 Cr. Cases 1058

(Calcutta)

GRAHAM AND PANCHKRIDGE, JJ.

Panchanan Sarkar—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 582 of 1930, Decided on 24th June 1930, from order of Magistrate, Asansol, D/- 14th April 1930.

(a) Criminal P. C., S. 347—Magistrate is empowered to commit case to Sessions on deciding that he should not try it provided evidence is completed.

A Magistrate has power at any stage of the proceedings to decide that the case is one which he ought not to try and which ought to be committed to the Sessions and he should ordinarily commit the case for a trial, provided the evidence has been completed. [P 1059 C 2]

(b) Criminal P. C., S. 350 (1), proviso (a)—Enquiry before commitment—De novo trial is not necessary.

Where proceedings are in the nature not of a trial but merely of an enquiry preparatory to commitment, the necessity of any provision for de novo trial does not exist. [P 1060 C 1]

Manmatha Nath Roy (Jr.)—for Petitioner.

Nirmal Chandra Chakravarty—for the Crown.

Graham, J.—In this case a rule was issued on the District Magistrate of Burdwan to show cause why an order of the Magistrate of Asansol dated 14th April 1930 refusing the petitioner's request for a de novo trial should not be set aside or why such other or further order should not be made as might appear fit and proper to this Court. An application for revision of the order in question was made to the District Magistrate of Burdwan and was rejected by him on 26th April. It appears that

the petitioner, who was a Tahsildar at Asansol under the Maharaja of Cossimbazar, was sent up for trial on a charge of criminal breach of trust under S. 408, I. P. C. The case was at first in the file of S. K. Guha and in its early stages was apparently proceeded with on the footing that it was a trial. No less than 67 witnesses were examined for the prosecution. Thereafter, it appears that the trying Magistrate left the district and was succeeded by another Magistrate Rai Sahib Hiralal Roy. As a consequence of that Mr. Guha recorded on 29th March 1930 an order in these terms:

"As I am not going to make over charge immediately the case need not be transferred just now. In the exercise of the power under S. 347, Criminal P. C., I direct that evidence shall be taken under S. 208, Criminal P. C., the accused is therefore called upon to cross-examine the prosecution witnesses forthwith and file a list of defence witnesses whom he wishes to summon under S. 208, Criminal P. C."

After that some of the witnesses were cross-examined and eventually Rai Sahib Hiralal Roy having succeeded Mr. Guha recorded an order on 9th April 1930 to the following effect:

"After going through the record I find that my predecessor decided under S. 347, Criminal P. C., to proceed in accordance with the provisions of S. 207, Criminal P. C. The defence wants the matter to proceed in accordance with Ss. 252 and 254, Criminal P. C."

After hearing the parties the Magistrate passed the order which forms the subject matter of the present application. He stated therein that after carefully considering the arguments on both sides he thought that in view of his predecessor's decision to proceed under S. 207, Criminal P. C., he ought to abide by that decision and he accordingly followed the same course, and rejected the prayer for a de novo trial. The petitioner thereupon moved the District Magistrate with the result which has already been stated above.

The main contention which has been urged before us is that the learned District Magistrate erred in law in holding that it was entirely within the discretion of the trying Magistrate to grant the request for de novo trial or not, and it has been strenuously argued that he ought to have held that the accused had a right to a de novo trial. The matter seems to depend mainly upon the interpretation to be placed on Ss. 347 and

350, Criminal P. C. S. 347 reads as follows:

"If in any enquiry before a Magistrate or in any trial before a Magistrate before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Sessions or High Court, and if he is empowered to commit for trial, he shall stop further proceedings and commit the accused under the provisions hereinafter contained."

Section 350 provides for cases of conviction or commitment upon evidence partly recorded by one Magistrate and partly by another. The learned advocate for the petitioner has contended that the proceedings were a trial and that that being so he was entitled to demand as of right a de novo trial. The answer to that however seems to be that the Magistrate had undoubtedly power at any stage of the proceedings to decide that the case was one which he ought not to try and which ought to be committed to the Sessions, and according to this section he would ordinarily commit the case for trial provided the evidence had been completed. In this particular instance however the evidence had not yet been completed and therefore it was not possible for the first Magistrate to make an order of commitment. He contented himself therefore with merely recording an order that the case was one which should be committed. From that moment what had hitherto been a trial became an enquiry, and the only reason why the case was not there and then committed for trial was that the enquiry was incomplete it being left by the Magistrate to his successor to finish the enquiry and make the necessary order for commitment. The argument advanced by the learned advocate for the petitioner seems really to amount to this that he wishes to tie the Magistrate down to the view which he took of the case in its earlier stages. It seems to be almost tantamount to saying "once a trial always a trial." I do not think that that view can be supported. It is to be borne in mind that the proceeding before the Magistrate was one continuous proceeding and the power which the first Magistrate possessed to take action under S. 347 existed equally in the case of the second Magistrate. Furthermore, it appears to be clear from the record that the second Magistrate did not

blindly accept the decision of his predecessor but that he brought his own mind to bear on the matter and came to the same conclusion that the case was one which ought to be committed to the Sessions.

Coming now to S. 350 it is important to note that the proviso to sub.S. (1) of that section refers to the case of a trial only, and it is only in that case that the accused may when the second Magistrate has commenced his proceedings demand that the witnesses or any of them should be re-summured and reheard; or in other words, that there should be a de novo trial. The principle which underlies this proposition is obvious. Where however the proceedings are in the nature not of a trial but merely of an enquiry preparatory to commitment the necessity of any provision for a de novo trial does not exist. In my judgment there has been no error of law in this case such as to render it necessary for us to interfere in the exercise of our revisional powers.

On the merits I find it difficult to understand why the petitioner who, it might be imagined, would be anxious to have a speedy trial should be so insistent upon a de novo trial in holding the examination of 67 witnesses over again and the inevitable delay and expense which would result therefrom.

In my opinion this rule must be discharged.

Panckridge, J.—I agree.

B.V./R.K.

Rule dismissed.

1930 Cr. Cases 1060

(Calcutta)

GRAHAM AND PANCKRIDGE, JJ.

Cyril C. Baker—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 137 of 1930, Decided on 2nd July 1930, from order of Chief Presidency Magistrate.

Opium Act (1 of 1878), S. 90—Meaning of "possession".

Possession implies knowledge, and there would be no possession when there is no knowledge on the part of the ostensible occupant of the cabin or room as the case may be. Possession without knowledge can hardly have been meant since in that case the element of criminal intention or knowledge would be entirely wanting. [P 1061 C 1, 2]

Where there is undoubtedly ground for grave suspicion regarding possession against the accused, but the element of reasonable doubt is not excluded, it would not be safe to con-

clude that the accused had the knowledge which is necessary to convict him of the offence. The onus of proving that knowledge is upon the prosecution, and relying solely upon the bare fact that the opium was found in the accused's cabin without proof of any additional or extraneous facts to establish any connexion between him and the opium is not sufficient to discharge that onus.

[P 1062 C 2, P 1063 C 1]

Charles' Bagram and *Sudhansu Mouli Chowdhury*—for Appellant.

Monindra Nath Mukherji—for the Crown.

Judgment.—This is an appeal against the order of the learned Chief Presidency Magistrate convicting the appellant, Cyril C. Baker, of an offence under S. 9, Opium Act (1 of 1878) and sentencing him to six months' rigorous imprisonment and to pay a fine of Rupees 1,000 or in default of payment thereof to a further term of three months' rigorous imprisonment.

The facts are shortly as follows: The appellant is, or was, at the time of the alleged occurrence, Assistant Wireless Operator of the B. I. S. N. Co's "S. S. Edavana," which was due to leave on the night of 23rd January or morning of 24th January last for Rangoon and the Straits. On the evening of 23rd January at about 7 p.m. a party of Customs Preventive Officers went on board the ship and searched the appellant's cabin, which was an ordinary 2nd class cabin on the lower deck having in it two berths and a settee. The accused accompanied the officers from the top deck and opened the door of the cabin with a key which he produced either from his pocket or from the top of a ledge outside the door of the cabin. Upon that point there was some controversy at the trial. This much however is clear that the door was locked and that it was opened by a key produced by the accused. On search being made twenty-seer packets of opium were found concealed in the covering of the settee and the mattresses of the upper and lower berth. The accused was thereupon taken into custody, and was in due course sent up for trial and convicted and sentenced as stated.

The defence set up was that the accused knew nothing whatever about the opium and that to use his own expression it was "planted" there by someone else. It was suggested that a Goanese servant, or "boy," who was employed to

wait on the accused and the other wireless operator, was the real culprit, and in support of that suggestion reliance was placed on the fact that this "boy" mysteriously disappeared from the ship on that same evening just about the time of the search; that he was found missing when the ship left next morning, and that he has not since been heard of. To prove this fact an entry in the ship's log (Ex. A) was put in by the defence from which it appeared that the "boy" was entered as having deserted the ship, that a small sum was due to him as wages, and that this and his effects were subsequently made over to the Shipping Master at Rangoon.

As the learned Chief Presidency Magistrate has observed in his judgment the facts were almost all admitted. The opium was found in the accused's cabin after he had himself opened the door with the key which he produced. The question therefore was whether he was in possession of the opium within the meaning of the word as used in §. 9 (c), Opium Act. That again depends upon what is meant by possession and whether it means mere physical or de facto possession, that is to say, in the sense of something that is found in a place which is in the exclusive occupation of some person or whether something more is required, and whether it connotes conscious possession with knowledge. It has been argued on behalf of the Crown that so soon as it is established that the opium was found in the de facto possession of the accused, that is to say in the cabin exclusively occupied by him, the effect will be that under §. 10 of the Act the presumption will be that the accused will be deemed to have committed the offence unless he can satisfactorily account for his possession. The presumption will however only come into play when it has been proved that the accused has dealt with the opium in any of the ways described in §. 10. So that we come back again to the question whether he was in possession. In regard to that we take the view that possession implies knowledge, and that there would be no possession when there is no knowledge on the part of the ostensible occupant of the cabin or room as the case may be and when it is shown

that the opium was placed there by some one else. Such possession as this can hardly have been meant since in that case the element of criminal intention or knowledge would be entirely wanting.

Proceeding then upon the footing that the possession must be conscious possession the question is whether it has been proved beyond reasonable doubt that the accused was in possession of the opium. Now there can be no doubt that up to a certain point the facts go very much against the accused. The opium was admittedly found in a cabin occupied exclusively by him, the door of which was kept locked and was opened with a key which he himself produced.

The quantity of opium too is remarkable being no less than 20 seers in weight in packets of 20 one-seer each concealed as already stated under the cover of the settee and in the mattresses of the two bunks. At first sight these facts seem to be almost conclusive against the accused, and it is difficult to believe that anyone else could have placed them there or that at all events that the accused could have been ignorant of the presence of the opium. If he had that knowledge he would of course be guilty.

But the case is complicated by the evidence regarding the mysterious disappearance of the Goanese boy, and the importance of this piece of evidence is this, that it gives rise to a doubt whether the boy could have been the culprit and whether it is possible that the accused was, as he claimed, ignorant of the fact that the opium was in his cabin. To my mind the fact which militates mostly against this theory is the fact that such a large quantity of opium was found, since it does seem difficult to believe that the Goanese would have dared to place such a large quantity of opium in his master's cabin knowing as he must have done that his master might enter the cabin at any moment and discover its presence with the consequences which would naturally ensue therefrom.

Whether the accused had knowledge of the opium or not one fact is we think abundantly clear and that is that the "boy" was concerned in the offence either alone and independently, or as a confederate of the accused. The evidence in that connexion is significant as

it shows that he disappeared suddenly just about the time when the search was made. According to the testimony of the first wireless operator the "boy" was serving him when he began his dinner at 7 p. m. and he then disappeared and could not be found. He was not seen again and next morning was entered in the log as having deserted the ship. Indeed he left in such a hurry that he abandoned, as stated above, his personal effects, and also a small amount of pay which was due to him. The learned Magistrate thought that his disappearance might be explained by his having had something to do with the information, but there is no evidence to support that conclusion, nor does it seem probable, if that was the reason, that the boy would have delayed his departure until the customs officers were actually on board. Had that been the reason for his departure it seems probable that he would have left much earlier, and have taken his personal effects with him. The suddenness of his departure suggests rather that he cannot have been the informant.

The "boy" had access to the cabin and the suspicious circumstances in which he left the ship go to show we think that he undoubtedly had knowledge of the fact that the opium was in the cabin.

But the question still remains whether the accused also had this knowledge. *Prima facie*, as I have said, it is difficult to believe that the "boy" would dare to secrete so large a quantity in the cabin with the risk of its being discovered at any moment. But there are some facts in this connexion which have to be taken into consideration. The accused was according to the evidence on duty on the top deck and it was about the time apparently when he usually had his dinner. It seems probable whoever placed the opium where it was found that it was only intended to be a temporary resting place, and that it would afterwards be removed to some safer place. There is a port-hole just over the settee where some of the packets of opium were found. It is possible that the "boy" who as we have held had undoubtedly taken a guilty part in the matter, was alone responsible for placing the opium where it was found, and that taking advantage of the temporary ab-

sence of his master he hid the opium in the cabin intending afterwards to remove it to some other place. In this connexion it may be borne in mind that the cabin was on the lower deck and that the porthole would afford a convenient means of smuggling the opium on board. The sudden and unexpected arrival of the customs officers just before the ship was due to sail may have upset any such plan.

There are other circumstances which deserve consideration. We agree with the learned Magistrate that the fact that the accused took the officers to his cabin does not help him because he had no option in the matter, and it was a case of *force majeure*. At the same time there is nothing in the evidence to show that the accused showed any reluctance to accompany the officers or that his demeanour was that of a guilty man. On the other hand he at once disowned any knowledge of the opium and said that it must have been "planted."

I may mention at this point that the theory has for the first time been propounded on behalf of the Crown that the entire story about the "boy" is a myth, and that it was a subsequent afterthought designed with the object of exonerating the accused. We do not think that such a suggestion ought to have been made. It was never part of the case for the prosecution at the trial nor was any cross-examination directed towards showing that the boy had never in fact existed. All that was suggested was that it had not been given out on that night that the boy was missing. The evidence to prove that the boy did exist is overwhelming, and the learned Magistrate has accepted that view with which we agree.

On a careful consideration of the evidence and of all the facts and circumstances the conclusion at which we have arrived is that while there is undoubtedly ground for grave suspicion against the accused the element of reasonable doubt is not excluded, and that it would not be safe to conclude that the accused had the knowledge which is necessary to convict him of the offence. The onus of proving that knowledge was upon the prosecution and in relying solely upon the bare fact that the opium was found in the accused's cabin without proof of any additional or extraneous facts to

establish any connexion between him and the opium they have failed to discharge that onus. It is apparent that careful investigation might have been expected to establish some of these missing links. We are not prepared on the evidence as it stands to hold that it proves beyond reasonable doubt that the accused was aware of the presence of the opium in his cabin, and we think that he is entitled to the benefit of that doubt. The result therefore is that we allow the appeal, set aside the conviction and sentence, acquit the accused, and direct that the fine, if realized, be refunded. The appellant will be discharged from his bail bond.

K.N./R.K.

Appeal allowed.

* 1930 Cr. Cases 1063

(Calcutta)

SUHRAWARDY AND COSTELLO, JJ.

Akhla Kulla Chaudury and another—
Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1452 of 1929, Decided on 15th May 1930, from order of Sess. Judge, Bankura, D/- 26th August 1929.

* (a) Criminal P.C. (1898), S. 476—Offence under S. 211, Penal Code—Person causing proceedings to be started may not be party to proceedings, yet Court can proceed against him.

Court may make a complaint against a person under S. 476 for an offence under S. 211, Penal Code, if it is of opinion that the proceedings before the Court were caused to be started by that person though he was not a party to a proceeding before it: *A. I. R. 1925 Rang. 321, Foll. ; 37 Cal. 250 and 7 C. L. J. 375, Ref.*

[P 1064 C 1]

(b) Criminal P. C. (1898), S. 195 (1) (b) and (c)—Meaning of "in" and "in relation to" explained.

The words "in" and "in relation to" mean that an offence may be committed by a person in relation to a judicial proceeding though he may not be a party to the proceeding or though it may not have been committed by that person in a judicial proceeding.

[P 1064 C 1]

Manindra Nath Banerjee—for Petitioner.

Lalit Mohan Sanyal—for the Crown.

Sures Chandra Talukdar—for Complainant.

Judgment.—This rule has been issued on the ground that the petitioner not having been a party to any proceeding before the Magistrate who made the complaint against him under S. 476,

Criminal P. C., the case instituted against him on such complaint should be withdrawn. The fact is that the petitioner was the Sub-Inspector of Gangajalhati Police Station in the District of Bankura. One Jugal Kishore Singh, a constable, lodged a first information report with the petitioner against certain persons charging one of them with escaping from his lawful custody and the others for rescuing him. This information was enquired into by a superior officer to the petitioner who found it to be false and concocted with the help of the petitioner and others. Mr. Bell, Superintendent of Police, Bankura, then lodged a complaint in Court under S. 211, I. P. C., against all the persons concerned including the petitioner. Jugal Kishore filed a protest petition and the case was enquired into and ultimately dismissed as false by the Deputy Magistrate, Mr. D. R. Ghose. Mr. Ghose on dismissing Jugal Kishore's complaint asked the petitioner and other persons to show cause why they should not be prosecuted under certain sections of the Indian Penal Code.

On considering the cause shown the learned Deputy Magistrate made a complaint against them under S. 476, Criminal P. C., for offences under Ss. 120-B-211, 193, 466, 466-109. There was an appeal by the petitioner to the Sessions Judge of Bankura against the order made by the Deputy Magistrate under S. 476-B. The learned Judge in a careful and lucid judgment dismissed the appeal but made certain slight alterations in the order made by the Deputy Magistrate. The petitioner moved this Court and obtained this rule on the ground that he was not a party to the proceeding before Mr. D. R. Ghose and that officer had no jurisdiction to make a complaint against him under S. 476. Before proceeding further it may be noted that the petitioner has raised an argument before us which is more academical than of any practical importance. If we set aside the complaint against the petitioner made by the Court under S. 476 the result will be that Mr. Bell's complaint existing against the petitioner will proceed. But as the point has been raised and strenuously argued it is necessary to give our opinion on it. We have al-

ready held in giving our decision in Criminal Admitted Appeals Nos. 934 and 935 of 1929 decided on 5th May last that the Court may make a complaint against a person under S. 476, for an offence under S. 211, I. P. C., if it is of opinion that the proceeding before the Court was caused to be started by that person though he was not a party to a proceeding before it. Here we may shortly give our reasons for that view. We have expressed therein, (1) under S. 211, I. P. C., a person who institutes, and also a person who causes to be instituted, a criminal proceeding which is proved to be false may be prosecuted for an offence under that section; and under S. 195, Criminal P. C., Cl. (4), a person who abets the commission of an offence may also be prosecuted under that section; (2) S. 476 does not speak of a party to a proceeding. It says that the Court can order further enquiry in a criminal case in respect of any offence referred to in S. 195 (1) (b) (c) which appears to have been committed in or in relation to a proceeding in that Court.

The words "in" and "in relation to" must be given their meaning; otherwise there is no sense in using those words. An offence may be committed by a person in relation to a judicial proceeding though he may not be a party to the proceeding or though it may not have been committed by that person in a judicial proceeding. (3) The offences with which the petitioner is charged are covered by S. 195 (1) (b) which are not restricted to the party committing the offence in or in relation to a proceeding in Court which is similarly worded as S. 476. A different consideration may arise in respect of an offence mentioned in Cl. (c), S. 195 (1). We are fortified in this view of ours by a Full Bench decision of the Rangoon High Court in *Emperor v. Syed Khan* (1).

The distinction seems to be this: that if a false information is lodged to the police with the conspiracy of several persons then all of them may be prosecuted for lodging false information. If the person who lodges the information goes to the Court without the assistance or collusion of the abettors the

Court may not have jurisdiction to order prosecution of the persons other than the man who actually gave the information. But where it is apparent that several persons combined to lodge a false information with the police and also lay a false complaint in Court the Court will have the power to pass orders against all the persons under S. 476 who had thus conspired. The case law on this point is not very clear as will appear from the judgment in the case of *Jadu Nandan Singh v. Emperor* (2) where all the cases have been noted; but it is to be noticed that the preponderance of judicial opinion is that in cases coming under S. 195 (1) (b) the Court has authority to order the prosecution under S. 476 in respect of offences mentioned therein whether committed by a person to a proceeding or by a person not apparently connected with the proceeding. In *Dharmadas Kaur v. Emperor* (3) sanction was given for the prosecution of two persons on the allegation that they had instigated the complainant to lodge a false information. That order was set aside by this Court on the ground that the information was lodged only before the police and, therefore, the Court had no jurisdiction to sanction the prosecution of those persons. The decision of the Court did not rest on the ground that the party against whom sanction was given was not a party to the proceeding. For these reasons, we are of opinion that the order passed by Mr. D. R. Ghosh, Deputy Magistrate directing the prosecution of the petitioner, was passed with jurisdiction. This rule, therefore, will stand discharged.

"As the proceedings have been so long protracted as remarked by the Sessions Judge we expect that action in the matter will be taken at once. Let the record be sent down at once.

V.B./R.K.

Rule discharged.

(2) [1909] 37 Cal. 250=11 Cr. L. J. 37=4 I. C. 710.

(3) [1908] 7 C. L. J. 373=7 Cr. L. J. 340=12 G. W. N. 575.

(1) A. I. M. 1925 Rang. 321=27 Cr. L. J. 4=91 I. C. 86=3 Ragg. 303 (F.B.).

1930 Cr. Cases 1065

(Bombay)

Full Bench

MARTEN, C. J. AND MIRZA AND

BROOMFIELD, JJ.

In re Shamdasani (No. 1)—Applicant.

* Criminal Appn: No: 146 of 1930, Decided on 15th April 1930.

(a) Criminal P. C. (5 of 1898), S. 526 — Derogatory allegations in another case against complainant—Subsequent case about accounts only — Criminal liability to be considered of accused and not of complainant—Fair trial could be had.

The observations alleged to be made by the Magistrate in another case, which are derogatory of the complainant, cannot be held to indicate that the complainant will not have a perfectly fair trial in deciding, first, a matter of accounts only, and, secondly, a question as to the criminal liability not of the complainant but of the accused in the case, [P 1066 U 2]

(b) Criminal Trial — Complainant filing successive applications for transfer—Applications frivolous and vexatious — High Court ought to exercise its inherent power under S. 561-A — Such conduct also can amount to contempt of Court — High Court can also direct complainant to lodge in Court a sum as security for costs occasioned to his opponent—Criminal P. C. (5 of 1898), S. 561-A.

Where successive frivolous and vexatious applications for transfer are resorted to as a means of preventing the ends of justice being attained, the High Court ought to exercise its inherent power under S. 561-A. Further conduct of this type can amount to contempt of Court which can be punished in various ways. There is also another remedy. The High Court may direct a complainant who resorts to such application for transfer to lodge a certain sum, say Rs. 1,000 as security for the costs occasioned to his opponent by these repeated adjournments and applications in respect of them. [P 1066 C 2 ; P 1067 C 1, 2]

Velinker—for Opponent No. 3.

Marten, C. J. — This is an application No. 140 of 1930, by Mr. Shamdasani, the complainant in a case filed on 13th June 1929, and still pending before the learned Chief Presidency Magistrate, asking that all proceedings had before the learned Magistrate be set aside and that the case be transferred to some other Court for disposal according to law. This is the third application of a similar nature, there having been two previous applications, viz. Criminal Revision No. 71 of 1930 filed in this Court on 17th February 1930, and Criminal Revision No. 104 of 1930 filed in this Court on 14th March 1930.

The prosecution which has been instituted by the complainant is in respect of certain alleged false balance sheets which have been published. The learned Magistrate has held an inquiry for some eight days, viz., on 9th October, 27th November, 4th, 5th and 6th December 1929 and 1st, 8th and 15th February 1930, into the allegations made by the complainant. Then, on 15th February, the hearing appears to have been prolonged up to 6-30 p.m.; and thereupon the complainant made an application for transfer alleging bias in the learned Magistrate and that he feared he would not get a fair trial. Subsequently, on 17th February, the first application to this Court was made. The result under S. 526 (8), Criminal P. C., was that the Magistrate had to postpone the case.

The first application, which I will call "A," was refused by the High Court on 7th March 1930. In the judgment delivered by my brother Mirza, J., the point of bias was thus dealt with :

"With regard to the second part of the application, namely that the Magistrate is prejudiced against the applicant and is not likely to do justice to his case with an impartial mind the materials placed before us do not in our opinion justify such a conclusion. If the applicant entertains an apprehension that he will not get justice at the hands of the Magistrate we would be constrained to say that the apprehension is not one which we would regard as reasonable. The application therefore is summarily rejected."

Accordingly on 11th March 1930 the inquiry was resumed by the learned Magistrate, and practically at once another application for a transfer was made on similar grounds. That was filed in this High Court on 14th March 1930, in which it was alleged that the cumulative effect of the incidents on the mind of the complainant was that the mind of the learned Magistrate was not free from some bias in the matter, and he did not approach the case with that judicial impartiality so essential to the administration of justice. That application, which I will call "B," came before my learned brothers on 26th March 1930, and was summarily dismissed.

Accordingly, the learned Magistrate on 29th March 1930, once more resumed the hearing of the case and once more an application was forthwith made for a transfer of the case on the same grounds of bias, which is the application "C" now before us. It is based on this ad-

ditional circumstance that on 28th March 1930 in another case the Magistrate made certain observations derogatory to Mr. Shamdassani which of themselves show that the Magistrate is not a fit person to continue the hearing of the present inquiry. Moreover Mr. Shamdassani alleges that those observations were defamatory, and he is accordingly petitioning the Local Government for sanction to take proceedings against the learned Magistrate for defamation in respect of those observations. And this, he contends, is an additional reason why the Magistrate should not continue the present inquiry, whether or no the requisite sanction to prosecute is eventually given by the Local Government.

We have carefully considered what has been urged before us by the complainant in the present case, but in coming to our conclusion we must remember the surrounding circumstances. The complainant puts himself in the position of one who is vindicating public justice and who accordingly is bringing repeated prosecutions against certain persons who are alleged to have filed improper balance-sheets. The point for decision before the learned Magistrate will therefore be whether these particular balance-sheets are improper, and, if so, whether the respondents are under any liability under the criminal law in respect of them. As regards the first point it will, I take it, be largely a question of accountancy and so on. Therefore we are a long way away from a case where there is a mere conflict of evidence between a complainant and an accused or where the result depends on the credibility of or character of the complainant. Moreover it has to be borne in mind, as the complainant himself tells us, that he has been bringing proceedings of a somewhat similar nature in these Courts for the last six years. Consequently it is impossible for any Judge or Magistrate to be unaware of the activities of Mr. Shamdassani in his desire that the law should be put in motion against any directors or auditors and others of limited liability companies who put forward or are alleged to put forward inaccurate balance-sheets.

Therefore bearing these facts in mind we do not think the observations which the learned Magistrate is alleged to

have made—and for the purpose of deciding this application we accept the words which the complainant says he uttered—show a bias which would influence the learned Magistrate in deciding whether these balance-sheets are false or not. We do not think they indicate that the complainant will not have a perfectly fair trial in deciding, first a matter of accounts only, and, secondly, a question as to the criminal liability not of the complainant but of the accused in the case. Therefore as regards this present application before us we unhesitatingly reject it. I repeat that in our opinion there is no adequate reason to suppose that the complainant will not get a fair hearing.

But the matter does not quite end there. We cannot shut our eyes to the fact that this is the third application for a transfer on the ground of bias and so on which has been presented to this Court since 17th February 1930. We also cannot shut our eyes to the fact that repeated transfer applications of this kind might in certain events enable a complainant, or for a matter of that an accused, to stop a trial or enquiry altogether under S. 526 (8), because as soon as one application for a transfer was rejected he could proceed forthwith to make another with only a possible liability for costs under S. 526 (6-A). But, fortunately, in our judgment, it is not open either to a complainant or to an accused to hinder the administration of justice in that way. We hold it to be clear that under S. 561-A, Criminal P. C., we can if necessary exercise the inherent power of the High Court to prevent the abuse of the process of any Court; and in such a case as I have indicated we ought unhesitatingly to apply that power.

Section 561-A runs:

"Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

To my mind it is clear that one of the ends of justice is to have a case properly heard and concluded within a reasonable time. Accordingly, if frivolous and vexatious applications are resorted to as a means of preventing the ends of justice being attained, then I

would hold that the Court ought to exercise its above inherent power to prevent its process being thus abused.

So too in certain cases, speaking for myself, conduct of this sort might, I think, amount to contempt of Court which could be punished in various ways. For instance, in Halsbury's *Laws of England*, Vol. 7, p. 293, para. 629, it is said:

"Abusing the process of the Court is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious, or oppressive, the ordinary remedy in such a case being to apply to strike out a pleading or stay the proceedings, or to prevent further proceedings being taken, without leave. Beyond this the Court has jurisdiction to punish abuse of process by committal or attachment as a contempt.

That means committal to prison. Then note (t) says:

"The following acts of abuse of process have been held punishable as contempts: taking out process without any colour of right to it; making use of process in a vexatious manner or to serve the purposes of oppression or injustice... And many other examples are given.

Now we have seriously considered whether in the present case we ought not to issue an order of the nature indicated in S. 561-A. But we propose to give the complainant one more chance. We have indicated what in principle we hold to be the powers of the Court. We have also indicated that in a proper case those powers ought to be exercised by this Court. We also consider that in the present case the Magistrate should continue to hold his inquiry into this present complaint and to bring the matter to a final conclusion without permitting any more adjournments than are necessitated by the other urgent work of his Court. Accordingly, if the complainant repeats what he has done in the past, namely that as soon as one application for a transfer is refused by the High Court he promptly makes another, then I must warn him that if the matter comes up again before the High Court he will be in grave risk not only of having an order under S. 561-A passed against him but also of having proceedings directed against him for contempt of Court.

There is also another remedy which we think as a matter of principle the High Court in an appropriate case could adopt. That would be to direct such a complainant as we have here to lodge a certain sum in Court, say a thousand

rupees, as security for the costs occasioned to his opponent by these repeated adjournments, and the applications in respect of them.

With this warning then, which we trust the complainant will pay very careful attention to, we will pass our order on the present application, namely that it should be dismissed. As regards the question of costs under S. 526 (6-A), to which we drew the complainant's attention, the present application is made *ex parte* for a *rule nisi*. Accordingly, on the present application we do not propose to make any order as regards costs.

Mirza, J.—I agree.

Broomfield, J.—I also agree.

S.N./R.K. *Application dismissed.*

1930 Cr. Cases 1067

(Bombay)

Full Bench

MARTEN, C. J., AND MIRZA AND
BROOMFIELD, JJ.

In re P. D. Shamdassani (No. 2).

Criminal Revn. Appln. No. 152 of
1930, Decided on 15th April 1930.

Criminal P. C., (5 of 1893), S. 526 (8)—
Accused desiring to go to High Court direct
for transfer—His right to do so cannot be
excluded.

If an accused desires to go direct to the
High Court for transfer of his case under
S. 526, instead of first proceeding under
S. 528, his right to do so as a matter of law,
cannot be excluded under the Code since the
passing of the present sub-S. 8, S. 526: 6
Bom. L. R. 480, *Dist.* [P 1078 U1]

Velinker—for complainant.

Marten, C. J.—This is an application by the accused in a case brought against him for defamation asking us to review the order of the learned Additional Presidency Magistrate, Mr. Brown, passed on 10th April 1930, on an application made by the accused for time on the ground that he meant to apply to the High Court for transfer under S. 526, Criminal P. C. The order made by the learned Magistrate was:

"I grant Shamdassani time until 8-30 p. m. on Saturday to make an application before the Chief Presidency Magistrate for a transfer of this case to some other Court. The time for an application to the High Court has not yet arrived as he has a right to go first to the Chief Presidency Magistrate."

The question is whether in effect the accused can be obliged to go first to

the Chief Presidency Magistrate for a transfer of the case under S. 528, or whether he is under S. 526 entitled to go to the High Court direct. It may be, as stated by Mr. Velinker, for the complainant, that the practice in the Presidency Magistrates' Courts has been that any application for transfer of proceedings in any Court other than that of the Chief Presidency Magistrate is normally made in the first instance to the Chief Presidency Magistrate and not to the High Court. As regards the mofussil Courts it was laid down in *In re Fonseca* (1) that ordinarily the High Court does not transfer a case pending before a Magistrate unless the party applying for transfer has moved the District Magistrate before coming to the High Court. That was a case in 1904. But the present sub-S. (8), S. 526, has been incorporated by the legislature since that date, and incidentally it makes it imperative on the Magistrate to grant an adjournment if either the complainant or the accused signifies his intention of applying to the High Court for a transfer.

We think that although the learned Magistrate's order may have been made following the practice in the Presidency Magistrates' Courts, and although it may be that in many cases it would be a convenient course to go first to the Chief Presidency Magistrate, yet on the other hand, if an accused claims the right to go direct to the High Court, we do not see how his right as a matter of law can be excluded under the Code as in the present circumstances. For instance the accused may not wish to incur the expenses of a double application, first, to the Chief Presidency Magistrate, and, secondly, to the High Court. In some other cases it may be that neither the complainant nor the accused would desire the extra delay which the double application would cause. But, however that may be, it is we think reasonably clear that in the present case the learned Magistrate's order was not strictly correct in point of law if the accused desired to go to the High Court direct. We would therefore make the rule absolute and direct the learned Magistrate to adjourn the case for a reasonable time for the

application in question to be made to the High Court.

I should add that we were told by counsel for the complainant that subsequently the case came again before the learned Magistrate and he has already adjourned it to 16th April in order that an application to the High Court for a transfer be made. But we have not got any official copy of the learned Magistrate's subsequent order before us. All we have is the revisional application as regards the order of 10th April. Therefore it is clearly to be understood that we are merely dealing with the order of 10th April, and that we are not prejudging any subsequent order which the learned Magistrate has made, or holding that any further order by him will be necessary. Nor again do we intend to give by means of this transfer application any loophole for unreasonable delay in the disposal of this particular case which we understand has already been heard for very many days by the learned Magistrate. Our order accordingly will be, rule absolute.

Mirza, J.—I agree.

Broomfield, J.—I also agree.

S.N./R.K.

Rule made absolute.

1930 Cr. Cases 1068

(Calcutta)

JACK, J.

Rafatulla Pramanik—Accused—Petitioner.

v.

Rajak Sardar and another—Opposite Party.

Criminal Revns. Nos. 448 and 449 of 1930, Decided on 5th June 1930.

Criminal P. C., S. 106—Unless offence necessarily involves breach of peace Court's finding to that effect is necessary for proceedings under S. 106.

Unless the offence is one which necessarily involves a breach of the peace there must be an express finding by the Court that the offence committed did in fact involve a breach of the peace for proceedings under S. 106.

[P 1069 C 1]

Md. Nurul Huq Chaudhury—for Petitioner.

Biraj Mohan Roy—for Opposite Party.

Judgment.—In both these cases rules were issued to show cause why

(1) [1904] 6 Bom. L. R. 480.

the order under S. 106, Criminal P. C., should not be set aside. It is urged for the petitioner that since the conviction was only under S. 379, I. P. C., in both the cases the orders under S. 106 are improper inasmuch as an offence under S. 479 does not involve any breach of the peace. There are a number of rulings as regards what amounts to an offence involving a breach of the peace as referred to in S. 106, Criminal P. C. I do not think it necessary to go into details of these cases. It appears to me that the trend of these rulings shows that unless the offence is one which necessarily involves a breach of the peace there must be an express finding by the Court that the offence did in fact involve a breach of the peace and I find that in both these cases there is such a finding.

In Case No. 448 the appellate Court found that the accused formed an unlawful assembly no doubt as the number was 50 or 60 men although no charge was framed against the accused under this section. The offence committed was accompanied by force and it certainly involves a breach of the peace. In Case No 449 the finding of the appellate Court was also that the offence committed involved a breach of the peace and the learned District Magistrate remarked that as the appellant did not desist from the wrongful act, even after his conviction in the case, he considered it necessary that the accused should be bound down to keep the peace. In these circumstances, I think that the orders under S. 106, Criminal P. C., in both these cases are justified according to law. The rules are therefore discharged

M.N./R.K.

Rules discharged.

1930 Cr. Cases 1069

(Calcutta)

Full Bench

RANKIN, C. J., AND C. C. GHOSE AND
MALLIK, JJ.

Rakhal Chandra Das and others—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 284 of 1930, Decided on 18th August 1930, against decision of Special Tribunal.

(a) Penal Code, S. 120-B—That person known to be associate was trying to extricate himself from being accused of anything connected with offence is not enough for conviction.

Merely that a person was an associate of the persons who were party to a criminal conspiracy is not of itself sufficient for the foundation of the conviction of that person; nor can the fact that the person was endeavouring to extricate himself from being accused of anything connected with the conspiracy help the case against such person. [P 1071 C 1,2]

(b) Penal Code, S. 120-B—That immediately after occurrence person was anxious to escape observation and was doing his best to conceal his whereabouts is not enough to infer complicity.

That a person was anxious to escape observation or even was doing his best to conceal his whereabouts after the date of the occurrence connected with the criminal conspiracy is not enough to infer the complicity of the person by completing what is necessary. [P 1072 C 1]

Mritunjoy Chatterji, Monindra Nath Banerji, Parimal Mukherji and Dehabrata Mukherji—for Appellants.

B. M. Sen—for the Crown.

. Rankin, C. J.—This is an appeal by three accused persons who have been tried before a Special Tribunal sitting under the powers conferred by the Bengal Criminal Law Amendment Act. The charges were in respect of an alleged dacoity or attempted dacoity upon a certain bus which on 11th September last was going from Rajshahye to Natore carrying passengers and also stopping at the post offices on the way in order to pick up the mails. The bus in question was being driven by witness 3 in the case Ramkrishna and there were certain employees of the Bus Company and there were also certain passengers who had got into the bus. In the driver's seat there was the driver, Satis the manager of the company and a certain other person. In the mail box or the middle part of the bus, there were witness 1 Ashutosh and witness Balavi (P. W. 17). The witnesses Khitish, Sukumar and certain others were in the back portion which has been referred to as the body of the bus. What happened was that after the bus had reached Puthia motor stand which was about 19 miles from Rajshahye and about 9 miles from Natore, one of the passengers in the bus asked the driver to stop on the ground that his watch had been dropped. The driver was unwilling to do so but some of the other passengers ap-

parently induced him to stop and he stopped the bus though the engine was left running. Thereupon, certain passengers inside the bus got out, raised the cry "hands up," one or more of them broke the headlights and punctured the front tyres and one or more stood over the driver threatening him with a dagger and threatening the people in the mail box to get down. The passenger who had been sitting in the front next to the manager got down and fired two shots with a revolver. He may have intended and probably did intend to hit the driver but he hit the manager Satis who was sitting next to him once in the arm and once in the chest. One of the dacoit passengers is said to have remained at the door of the bus with a dagger in order to prevent any of the other passengers in the bus from getting out. As the driver was not hit by the revolver he started the bus and in the end the bus got away and ultimately reached Natore. It appears according to the prosecution case that the accused Sushil who was at the back of the bus guarding the door was taken by surprise as the bus went off and he appears to have been thrown from the bus and to have sustained certain injuries in that way.

The commissioners in a very careful judgment have set out the whole narrative of the events which throw light upon this case. We find that certain persons went to the police station. We find what the people in the police station did, how they came along a part of the road, how they made a search list of what had been discovered and how they came ultimately to the police station of Natore. Curiously enough late in that evening the accused Sushil was brought to the police station, and it appears that he had been found in the field or premises of a certain agriculturist at a considerable distance to the south of the road along which the motor bus was going. The agriculturist called in his munib who advised him that the police should be given notice and Sushil was taken to the thana. There is evidence that he at first, at all events, gave a false name and said that he belonged to a place called Sherpur. It would appear from the medical evidence that he had sustained a certain amount of concussion because there was bleeding from his ear,

which showed that this had happened, and it is probably true that he was in a semiconscious condition at the time when he was found and also even at the time when he was taken to the police station. Proceeding upon the suspicious feature of this discovery near about the spot where the attack upon the bus had taken place, of a young man suffering in this way the police appear to have commenced investigation as to the antecedents and past history of Sushil, and in that way they discovered that Sushil and his co-accused Dharani were students of the Rangpore College, and they further found that these two had come on the 2nd to a mess at Rajshahye and that they had afterwards returned there on the 4th and stayed in the room belonging to the accused Rakhal until the 11th, the date of the occurrence. It appears that on the 7th Rakhal joined them and there is evidence to show that at about 6-30 p. m. on that day Rakhal was seen in Rajshahye, so that he was not a person who could have taken part in the attack on the bus, if the prosecution evidence is to be believed. In the end the commissioners have given full and adequate reasons for their finding that there was this attack upon the bus as alleged by the prosecution. They have also given reasons and good reasons for finding that more than five persons took part in the attack and they have further given reasons for finding that the object of this attack on the bus was to secure the mail, there being indeed no other object that could very well be served by this attack so far as the evidence discloses.

The case therefore comes back as regards each accused to the question whether it is shown that he was a party to the attack; in other words whether the evidence of identification is sufficiently ample to justify the Court in holding that each prisoner has been satisfactorily identified.

So far as Rakhal is concerned the prosecution in the end abandoned the case that he did take any part in the actual attack. So we have to deal, first of all, with the prisoner Sushil and then with the prisoner Dharani in considering whether it is proved that they took part.

As against Sushil I am of opinion that the evidence which has been very plainly

and clearly marshalled in the judgment of the tribunal is amply sufficient to show that he was one of those who took part in the attack. To begin with, there was found on him at the time of his discovery a ticket which had been issued for this very bus for the journey with which we are concerned. The witnesses who identified him are P. W's 1, 16, 17, 18, 19 and 21, and they identified him as the one who remained inside the bus near the door to prevent other people from descending. Then we come to this: that curiously enough on this very evening, some time after this occurrence, Sushil is found not very far away in a wounded condition by the witness who speaks to having seen him there. There is further the fact which is clearly proved that when he was asked to give an account of himself after he had been taken to the thana he gave a false name and a false address. It appears also that a revolver and a dagger were found some 400 yards away from the place where Sushil was found. This last fact certainly by itself is no very secure foundation to identify the accused; but it certainly points to this: that whoever assisted Sushil to the place where he was found threw away these articles in the course of the journey. Having regard to the corroborative evidence and the direct evidence, I cannot think it possible that this Court should differ from the opinion of the members of the tribunal who found that Sushil's complicity in the dacoity was amply proved.

In the case of Dharani, the evidence is not quite so extensive. The evidence against Dharani consists, first of all, of the evidence of association with Sushil staying with him at a mess in Rajshahye both being students of the Rangpore College. I need not say that that of itself would be a highly insufficient foundation for conviction of Dharani merely upon evidence which implicated Sushil and certain others. There is also the fact that when Dharani was arrested he immediately denied that he had ever been in Rajshahye in his life. That may be some evidence that he was endeavouring to extricate himself from being accused of something connected with Rajshahye; but again that in itself

is no evidence that Dharani was taking part in the dacoity.

The evidence to implicate Dharani is the evidence of P. W. 2 Satis, the manager who was shot and of P. W. 3 Ram Krishna, the driver, and the real question in this case is, having regard to a certain amount of antecedent corroboration in the evidence of association, whether these two witnesses' evidence is sufficient. Now, it appears that on 7th October a certain number of people, including some people who were present in the bus at the time of the occurrence, were brought to the jail to see if they could identify, among others, Dharani. None of the eyewitnesses identified him on 7th October, but neither the driver nor Satis was present at this identification. Another identification was held on 7th November and it is true that other persons as well as Dharani, who were suspects, were put among the persons paraded. On this occasion Satis and the driver both identified Dharani as the person who took part in the attack going in front and threatening the driver, and they did not apparently identify certain other suspects who were shown to them.

The question is whether we can rely upon the evidence of these two witnesses. In my opinion, the evidence of the driver Ram Krishna is very definite and strong. To begin with, he says:

"I say that Dharani first stood over me with a dagger and broke the lights after. He was on my right. I saw him in the light of the headlights. If this had not been there I would not have recognized him. I mean that I could see him by the headlight when he was standing over me, but I could not have seen him in the lights if the headlights had not been on."

He says of Dharani:

"He was in the bus at the time. He it was also who punctured the tyres, broke the lights and stood over me with the dagger."

Satis says:

At Rajshahye, I identified Dharani At Baneswar he asked me the cause of the delay."

That was because the bus had to wait there for mails.

"He also was the man at Putia who broke the headlights and pierced the tyres."

And in cross-examination he says:

"I first noticed Dharani at Baneswar. I saw him get in behind at Baneswar. He did not sit beside me. I identified Dharani only. I made a statement to the police. I did say

to the police that I recognized the man who sat by me but not the other dacoits well. The man who shot the revolver was the man who sat next to me,"

and so forth. In my judgment, the criticisms of the evidence of these two witnesses are not sufficient to induce one to think that there is any reasonable doubt about the identification of Dharani; and, in my opinion, the conviction of Dharani by the tribunal must be upheld.

I come last to the case of Rakhal. With regard to Rakhal, I am clearly of opinion that the evidence is entirely insufficient to bring home to him the charge of conspiracy under S. 120-B, I. P. C. Indeed, it is difficult to see that the evidence against Rakhal amounts to very much more than some circumstances of suspicion. It is said that his movements were peculiar and suspicious. He was employed, it seems, by an Insurance Company and his business no doubt was to get people who would take policies and arrange for agencies with other people who would extend the business of the company. It would seem that he was at Berhampore about the 4th of the month. It would seem that on the 7th he came to Rajshaye and stayed there till the 11th. It is true that his two co-accused were then putting up with his consent in his room in the mess. It seems that he left Rajshaye on the evening of the day of the occurrence, that next morning he was found at the Ranaghat station, that he spent the time from 11th to 13th again at Berhampore and that he was not finally arrested till some time after that at the house of a relative. All this is very well; but it has nothing in the world directly to do with the attack on the bus. It amounts merely to some evidence of association with Sushil and Dharani, and it shows that he was sufficiently friendly with them to be putting them up in the mess in Rajshahye where he was living. It does not seem to me that it is possible, by saying that when 11th October had passed he was anxious to escape observation or even was doing his best to conceal his whereabouts, that the prosecution can complete what is necessary in order to show that he was a person who concerted with others and agreed with them that this attack on the bus

should be made. The commissioners said that, as he no longer did any business with the Insurance Company, he was thus prepared to sacrifice his employment and his pay rather than to give any clue as to his whereabouts. Be it that he was most anxious to escape observation. The commissioners inferred from this:

"We do think that the other points which we have mentioned above have established beyond reasonable doubt that Rakhal's friendship with the other two accused was not unconnected with the project of dacoity and we find it impossible to hold the facts proved to be consistent with his innocence."

I can only say that to my mind the facts proved are in no way conclusive of an agreement on the part of Rakhal that this attack on the bus should be made. No doubt it may be, for anything that I can say, that the absence of any further evidence against Rakhal is due entirely to the fact that he let the younger people do the work and undertake the peril of his scheme, but that must remain entirely in the region of hypothesis. Until we are first convinced by proper proof that Rakhal was a conspirator, no such consideration can arise. We have to be satisfied that he was agreeing and intending that this attack upon the bus should be made before we can find him guilty of a charge such as has been framed against him. In my opinion, the appeal of Rakhal must be allowed and he must be acquitted and released. As regards the other two accused Sushil and Dharani, nothing has been said upon the question of sentence. The tribunal have sentenced both of them to six years' rigorous imprisonment each. In my opinion, that is a very proper sentence and ought not to be interfered with. Their appeal is accordingly dismissed.

C. C. Ghose, J.—I agree.

Mallik, J.—I agree.

V.B./R.K.

Order accordingly.

1930 Cr. Cases 1073 (Oudh)

RAZA AND NANAVUTTY, JJ.
Prag—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 336 of 1930, Decided on 19th August 1930, from order of Addl. Sess. Judge, Bahraich, D/- 23rd July 1930.

(a) Criminal P. C., (1898) S. 164 — Duty of Magistrate recording confession explained—Data or materials necessary to form estimate as to voluntary nature of confession stated.

It is the Magistrate's duty to satisfy himself in every reasonable way that the confession is made voluntarily, and it is further the imperative duty of the Magistrate to record those questions and answers by means of which he satisfies himself that the confession is in fact voluntary. It is only by recording those questions and answers prior to taking down the story of the accused that the Magistrate recording the confession furnishes data which enable the Court of Sessions and the High Court or the Chief Court to arrive at the same conclusion as that to which the recording Magistrate has come as regards the voluntary nature of the confession. Without these data or materials it is impossible to form any estimate as to the voluntary nature of a confession: *A. I. R. 1925 Cal. 587* and *A. I. R. 1927 Oudh 17, Ref.* [P 1075 C 1, 2]

(b) Practice—Appellate Court—Genuineness and truth of confession and fact of its being voluntary are within exclusive province of Court of Sessions and of High Court—Ready made opinions of recording Magistrate without materials to prove independent opinion will not be accepted.

The Court of Session or the High Court cannot merely accept the ipse dixit of the Magistrate recording the confession as to its being voluntary. The genuineness and the truth of the confession and the fact of its being voluntarily made are matters which are within the exclusive province of the Court of Session and of the High Court, and neither of them can blindly accept the ready-made opinions of the recording Magistrate on these points without having before it materials from which it could arrive at an independent opinion on these questions.

[P 1075 C 2]

(c) Criminal P. C., (1898), S. 533—Scope.

Section 533 is intended primarily to cure a defect of form only and not one of substance: *A. I. R. 1922 Lah. 237, Foll.* [P 1076 C 1]

(d) Criminal Trial—Proper recording of confession is of supreme importance in criminal trials.

The proper recording of confessions which can be shown on the face of them to be voluntary and apparently true is of the highest and supreme importance in criminal trials.

[P 1077 C 1]

Bhawani Shankar—for Appellant.

Ali Mahommed—for the Crown.

Judgment.—These are two connected appeals from a judgment of the Addl.

1930 Cr. C. 135 & 136

tional Sessions Judge of Gonda at Bahraich convicting the appellants Prag Kurmi and Mt. Bishna Kurmin of an offence under S. 302, I. P. C. and sentencing each of them to undergo the extreme penalty of the law. Prag Kurmi and his wife Mt. Bishna have both appealed. The reference in confirmation of the sentences of death is also before us.

The case for the prosecution is as follows:

The deceased Thakur Nanhu Singh was in the service of a zamindar Maulak Ram, and the accused Prag was himself in the employ of Thakur Nanhu Singh. The latter though a married man was of very loose character, being fond of wine and women. For the last year or so he carried on an illicit intrigue with the married daughter of his servant Prag. Her name was Mt. Naraini. Prag resented the efforts of his Thakur Master to debauch his daughter. He entreated Nanhu Singh to desist from his evil designs, but his entreaties fell on deaf ears. Boldly and shamelessly Nanhu Singh took Mt. Naraini with him wherever he went and he even quartered himself at the house of Prag and made Prag's wife and daughter cook food for him; for his was apparently a masterful and domineering personality. In this unsatisfactory manner things went on till 14th January last which was Khichri day, the festival of Makar Shankrant. On that day Nanhu Singh came to Prag's house and told Prag that he (Nanhu Singh) was going to stay there for the night, and ordered Prag to go and sleep at his (Nanhu Singh's) house that night. Prag went away from his house in compliance with his master's orders. Nanhu Singh then ordered Dhonrey Chamar to go to the bazar and buy for him some flour (ata) and ghee and about half a rupee worth of country liquor. Dhonrey went and purchased these articles and gave them to Nanhu Singh. Nanhu Singh drank up the country liquor at once and gave the flour and ghee for the preparation of his evening meal. Dhonrey then went back to his own house. Half an hour later, as his food had not been cooked by then, Nanhu Singh himself went to Dhonrey Chamar's house to have a smoke and chat with him. Over his evening pipe full of the country liquor he had just imbibed,

Nanhu Singh opened out his heart to Dhonrey and bitterly complained to him that though he (Nanhu Singh) had lavished so much money on Mt. Naraini that faithless woman had no love for him (Nanhu Singh) and had run away to her mother-in-law's house at Gajodharpur with Nanku Brahman. After having thus unburdened himself of the sorrow which lay at his heart, Nanhu Singh went back to Prag's house to have his evening meal. Dhonrey, it is said, accompanied him again to his house and it was only after Nanhu Singh had sat down to eat his food that Dhonrey betook himself to his own home.

Next morning (15th January 1930) when Nanhu Singh did not turn up to give orders to the zamindars servants, then Dhonrey asked Ram Jiawan another servant as to where Nanhu Singh was. Ram Jiawan told Dhonrey that he had learnt from Prag that Nanhu Singh had returned late in the night to his own house. Dhonrey then went the next day (16th January 1930) to Nanhu Singh's house and asked his wife about him. Mt. Bitti, Nanhu Singh's wife, told Dhonrey that her husband had not been seen by her since khichri day. The following day the 17th January Prag gave to Nanhu Singh's wife Mt. Bitti at her house a quilt (razai) and sheet (chaddar) belonging to Nanhu Singh, saying that they were left at his house by Nanhu Singh.

Mt. Bitti then made a search for her husband and she informed her brother-in-law Kanchan Singh about his brother's disappearance. On 24th January 1930 Kanchan Singh reported at P. S. Hazurpur that his brother was missing. The thanadar sent for Prag and his wife and daughter, but only Mt. Bishna was found at home. The corpse of Nanhu Singh was recovered from a tank upon certain information given by Mt. Bishna. A Panchayatnama or inquest report was prepared and the corpse was sent to Sadr for post-mortem examination. The Civil Surgeon of Bahraich reported that the probable cause of death was "asphyxia probably by suffocation due to pressure on mouth, nose and chest." Subsequently Prag, Mt. Naraini and Ram Bali Khan were arrested and incriminating statements obtained from them also by the police. All four accused were then put up before a First

Class Magistrate, B. Bhagwati Prasad Sinha to have their confessions recorded. These confessions were recorded on 4th February 1930. The Chemical Examiner reported that the viscera of the deceased Nanhu Singh sent to him for analysis showed traces of some deleterious substance having the properties of dhatura poison. In the light of the Chemical Examiner's report the Civil Surgeon of Bahraich in his deposition before the committing Magistrate enlarged upon his opinion as to the probable cause of death given in his post-mortem report and stated that the deceased may have been first rendered powerless by the administration of some poison like dhatura, and then strangled to death, by pressure on the throat mouth and chest. We shall show later on that this opinion of the Civil Surgeon as to the probable cause of death of Thakur Nanhu Singh has a very direct and crucial bearing on the question as to the genuineness and truth of the confessions of the accused. The investigating police officer after completing his investigation prosecuted Prag and his wife Mt. Bishna and his daughter Mt. Naraini on a charge under S. 302, I. P. C. and he prosecuted Ram Bali Kahar on a charge under S. 201, I. P. C. The learned Additional Sessions Judge has acquitted Mt. Naraini of the charge of murder holding her confession to be false, and believing that on the day when the deceased was killed she was not in her father's house but that she had been taken by Bhiku Kurmi and Nankhu Brahman to Gajodharpur, a day prior to khichri day, i. e., 13th January 1930.

He has however convicted Prag Kurmi and Mt. Bishna his wife on the charge of murder and sentenced each of them to undergo capital punishment. He has also sentenced Ram Bali Kahar for an offence under S. 201, I. P. C., to undergo seven years' rigorous imprisonment, and to pay a fine of Rs. 100. Ram Bali has not appealed, and we are, therefore, not concerned in the present appeals with the question of his guilt or innocence.

It is admitted on all hands that the case for the prosecution against the appellants Prag Kurmi and his wife Mt. Bishna rests primarily upon the confessions made by them. If the confes-

sions are held to be not voluntary and not genuine and true, then it is conceded that the rest of the evidence on behalf of the prosecution is far too inconclusive and insufficient to justify the conviction of the appellants on the capital charge of murder.

The confessions of Prag and Mt. Bishna are typed in Roman Urdu, and the only thing on the record of these confessions in the Magistrate's own handwriting are his signature "B. P. Sinha" at the foot of the confession and at the bottom of the certificate required by law under S. 164, Criminal P. C.

It is with regret, with stern regret, that we note that Babu Bhagwati Prasad Sinha the Deputy Magistrate who recorded these confessions, has completely disregarded the standing orders of Government as to the method in which confessions ought to be recorded. Paras. 852, 853 and 853-A of the Manual of Government Orders, Vol. I, lay down definite rules in this matter for the guidance of all Magistrates throughout British India. These standing orders of the Government are based upon instructions issued by the Government of India and embodied in G. G. O., Home Department, (Police) No. 36-C dated 5th January 1916. In the record of the confessions of Prag and Mt. Bishna (not to speak of the confessions of Mt. Naraini and Ram Bali) in the present case there is nothing to show that Babu Bhagwati Prasad Sinha informed any of these confessing prisoners that he was a Magistrate of the first class empowered under the law to record a confession which could subsequently be utilized in the Court of Session and be sufficient to base a conviction of the confessing prisoner on the capital charge of murder. Had he done so, one of the confessing accused could not subsequently with any show of reason or decency, have urged (as did Mt. Naraini afterwards) that the person recording the confession was understood by the prisoner, to be a police officer and not a Magistrate.

As pointed out by Government in para. 853-A of the Manual of Government Orders quoted above, it is the Magistrate's duty to satisfy himself in every reasonable way that the confession is made voluntarily; and it is further the imperative duty of the Magis-

trate to record those questions and answers by means of which he has satisfied himself that the confession is in fact voluntary. It is only by recording those questions and answers prior to taking down the story of the accused, that the Magistrate recording the confession furnishes data which enable the Court of Session and the High Court or the Chief Court to arrive at the same conclusion as that to which the recording Magistrate has come, as regards the voluntary nature of the confession. Without supplying these data or materials it is impossible for the trial Court (i. e., the Court of Session) or for this Court to form any estimate as to the voluntary nature of these confessions. The Court of Session or this Court cannot merely accept the ipse dixit of the Deputy Magistrate recording the confession as to its being voluntary. The genuineness and truth of the confession and the fact of its being voluntarily made are matters which are within the exclusive province of the Court of Session and of this Court and neither the Court of Session nor this Court can blindly accept the ready-made opinions of the recording Magistrate on these points without having before it materials from which it could arrive at an independent opinion on these crucial questions on which the fate of the accused hangs.

In the present case there is a complete absence of these questions and answers tending to show that the confessions were made voluntarily. The data therefore upon which this Court could have formed a sound and well-founded opinion as to the voluntary nature of the confessions of Prag and Mt. Bishna (with whom alone we are at present concerned) are entirely missing. The learned Additional Sessions Judge, in a legitimate attempt to help the prosecution, examined Babu Bhagwati Prasad Sinha before him. In his deposition, before the Court of Session Babu Bhagwati Prasad Sinha stated that he satisfied himself in each case that "the statements" (i. e., the confessions) were voluntary. We find that with the exception of Prag's confession there is no note of any kind at the commencement of the confessions of Mt. Bishna, Mt. Naraini or Ram Bali to show what steps this Deputy Magistrate took to satisfy

himself that these confessions were voluntary. Further in his cross-examination, Babu Bhagwati Prasad Sinha admitted that he did not remember what questions he asked the accused prior to recording their statements, nor did he enter them on the proceedings connected with the recording of those statements. That being the case, it is not possible for this Court to form any opinion as to the voluntary nature of these confessions, and even the Deputy Magistrate who recorded those confessions was, according to his own deposition in the Court of Session, not in a position to say then that these confessions were voluntarily made.

Convictions and beliefs in respect of the voluntary nature of a confession that have been strained through the crucible of a record of confession properly and carefully prepared, with due prudential regard to the interests of the confessing accused, and after making him fully realise the dreadful and terrible consequences of making a confession which will send him straight to the gallows, differ immeasurably in solidity and weight from those airy beliefs to which Babu Bhagwati Prasad Sinha has given expression in the typed certificates which he has perfunctorily signed at the foot of each of these four confessions of Prag, Bishna, Naraini and Ram Bali as required by S. 164, Criminal P. C. We do not agree with the learned Additional Sessions Judge of Bahraich in considering that these grave and serious defects in the procedure of Babu Bhagwati Prasad Sinha which go to the root of the matter and which injuriously affect the accused in their defence on the merits can be cured by the provisions of S. 533, Criminal P. C. That section in our opinion is primarily intended to cure a defect of form only, and not one of substance. Thus, for instance, if perchance Babu Bhagwati Prasad Sinha had omitted to append at the foot of each of these confessions the certificate required by S. 164, Criminal P. C., but had, on the other hand, brought on the record an account of all the steps he took to satisfy himself that the confessions were voluntarily made and if he had questioned the confessing prisoners with a view to ascertaining the exact circumstances in which these confessions were made and

the connexion of the police with them, and if he had endeavoured to record the confessions of each of the four accused brought before him in as much detail as possible with a view to affording material and internal evidence from which their genuineness could be judged and whether they were freely made or were the outcome of suggestion, and the questions and answers referred to above were fully recorded so as enable one to detect any misuse of his powers on the part of the Magistrate, then in that case we would have been ourselves the first to apply the provisions of S. 533, Criminal P. C., to cure that defect, for obviously it was one of form only and not of substance.

In the present case however the facts are very different. The Deputy Magistrate, Babu Bhagwati Prasad Sinha, when he was asked to record the confessions of the accused failed to realise that he was asked to create new evidence on behalf of the prosecution, to forge, in fact, the strongest link in the chain of evidence that was to send these accused to the gallows. In these circumstances it behoved him not only as a Magistrate discharging his legitimate judicial duties but even as a mere man clothed with ordinary decent human instincts and human sympathy to take a little human interest in these unfortunate fellowmen brought before him and to make them fully understand where they stood and before whom, to remove from their minds all fear of the police and all wordly hope of pardon or any other benefit, to bring to them the fact that there was no police round about them at the time they were brought before him to confess, and above all that there was no need for them to make any statement or confession of any kind and thereby to put the halter round their necks unless they desired to make their peace with God or were urged by some irresistible impulse to do so. The record of the confessions before us shows how utterly callous and indifferent B. Bhagwati Prasad Sinha was as to the fate of these accused. He did not look upon the recording of these confessions as work of the highest importance inasmuch as he was asked to create fresh evidence of supreme importance in a murder case. Such work called for the

sound and discreet exercise alike of the powers of the intellect as of the heart. But the labour of recording these confessions did not strike B. Bhagwati Prasad Sinha in that light. He looked upon his work as Treasury Officer as his legitimate work and the recording of these confessions as a piece of forced labour (begar) to be finished somehow in the quickest manner possible. We regret to have to make these trenchant observations, but the proper recording of confessions which can be shown on the face of them, to be voluntary and apparently true is of the highest and supreme importance in criminal trials, especially in those of murder and dacoity and the consequences of B. Bhagwati Prasad Sinha's mistakes are tragic indeed, for, thanks to his blunders, the murder of Nanhu Singh must now go unpunished.

We next turn to consider the truth of these confessions of Prag and his wife. The learned Additional Sessions Judge has expressed

"grave doubts as to the truth of the contents of the confession of Mt. Naraini."

He has believed the evidence of the defence witnesses Bhiku and Nanku and others who deposed that Mt. Naraini had gone to Gajodharpur to her mother-in-law's house on 13th January 1930, a day before Nanhu Singh came to Prag's house and was murdered on the night of 14th January 1930. We have carefully examined the evidence of Dhonrey Chamar. He deposed in the Court of Session, as well as before the police in the course of the thanadar's investigation (Ex. B), that the murdered man Nanhu Singh complained to him that Mt. Naraini, in spite of all the love and money that he had lavished on her, had proved a fickle and faithless woman and had deserted him that Khichri day by running away with Nanku Brahman to her mother-in-law's house at Gajodharpur. The evidence of the defence witnesses of Mt. Naraini, namely Bhiku (D. W. 1), Parbhu (D. W. 2), Raghubar (D. W. 3) and of Nanku Brahman (D. W. 4), fully corroborates the truth of the remarks of Nanhu Singh quoted by Dhonrey as to Mt. Naraini's absence from her father's home that fatal Khichri day. We have read and re-read the original deposition of Dhonrey in Urdu, and

we are satisfied by the turn of the phrase used by Dhonrey that Nanhu Singh was referring not to any previous visit of Mt. Naraini to her mother-in-law's house but to the very last visit of hers made the day before Khichri day. There is also internal evidence to corroborate this fact in the statement of Dhonrey (Ex. B) in which Dhonrey nowhere mentions the presence of Mt. Naraini at her father's house on the day that Nanhu Singh arrived there on 14th January 1930. In his statement (Ex. B) Dhonrey does not state that Nanhu Singh gave the flour and ghee to Mt. Naraini to cook his evening meal. For the first time in the committing Magistrate's Court, Dhonrey introduces the story of Nanhu Singh giving flour and ghee to Mt. Naraini to cook puris for him. We have no hesitation in coming to the conclusion that this portion of Dhonrey's evidence in Court is false. We have no doubt that Mt. Naraini was not at her father's home on the night of the murder, and that her confession as well as the confessions of her father and mother on this point are absolutely false. It is beyond our powers to explain why father, mother and daughter all three, chose to make a false confession on this point, but the fact remains that they did so, and that being our opinion, these confessions must be rejected on this ground also as being utterly worthless and unreliable.

Then again there is a clear contradiction between the confession of Prag and that of his wife as to who mixed the poison in the food which Nanhu Singh ate. According to the confession of Prag poison was mixed in the food by Mt. Naraini, whilst Mt. Bishna in her confession stated that it was she who mixed the powder in the food which Nanhu Singh ate. According to both these confessions Nanhu Singh fell down in a heap the moment he had eaten the poisoned food and died shortly afterwards. Now the medical evidence goes directly against this portion of the confession. The Civil Surgeon deposes, that death was due to asphyxia, probably by suffocation due to pressure on mouth, nose and chest. Even when the Chemical Examiner's report was received which showed that the viscera of Nanhu Singh contained some deleterious substances like dhatura, the Civil Surgeon stuck to

his opinion that although the man may have been rendered powerless by the administration of poison, still his death was caused by suffocation. Not a word is said by either of the confessing accused that anybody throttled Nanhu Singh by pressing his mouth, and nose or chest. According to the medical evidence death was not due to the administration of poison and so the accused cannot, even on their own confessions be held guilty of an offence under S. 328, I. P. C. The confessions of both accused do not reveal the commission of any such acts as resulted in the murder of Nanhu Singh whose death in the opinion of the Civil Surgeon was caused by asphyxia. In plain English the accused Prag and Mt. Bishna do not admit that they suffocated Nanhu Singh after having administered some poisonous stuff to him. On this point, as to the cause of death of Nanhu Singh, we prefer to accept the testimony of the Civil Surgeon rather than the tainted confessions of Prag and Mt. Bishna. In arriving at this conclusion we have been also influenced by the further consideration that the living do not give up their secrets with the candour of the dead.

The results of our scrutiny of these confessions of Prag and Mt. Bishna have thus far shown that not only are these confessions not voluntary, but they are also false in two important and essential particulars, namely as to the presence of Mt. Naraini on the night of the murder and as to the manner in which Nanhu Singh was done to death. Envisaging the story told in these confessions of Prag and Mt. Bishna as a whole we find that there are many other latent defects besides the shortcomings pointed out above. If Nanhu Singh realized that the Kurmin, Mt. Naraini, had no love for him, would he venture to give her a poisonous powder to be administered to her own father? When and where was poison given by Nanhu Singh to Naraini? How long did Naraini keep it with her? When did she tell her father about it? Where did she keep it? Who really administered the powder to Thakur Nanhu Singh? Why was this powder administered in Prag's house where his whole family ran the risk of being charged with murder when it could have been secretly administered with much greater safety at Nanhu Singh's own

house? These and many other similar and cognate questions arise out of the story told in these confessions, but no answer can be given to any of these queries, because the record of the confessions is incomplete, apart from any question as to the falsehood of these confessions.

We have given these confessions of Prag and Mt. Bishna our very best consideration, and we have come to the conclusion after much serious thought that these confessions are not only, not voluntarily made, but are also false and untrue, and we have therefore no hesitation in rejecting them as worthless and of no evidentiary value, and in fact not even admissible in evidence.

The principles that have guided us in arriving at the conclusion to which we have come, have received judicial recognition from all High Courts in India. In *Emperor v. Panchkauri Dutt* (1) it was laid down by the Calcutta High Court that to ensure the voluntariness of a confession the Magistrate must question the accused before the latter makes his confession, that the Magistrate must make a real endeavour to ascertain whether the prisoner was about to make a voluntary confession by questions directed to the eliciting of facts which would enable him to judge of the character of the confession, that it was not sufficient for the purpose merely to ask the accused whether his confession was voluntary or to put a few formal questions or some set formulæ which the prisoner could scarcely comprehend. It was further held in that case that the omission to warn the accused that he was before a Magistrate was material. It was also laid down in this ruling that if there was a doubt as to the admissibility of a confession, then the prosecution must satisfy the Court affirmatively that it was made voluntarily, otherwise the Court should reject it.

In *Farid v. Emperor* (2) it was held by a Bench of the Lahore High Court consisting of the Hon'ble the Chief Justice and Martineau, J., that as the Magistrate failed to question the confessing prisoner as to whether he was making his statement voluntarily, and

(1) A. I. R. 1925 Cal. 587=86 I. C. 414=26 Cr. L. J. 782=52 Cal. 67.

(2) A. I. R. 1922 Lah. 287=65 I. C. 613=23 Cr. L. J. 149=2 Lah. 325.

as that omission prejudiced the accused in his defence, on the merits the confession was inadmissible in evidence, and the defect which was one of substance and not of form only could not be cured by S. 533, Criminal P. C. In *Raj Bahadur Singh v. Emperor* (3) a Bench of this Court, to which one of us was a party, laid down in some detail what particular steps a Magistrate should take so as to satisfy himself that the confession was voluntarily made before he started recording the confession of the accused.

The circumstances of each case vary, and the form of the question put by the Magistrate so as to satisfy himself that the prisoner is in fact making a voluntary confession may also in consequence vary, but fundamental principles must ever remain constant, and their application needs only the exercise of a little intelligence and a little sympathy and understanding on the part of the Magistrate of the needs and the limitations of the confessing prisoner.

The confessions in the present case, it may be noted, were retracted by Prag and Mt. Bishna in the Court of Session; but before the committing Magistrate both Prag and Mt. Bishna admitted the correctness of their confessions. In face of their absolute denial of the charge of murder before the committing Magistrate, these acknowledgments of the correctness of their confessions are meaningless and inconsistent with their plea of not guilty, and merely betray the low standard of intelligence of these Kurmi accused, besides revealing the fact that the confessions in question were not made voluntarily.

If the confessions are rejected as inadmissible in evidence and as false then the rest of the prosecution evidence merely consists in the recovery of the corpse of Nanhu Singh at the instance of Mt. Bishna and the story of the illicit connexion between Mt. Naraini and Nanhu Singh as furnishing the motive for the murder of Nanhu Singh by these appellants.

Even if the story as to the illicit connexion between Nanhu Singh and Mt. Naraini be accepted as correct, that will not help to advance the case for the prosecution on the actual charge of

murder in the absence of any evidence, direct or circumstantial, connecting these appellants with the murder of Nanhu Singh. As to the evidence regarding the recovery of the corpse at the instance of Mt. Bishna, that only goes to prove that Mt. Bishna knew something about the disposal of the corpse, but it will not by itself be sufficient to justify the charge of murder of Nanhu Singh by Mt. Bishna. Even the presence of Nanhu Singh at the house of Prag, though it may raise grave suspicions against Prag as to his complicity in the murder, would not, in the absence of any other evidence, direct or circumstantial, connecting him or his wife with the murder of Nanhu Singh, justify this Court in finding either of them guilty of murder. For the reasons given above we are constrained to allow these appeals. We accordingly set aside the convictions and sentences passed upon the appellant Prag and Mt. Bishna, acquit them of the offence charged and order their immediate release.

G.P./R.K.

Conviction set aside.

1930 Cr. Cases 1079 (Oudh)

RAZA AND NANAVUTTY, JJ.

Bachchu—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 70 of 1930, Decided on 25th July 1930, from order of Spl. Sess. Judge, Bahraich, D/- 11th January 1930.

(a. Penal Code, S. 400—Nature of evidence necessary for conviction under S. 400.

The term "belong" in S. 400, implies something more than the idea of casual association; it involves the notion of continuity and indicates a more or less intimate connexion with a body of persons extending over a period of time sufficiently long to warrant the inference that the person affected has identified himself with a band, the common purpose of which is the habitual commission of dacoity: 13 O. C. 243, *Ref.* [P 1082 O 2]

It is not necessary for a conviction under S. 400, I. P. C., that the person convicted must have taken part in any one dacoity. Evidence showing the actual participation by an accused in any given dacoity is evidence both of his association with the gang and of his object in such association. Evidence which though not believed for the purpose of a conviction under S. 395, I. P. C., may yet be relied upon for the purpose of a conviction under S. 400, I. P. C. A conviction under S. 400, I. P. C., cannot be considered bad in law merely because the evidence on the record would also have justified

(3) A. I. R. 1927 Oudh 17=98 I. C. 106=27 Cr. L. J. 1258.

a conviction of a specific offence under S. 895, I. P. C. : 13 O. C. 235 and A. I. R. 1929 *Oudh* 321, *Ref.* [P 1032 C 2]

(b) Evidence Act, S. 133—It is not safe to convict on the sole testimony of accomplice unless corroborated in material particulars by direct or circumstantial evidence.

The evidence of accomplices is always admissible and is always relevant, but under a very old practice of the Courts in England some evidence is accepted only with great caution and after the closest scrutiny and is not usually accepted against any individual person unless it is corroborated. Although it is not illegal to convict on the uncorroborated evidence of an accomplice, there is a consensus of opinion that a conviction on the uncorroborated evidence of an accomplice is rarely justified. The practice in India is the same as the practice in England. The evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words it must be evidence which implicates him, that is, which confirms in some material particulars not only the evidence that the crime has been committed, but also that the prisoner committed it. The corroboration need not be direct evidence that the accused committed the crime, it is sufficient if it is merely circumstantial evidence of his connexion with the crime: A. I. R. 1927 *Oudh* 369, *Ref.* [P 1033 C 1]

(c) Criminal Trial — Identification of accused — Evidence of identification is admissible though its value is weakened subsequently.

The power to identify varies according to the power of observation and observation may be based upon small minutiae which a witness cannot describe himself or explain. It is impossible to lay down any useful principles as to the exact amount of identification which is required in any particular case. The Court will consider the value of the evidence of identification against each accused, and satisfy itself as to whether the man is or is not guilty: A. I. R. 1928 *Oudh* 430, *Ref.*

The evidence which goes to prove that a person has identified another person as having taken part in a particular offence either in jail identification proceedings or elsewhere is admissible though the value of such evidence is weakened perceptibly as a general rule by failure to identify subsequently in Court: A. I. R. 1927 *Oudh* 598, *Ref.* [P 1033 C 1]

(d) Evidence Act, S. 14 — Evidence of previous conviction, admissible aliunde, should not be excluded—It is admissible to prove habit and association for conviction under Penal Code, S. 400.

Where the evidence of previous conviction or the evidence that a man has been bound over under the preventive sections can be considered only as evidence of character it must be excluded, but where such evidence is admissible aliunde, it should not be excluded. Where the accused is charged under S. 400, I. P. C., such evidence is admissible, not as evidence of character but as evidence to prove habit and association. [P 1033 C 2]

(e) Criminal P. C., S. 403—Acquittal on charge of dishonest possession of property

stolen in dacoity is no bar to prove that the accused actually took part in the dacoity.

Where a man has been tried and acquitted on a charge of being in dishonest possession of property stolen in a dacoity knowing or having reason to believe that the property was stolen in a dacoity it is open to the Crown to prove that he actually took part in the dacoity, for the latter was not the offence of which he was acquitted. Even if he has been acquitted on a charge of dacoity it is open to the Crown to prove that the day before the dacoity he was seen in the neighbourhood of the dacoity: A. I. R. 1928 *Oudh* 430, *Ref.* [P 1033 C 2]

H. K. Ghosh—for the Crown.

Judgment.—These appeals (Nos. 70 to 90, 157 to 184 and 197 of 1930) arise out of a gang case known as the Bahraich gang case. This was the principal case (Sessions Trial No. 1 of 1929). Seventy persons were sent up for trial in this case. In the supplementary case (Sessions Trial No. 4 of 1929) only one person, namely, Gur Charan was tried. Gur (sic) Charan also appealed and his appeal is No. 91 of 1930. Thus 71 persons in all were placed on their trial on a charge under S. 400, I. P. C. Of these 71 persons, 16 were acquitted and the remaining 54 convicted by the learned Additional Sessions Judge of Bahraich. The charge against one man, namely Ramzan, was withdrawn. It appears that he was seriously ill and has since died. Of the 54 persons convicted by the learned Judge, 20 were sentenced to transportation for life and the remaining 34 to ten years' rigorous imprisonment each. 51 out of 54 persons convicted by the learned Judge have appealed to this Court. The remaining three persons, namely, Nanhu, Parbhu Din and Ram Prasad, who have been sentenced to transportation for life, have not appealed. It is to be noted that out of the 54 persons convicted, 51 were found guilty by all the four assessors who assisted the learned Judge in the decision of these cases. The only three persons who were not found guilty by the assessors were Ajudhia Prasad, Babadin Singh and Mohammad Zaman Khan alias Kanabadoh.

The appellants were not represented by any counsel in this Court at the hearing of these appeals; but we have examined the record carefully to see whether the evidence on record is sufficient to justify the conclusion that they were concerned in the crime. We should like to note also that the learned

Government Advocate has laid before us the whole evidence, in a fair and proper manner. The charge against each appellant was that he belonged to a gang of persons associated for the purpose of habitually committing dacoities during the period between January 1924 and October 1927.

There are jungle tracts in the northern part of the Bahraich District which have since time immemorial given refuge to criminals of every description. This area is near the border of the Nepal State. The evidence on record shows that the dacoits had their rendezvous in this area, which was the scene of their operations. Bands of dacoits used to sally forth from these jungles for the purpose of committing dacoities. There are 28 dacoities which we have to take into consideration in disposing of these appeals. The detail is as follows:

Name of dacoity.	Date.
1. Santalia Sarak Danda ...	January 1924.
2. Gajpatipurwa ...	1st Feb. 1924.
3. Raniser Badla ...	15th Feb. 1924.
4. Pathawapur ...	27th April 1925.
5. Murtazapur Kharia H- san ...	10th Aug. 1925.
6. Sahdei ...	11th May 1926.
7. Sunrai ...	18th May 1926.
8. Raidih Bahorwa ...	5th Sep. 1925.
9. Krihipurwa Narainapur.	23rd Jan. 1927.
10. Chandampur ...	Do.
11. Khairia Jungle ...	24th Jan. 1927.
12. Chhitallahwa Lakkurshah	15th Feb. 1927.
13. Shankarpur ...	28th Feb. 1927.
14. Kirhipurwa Balsinghpur.	March 1927.
15. Banjaran Tauda ...	23rd April 1927.
16. Pairwa ...	9th May 1927.
17. Parsa Dheria ...	20/21st June '27.
18. Majhawan ...	20th Sep. 1927.
19. Piprahwa Chak ...	22nd Sep. 1927.
20. Chhasarka Abdullaganj.	8th Oct. 1927.
21. Amrahwa ...	9th Oct. 1927.
22. Phul Takra ...	Do.
23. Malonapurwa ...	Do.
24. Ramlalgaon ...	19th Oct. 1927.
25. Karinga (Bhagwanpur).	19/20th Oct '27.
26. Manohra Chak ...	25th Oct. 1927.
27. Chaugoin ...	26th Oct. 1927.
28. Ganeshpur ...	26/27th Oct. '27.

Balraj Singh, Mahadeo Singh, Hukum Singh and Turab were convicted in the Ganeshpur dacoity under S. 396, I. P. C., on 8th March 1928. They were sentenced to death subject to confirmation by this Court. The sentences were confirmed by this Court on 5th April 1928. It appears that these men were hanged some time in May 1928.

Two persons, namely, Banwari Bania and Danku Gararya were made approvers and examined as such in the principal case. Banwari speaks of eight dacoities in which he himself has taken part along with the members of his gang. These dacoities were committed at Santalla Sarak Danda, Sahdei, Sungai, Ramlalgaon, Haringa (Bhagwanpur), Manohra Chak, Chaugoin and Ganeshpur. Danku gives evidence about one dacoity only which was committed at Pairwa on 9th May 1927. All other dacoities out of the 28 dacoities mentioned above have been proved by other evidence. It appears that the Bahraich police had been on the look-out for the dacoits long before October 1927. They tried their best to capture the gang and armed police were posted on duty at various places in the district. The Superintendent of Police visited different places with mounted and armed police and the Nepal Government police also started similar operations on their side of the border. Sub-Inspector Umrao Singh received information on 15th May 1927 that dacoits had assembled at the house of Ram Bilas accused on the pretence of celebrating the Janco ceremony of the son of Ram Bilas. He gave the necessary information to the Superintendent of Police, Mr. Waddell, who with the Sub-Inspector and the Circle Inspector and armed and mounted police raided the house of Ram Bilas. Ram Bilas was found at the house of one Bansidhar in the same village. He was captured and a bag of ammunition was found at the head of his bed. Bansidhar made over a gun to the police admitting that it belonged to Ram Bilas. Bachan and Sattan accused were also arrested at the same time. Ram Bilas was convicted under the Arms Act and proceedings were taken against Bachan and Sattan under the preventive sections of the Code of Criminal Procedure. Banwari (approver) was arrested on 28th October 1927 in Abdullaganj forest with his companions Walidin, Beraï and Nanbu Lonia immediately after the night on which the Ganeshpur dacoity was committed. He made a confession before Mr. Mohammad Abbas Khan, Deputy Magistrate, on 30th October 1927 naming his associates and several of them were arrested by the police. The information which the police re-

ceived from Banwari helped them in arresting Turab, Mahadeo Singh, Banney Chhutkao, Baolu, Hukum Singh and others. Then many other persons of the gang were arrested. Danku (approver) was arrested in August 1927 and he also gave useful information to the police about the gang. It was decided after the arrest of Banwari, Danku and others that the arrested persons should be tried together in a gang case and the charge of the case was made over to the Special Dacoity Police. Rai Sahib Nand Kishore Inspector was placed in charge of the case and Umrao Singh, Sub-Inspector was appointed to help him. It appears that Danku had committed several dacoities before he had committed the dacoity at Pairwa in May 1927. He had however committed only one dacoity out of the 28 dacoities mentioned above. He and his small gang had joined Banwari's gang in the beginning of May 1927 and the Pairwa dacoity was then committed on 9th May 1927. Hukum Singh, Balraj Singh, Turab, Nazar Muhammad Khan, Banwari, Danku and Ram Bilas were said to be the leaders of the gang. It appears that Nazar Muhammad Khan was a resident of Nanpara and had removed to Nepal and was sent to jail there. He however succeeded in escaping from the jail and is now one of the accused in this case. Turab while lying under sentence of death in the Fyzabad jail made a full and detailed confession before Mr. Ramakant, Deputy Magistrate, on 10th and 11th April 1928. This confessional statement was produced before the learned Judge, but he rejected it on the ground that Turab was hanged before his statement could be taken in Court and that the statement in question could not be used against any of the accused in the present case. The learned Government Advocate has asked us to admit the document in evidence under S. 32, Cl. (3), Evidence Act. It need not be decided in this case whether or not the confessional statement in question is admissible in evidence as we are satisfied that the rest of the evidence on the record sufficiently establishes the guilt of the appellants before us.

We have carefully considered the whole evidence produced in this case. The prosecution have produced evidence to prove the dacoities mentioned above.

They have also produced evidence of identification and evidence of specific and general association and also evidence of recovery of arms and ammunitions and some of the stolen property. Some evidence has also been produced to prove previous convictions of some of the accused. Evidence of this description is generally produced in gang cases.

Before discussing the case of each individual appellant, we think it proper to refer to some principles of law, which should be borne in mind in considering the evidence produced in gang cases under S. 400, I. P. C.

Section 400, I. P. C., is in the following terms:

"Whoever, at any time after the passing of this Act, shall belong to a gang of persons associated for the purpose of habitually committing dacoity, shall be punished with transportation for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine."

The term "belong" in S. 400, I. P. C., implies something more than the idea of casual association; it involves the notion of continuity and indicates a more or less intimate connexion with a body of persons extending over a period of time sufficiently long to warrant the inference that the person affected has identified himself with a band, the common purpose of which is the habitual commission of dacoity: see *Hira Lal v. Emperor* (1).

It is not necessary for a conviction under S. 400, I. P. C., that the person convicted must have taken part in any one dacoity. Evidence showing the actual participation by an accused in any given dacoity, is evidence both of his association with the gang and of his object in such association. Evidence which though not believed for the purpose of a conviction under S. 395, I. P. C., may yet be relied upon for the purpose of a conviction under S. 400, I. P. C. A conviction under S. 400, I. P. C., cannot be considered bad in law merely because the evidence on the record would also have justified a conviction of a specific offence under S. 395, I. P. C.: see *Gaya Din v. Emperor* (2) and *Lala v. Emperor* (3).

(1) [1910] 13 O. C. 243=11 Cr. L. J. 554=7 I. C. 1012.

(2) [1910] 13 O. C. 235=11 Cr. L. J. 551=7 I. C. 1006.

(3) A. I. R. 1929 Oudh 321=1929 Cr. C. 143 =118 I. C. 423=30 Cr. L. J. 922.

The evidence of accomplices is always admissible and is always relevant, but under a very old practice of the Courts in England such evidence is accepted only with great caution and after the closest scrutiny, and is not usually accepted against any individual person unless it is corroborated. Although it is not illegal to convict on the uncorroborated evidence of an accomplice, there is a consensus of opinion that a conviction on the uncorroborated evidence of an accomplice is rarely justified. The practice in India is the same as the practice in England. The evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words it must be evidence which implicates him, that is, which confirms in some material particulars not only the evidence that the crime has been committed, but also that the prisoner committed it. The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connexion with the crime: see *Ram Prasad v. Emperor* (4).

The power to identify varies according to the power of observation and observation may be based upon small minutae which a witness cannot describe himself or explain. It is impossible to lay down any useful principles as to the exact amount of identification which is required in any particular case. The Court will consider the value of the evidence of identification against each accused, and satisfy itself as to whether the man is or is not guilty: see *Khilawan v. Emperor* (5).

The evidence which goes to prove that a person has identified another person as having taken part in a particular offence either in jail identification proceedings or elsewhere is admissible though the value of such evidence is weakened perceptibly as a general rule by failure to identify subsequently in Court: see *Parbhu v. Emperor* (6).

In criminal proceedings, evidence that an accused person has a bad cha-

racter is inadmissible unless evidence has been given that he has a good character, in which case it becomes admissible. But S. 54, Evidence Act, does not apply to cases in which the bad character of any person is itself a fact in issue. If the evidence of bad character is introduced in order to establish a relevant fact, which cannot be proved aliunde, the evidence of bad character is admissible. One illustration is, where evidence is given in a case of murder to prove that the accused had committed a theft, such evidence would ordinarily be excluded as evidence of character. But in a particular case its introduction would be justified to prove a motive for the accused having murdered a person who had brought a charge of theft against him. Where the evidence of previous conviction or the evidence that a man has been bound over under the preventive sections can be considered only as evidence of character it must be excluded, but where such evidence is admissible aliunde it should not be excluded. Here the provisions of S. 14, Act. 1, 1872 have application. Such evidence is admissible, not as evidence of character but as evidence to prove habit and association. Once a man has been acquitted on a charge of that nature it is not open in a subsequent criminal prosecution to prove that he actually committed that offence. The case is of course different where the prosecution is endeavouring to establish an offence with which he was not charged in that case. For example, where a man has been tried and acquitted on a charge of being in dishonest possession of property stolen in a dacoity knowing or having reason to believe that the property was stolen in a dacoity it is open to the Crown to prove that he actually took part in the dacoity for the latter was not the offence of which he was acquitted. Even if he has been acquitted on a charge of dacoity it is open to the Crown to prove that the day before the dacoity he was seen in the neighbourhood of the dacoity: see *Khilawan v. Emperor* (5) at pp. 768 and 769 (of 5 O. W. N.).

After having been through the voluminous record we are not prepared to disagree with the finding of the learned Judge that there was really a gang of

(4) A. I. R. 1927 Oudh 362=106 I. C. 721=2 Luck. 681.

(5) A. I. R. 1929 Oudh 480=112 I. C. 337=29 Cr. L. J. 1009.

(6) A. I. R. 1927 Oudh 598=104 I. C. 626=28 Cr. L. J. 850.

persons associated for the purpose of habitually committing dacoities and that the evidence given by the approvers is sufficiently corroborated, by other reliable evidence on the record. The approvers' evidence is not the only evidence in this case. They have given evidence of about nine dacoities only and other dacoities are proved by other reliable evidence. "It is satisfactorily established that the appellants before us really belonged to a gang of dacoits. The learned Judge has tried the case with great care and intelligence. He has tested the evidence carefully, and if any criticism can be directed against his treatment of the evidence, that criticism can only be that he has tested the evidence too strictly. This fact makes his findings all the more strong.

We now proceed to discuss the case of each appellant individually. It will be convenient to take up the appeal of each appellant in the order in which the individual cases were taken up by the learned Sessions Judge. (Their Lordships after considering the conviction of each accused held that it was proper in all the cases and proceeded.) The result is that all the 51 appeals fail and must be dismissed. The appellants belong to a dangerous gang of dacoits. Having regard to their criminal activities we think the sentences are not excessive.

We have to express our appreciation of the good work done by Mr. Mohammad Akbar Khan in conducting the prosecution in these cases. We also entirely agree in the remarks made by the learned Additional Sessions Judge as to the admirable work done by Rai Sahib Pt. Nand Kishore Tiwari in these cases.

K.N./R.K.

Appeal dismissed.

1930 Cr. Cases 1084

(Oudh)

NANAVUTTY AND RAZA, JJ.

Gendan Lal—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 300 of 1930, Decided on 19th August 1930.

(a) Penal Code, S. 302—Conviction should not be based on probabilities and suspicions.

"Probabilities and suspicions are not sufficient grounds in law upon which to found a conviction of an accused in a criminal trial spe-

cially in a murder trial where the maximum punishment is death. [P 1087 C 1]

(b) Penal Code, S. 302—Prosecution witness found untruthful as to greater part of evidence—Accused should not be convicted on residue without corroboration—Evidence Act, S. 114.

Where the prosecution witnesses are found to be untruthful as to the greater part of their evidence, it is dangerous to convict the accused on the residue without corroboration: 42 Cal. 784, *Foll.* [P 1087 C 2]

St. G. Jackson and *S. N. Roy*—for Appellant.

Ali Mohammad—for the Crown.

Judgment.—This is an appeal from the judgment of the learned Additional Sessions Judge of Kheri convicting the appellant Gendan Lal of an offence under S. 302, I. P. C., and sentencing him to transportation for life.

The case for the prosecution is as follows:

On the morning of 28th March 1930 the deceased Ghurai with his brothers Chotai (P. W. 5) and Kedar (P. W. 6) went to cut the standing crops in the wheat fields of Ram Dayal. Some two gharis before sunset the three brothers returned to their home in Barwar. When they reached the field of Debi Din in Fakhrapur nine men who lay in ambush rushed out of an arhar field with lathis in their hands. These nine men were Debi Din, Sundar, Bisheshwar, Ram Bilas, Salik, Gangaram, Ramzani, Mahadeo and lastly Gendan Lal, the appellant before us. Bisheshwar ordered Ghurai to stop. Ghurai refused to do so and tried to run away, but Bisheshwar quickly struck him a lathi blow on the head with the result that Ghurai fell down on the ground. Debi Din then called out to his men to kill Ghurai as he lay senseless on the ground and thereupon all the nine men jointly began to beat Ghurai's prostrate body with their lathis. Hearing the order of Debi Din, and seeing their brother Ghurai fall down and being belaboured by lathi blows by all these nine men, Chotai (P. W. 5) and Kedar (P. W. 6) raised an alarm and ran towards their home in Barwar. When they reached the abadi or populated site of the village, they met Har Dayal and they told him that their brother Ghurai was killed by these nine men whose names they also took. They also told Bhola, Piare Lal, Ramdin and Din Dayal the same story, and then, accompanied by Din

Dayal and about fifteen or twenty other men, the two brothers, Chotai and Kedar, went back to the spot where Ghurai had been attacked. Ghurai was found lying dead in the field of Debi Din. Chowkidar Gendai, with two or three other men, was left to watch the dead body and Chotai and Kedar and others returned to Dir Dayal's house. Din Dayal wrote out the report to the dictation of Chotai and Kedar and the two latter signed it (Ex. 3). Maiku chowkidar took this written report (Ex. 3) to the thana; Chotai and Kedar refused to go with the chowkidar to the police station as they feared that their enemies might kill them on the way. The thana munshi came to the village the next day and after preparing a panchayatnama or inquest report sent the corpse of Ghurai to Gola for post-mortem examination. The thanadar came the same day in the afternoon and after completing his investigation prosecuted eight men, viz. Debi Din, Ram Bilas, Sundar Lal, Salik Ram, Bisheshwar Dayal, Ramzani, Mahadeo and Gendai on a charge under S. 302, I. P. C. Gangaram could not be arrested and he was shown as absconding.

The motive for the murder of Ghurai was alleged to be the longstanding enmity between Ghurai on the one hand and Debi Din and Bisheshwar on the other. About a year ago Ghurai married Mt. Ram Kali, daughter of Din Dayal. Debi Din and Bisheshwar wanted that Mt. Ram Kali should be married to Gangaram, the same accused person who is at present absconding. Gangaram is the brother-in-law of Bisheshwar accused. Din Dayal refused to marry his daughter to Gangaram whose Brahmin subcaste was according to him inferior to his own. When Ghurai's marriage to Ram Kali was settled Bisheshwar and Debi Din threatened Ghurai and told him they would be even with him one day. Ghurai made a report under S. 506, I. P. C., at the thana in Asarh last. Ghurai was in the service of Debi Din. After his marriage with Ram Kali, Ghurai was again threatened by Bisheshwar, Debi Din and Gangaram who told him that they would yet be the death of him. Ghurai then left his brothers and began to live with his wife in Raja Ram's house. It so happened that Raja Ram

was also once beaten at night, and his house was set on fire on another occasion. This is the alleged motive for the murder of Ghurai. It is significant to note that no personal enmity between Ghurai and appellant is alleged, nor is the appellant Gendai said to have any motive for joining in the murder of Ghurai.

Of the eight men prosecuted by the police, the learned Additional Sessions Judge has acquitted seven holding that they were falsely implicated in this case. He convicted Gendai alone on a charge under S. 302, I. P. C. and sentenced him to transportation for life. The learned Additional Sessions Judge has given very good reasons for acquitting Debi Din and the six others prosecuted along with Gendai; and it has been strenuously argued on behalf of Gendai, appellant, by his learned counsel, Mr. St. George Jackson, that the same reasons which led the learned trial Judge to acquit these men apply with equal force to the case of his client also.

The excellent reasons given by the learned Additional Sessions Judge for holding that Debi Din, Bisheshwar and others were not concerned in the murder of Ghurai command the assent of our intellect. It has been held, and rightly held, that Bisheshwar did not begin the attack on Ghurai by striking the first blow and that Debi Din did not tell his men to beat Ghurai all in a body as the latter lay on the ground. The medical evidence clearly shows the falsity of this portion of the prosecution story, for the medical officer in charge of the dispensary deposes that there were five contused wounds all on the head of the deceased and there was only one other injury, viz. a bruise, on the left knee. Except for these injuries the rest of the body of Ghurai bore no marks of hurt. Had eight or nine men, as alleged by Chotai and Kedar, struck Ghurai repeatedly as he lay flat on the ground, there would have been innumerable injuries on the side, ribs, thighs, buttocks and legs of the deceased besides the injuries on the head. The absence of all injuries on the lower part of the body except the bruise on the knee goes to show that the story that all eight or nine men struck Ghurai as he lay on the

ground with lathi blows is not true. Gendai, according to the evidence of the two eyewitnesses to the murder, viz. Chotai (P. W. 5) and Kedar (P. W. 6) only took part in the murder of Ghurai when the latter was struck down by Bisheshwar and when Debi Din ordered all his associates to beat the fallen man. The medical evidence gives the lie direct to this portion of the prosecution story, and the account as to the commencement of the attack on Ghurai by Bisheshwar has been discredited and disbelieved by the learned Additional Sessions Judge of Kheri. The only other evidence which goes to implicate the appellant Gendai, is that of Murlidhar, P. W. 12. His evidence is to the effect that three hours before sunset he saw Gangaram and Gendai in Chak Muhammadpur Khairulla and that the field where Ghurai was killed is about two hundred yards from the place where he saw Gangaram and Gendai. This evidence, even if believed to be absolutely true, does not bring home to the appellant his guilt. From the mere fact that a cultivator was seen in a certain field or chak in his village at about three hours before sunset some time before the commission of the murder, no inference can be drawn against him that he must have committed or taken some part in the murder that followed later on. The evidence of Murlidhar, P. W. 12, is therefore quite inconclusive and no inference inimical to the appellant can legitimately be drawn from his testimony.

It has been argued on behalf of the prosecution that the principle, "*falsus in uno, falsus in omnibus*" cannot be applied to criminal trials in India and that the fact that Debi Din and six others have been acquitted by the learned trial Judge is no reason for acquitting the appellant Gendai. That is true, but before Gendai can be convicted of the murder of Ghurai it must be shown by the prosecution that over and above the evidence which was rejected by the learned Additional Sessions Judge as against Debi Din and six others, there is other reliable and untainted evidence which goes to prove clearly and beyond any reasonable doubt the guilt of the appellant Gendai. No such evidence is, however, forth-

coming. The evidence of Murlidhar, P. W. 12, as shown above, is quite inconclusive. P. W. 13 Nawazi does not mention the appellant as having been seen by him near the spot prior to the commission of the offence. There remains then the evidence of Chotai (P. W. 5) and Kedar (P. W. 6) against the appellant. Except for mentioning the fact that Gendai was one of the assailants who under the orders of Debi Din joined in beating Ghurai to death these witnesses say nothing more against Gendai. Gendai is a mere servant of Debi Din. He had no personal motive in killing Ghurai or joining others in murdering him. His master and Bisheshwar Dayal, who are alleged to have deeply resented the marriage of Ghurai with Mt. Ram Kali, have been found not guilty of the charge of murdering Ghurai upon the evidence of these two very witnesses Chotai and Kedar. It is therefore next to impossible to convict Gendai, the servant of Debi Din upon this very same tainted evidence of Chotai and Kedar in the absence of any other evidence tending to incriminate him. Unless the case of the appellant can be differentiated from that of the other accused who have been found guiltless of the charge of murder, and unless it can be made manifest by cogent and convincing reasoning that though these witnesses Chotai and Kedar were giving false evidence against Debi Din and six others, they were nevertheless giving true evidence against the appellant, the appellant's conviction based solely upon the tainted testimony of Chotai (P. W. 5) and Kedar (P. W. 6) cannot be legally sustained. The learned Assistant Government Advocate has not been able to point to any other evidence on the record to corroborate the evidence of Chotai and Kedar except the evidence of Murlidhar, P. W. 12. Murlidhar's evidence, as has been pointed out above, is inconclusive and does not serve to prove the guilt of the appellant. From a perusal of the evidence of Chotai and Kedar, the case of the Crown against the appellant Gendai cannot be differentiated from the case against Debi Din and others, are adequate and convincing. It would be a work of supererogation to recapitulate those reasons in this judgment. Those reasons apply with equal force

to the case of the appellant Gendai as they do to that of his master Debi Din, and others. The motive for the murder in the case of the appellant is far weaker (if not completely absent) than in the case of Debi Din and Bisheshwar Dayal. Chotai and Kedar are partisan witnesses. There is no independent eye-witness of the occurrence to corroborate and give strength to their partisan and tainted testimony. It is a matter for deep regret that the brothers of the murdered man, thanks to their own folly and wickedness in trying to implicate innocent men in this serious crime, have by their own conduct enabled the guilty to escape with the innocent. Apart, however, from these moral reflections, this Court is primarily concerned with the question as to whether the guilt of the appellant Gendai is proved beyond any reasonable doubt upon the evidence on the record. No good reasons have been given by the learned Additional Sessions Judge as to why, after rejecting the evidence of Chotai and Kedar as against Debi Din and six others, he thought it proper to act upon it as against Gendai, the appellant. The finding of the learned Additional Sessions Judge against Gendai is summed up as follows :

"Gendai is admittedly in the service of Debi Din. He therefore must have some sympathy for the failure of Gangaram in not getting his desired wife. Both these men were seen by the above witnesses (this is not correct as a matter of fact) hovering round the field of Debi Din on the day and about the time when Ghurai was killed. It is therefore probable that Ghurai was attacked with lathis by Gendai and the abettor Gangaram in the presence of P. W. 5 and P. W. 6 (i. e., Chotai and Kedar.)"

It is impossible to accept this finding of the learned trial Judge. As Gangaram was not on his trial before the learned Judge, the latter should not have expressed directly or indirectly any opinion as to his guilt. In the second place, the finding against Gendai is only based upon a probability that he along with another man attacked Ghurai with lathis and killed him. Probabilities and suspicions are not sufficient grounds in law upon which to found a conviction of an accused in a criminal trial especially in a murder trial where the maximum punishment is death. The reason given by the learned trial Judge for not passing

sentence of death upon Gendai is wholly inadequate. The fact that the prosecution witnesses have told lies and have falsely implicated innocent men is good reason for rejecting their testimony, but no reason for not passing sentence of death upon the person who was found guilty of the brutal murder of Ghurai. The shortcomings of the prosecution witnesses furnish no legitimate grounds for palliation of the brutal conduct of the appellant, if he were really held guilty of the horrible murder of Ghurai who was done to death by lathi blows on his head.

The appellant, however, is entitled to the benefit of the very serious doubts which the learned Additional Sessions Judge had as regards the guilt of his co-accused. The case of Gendai cannot be separated from that of the other accused tried along with him, and, for the excellent reasons set forth at great length in the judgment of the learned trial Judge, the appellant Gendai is also entitled to an acquittal. When the prosecution witnesses are found to be untruthful as to the greater part of their evidence, it would be dangerous to convict the accused on the residue without corroboration: see *Hari Krishna v. Emperor* (1).

For the reasons given above, this appeal is allowed and the conviction and sentence passed upon the appellant Gendai are set aside. He is acquitted of the offence charged and ordered to be released immediately.

R.M./R.K. *Conviction set aside.*

(1) [1915] 42 Cal. 781=15 Cr. L.J. 411=28 I. C. 795.

* 1930 Cr. Cases 1087

(Calcutta)

CUMING, J.

Asoke Prasanna Bal—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1429 of 1929, Decided on 20th January 1930, against order of Dy. Mag., Mymensingh, D/- 31st August 1929.

(a) Criminal P. C., S 162 — Magistrate can make use of general diary to corroborate case of complainant.

There is nothing improper in a Magistrate making use of the general diary for the purpose of corroborating the case of the complainant and showing that the complainant made the same remarks at the time of recording the diary as he did in the Court. . . [P 1038-C 1]

* (b) Criminal P. C., S. 106—"Offence involving breach of peace"—Meaning explained.

The expression "offences involving a breach of the peace" means offences in which a breach of the peace is an ingredient and not offences provoking or likely to lead to a breach of the peace: 43 Bom. 554; 33 All. 771 and 30 Cal. 366, Ref. [P 1088 C 2]

B. C. Chatterjee and Birendra Kumar De—for Petitioner.

G. Gupta and Bireswar Chatterjee—for the Crown.

Judgment.—The petitioner in this case has been sentenced to pay a fine of Rs. 25 under S. 504, I.P.C., and further to give security for his good behaviour under S. 106, Criminal P. C. The case against him was briefly that he filthily abused the complainant in such a way that the complainant was likely to lose control of himself and to commit a breach of the peace.

The Rule has been granted on grounds Nos. 3, 4 and 5 of the petition to this Court. The first ground urged by Mr. Chatterji is that the general diary entry, Ex. I, is not admissible for the purpose of proving the falsity of the defence case and it cannot legally be used in evidence to disprove the defence and the learned Magistrate was wrong in using the said entry, Ex. I, against the petitioner. As a matter of fact the learned Magistrate has used the general diary entry, Ex. I, for the purpose of corroborating the case of the complainant and showing that the complainant made the same remark then as he does now in Court and that there is no difference in his cases. There is nothing improper in the use that the learned Magistrate has made of the entry.

The next ground taken is that the Magistrate's finding with regard to the motive of the petitioner is wholly erroneous and the learned Magistrate acted under a misapprehension in proceeding upon the basis that the petitioner had filed his application for removal of Sashi Babu from the common managership before 1st November 1928. It does appear that as a matter of fact this application was not filed before 1st November 1929. Even however if the Magistrate was wrong on this question of motive, there still remains the positive evidence of witnesses that abusive language was used; the question of probability or improbability of the petitioner's

losing temper at the sight of the complainant is not really so material when we have positive evidence that he had actually used the abusive language.

The last ground taken by Mr. Chatterji has more substance in it, namely that the order under S. 106, Criminal P. C., passed in the present case is bad in law. Mr. Chatterji argues that a breach of the peace is not a necessary ingredient of an offence under S. 504, I.P.C. The only portion of S. 106, Criminal P. C., under which the present offence could come is "other offence involving a breach of the peace," and S. 504, I.P.C., does not necessarily involve a breach of the peace. I think this contention is correct. There is no doubt that the decision in the case of *Emperor v. Syed Yacoob* (1) supports the case of the opposite party as also the decision in the case of *Emperor v. Manik Rai* (2). These words "offence involving a breach of the peace" were considered and construed in the case of *Arun Samanta v. Emperor* (3) where it was held that the expression "offences involving a breach of the peace" means offences in which a breach of the peace is an ingredient and not offences provoking or likely to lead to a breach of the peace. No doubt the learned Judges in that decision were considering the meaning of the words "offences involving a breach of the peace" as used in S. 110, Criminal P. C., Cl. (e). But I see no reason why any different meaning should be placed on identically the same words in S. 106, Criminal P. C., to what has been placed upon them in S. 110, Cl. (e), Criminal P. C. The order therefore binding over the petitioner is apparently bad in law and must be set aside. It is accordingly set aside and with this modification the Rule is discharged.

V.B./R.K.

Rule discharged.

(1) [1919] 43 Bom. 554=20 Cr.L.J. 543=51 I.O. 783.

(2) [1911] 33 All. 771=12 Cr.L.J. 805=11 I.O. 589.

(3) [1903] 30 Cal. 366.

1930 Cr. Cases 1089

(Patna)

COURTNEY-TERRELL, C. J., AND

ROWLAND, J.

Bhikari Pati—Accused.Y.
Emperor

• Criminal Reference and Criminal Appeal, No. 75 of 1929, Decided on 2nd July 1929, made by Sess. Judge, Cuttack, on 23rd March 1929.

(a) Criminal P. C., S. 288 — Statement made before committing Magistrate but subsequently relied before Sessions trial, can be taken in evidence if tendered under S. 288.

A statement made by an approver before the committing Court and subsequently relied from before the Sessions Court, can be taken into consideration provided it is brought on record under S. 288: *A. I. R. 1925 Pat. 51; A. I. R. 1929 Pat. 212 and A. I. R. 1928 Pat. 680, Ref.* [P 1092 C 1]

(b) Penal Code, S. 34 — Murder pre-arranged and accused assigned some part and present at spot armed—It is not necessary that he should have struck blow.

Where all accused come on the spot armed before the murder is completed and the murder is a pre-arranged matter and the accused has part assigned to him from beforehand such as keeping away the intruders, it is of no avail to him to say that he struck no blow on the deceased nor can his presence be considered accidental: *A. I. R. 1925 P. C. 1, Foll.* [P 1092 C 2]

S. M. Gupta—for Appellants.

G. M. Agarwala—for the Crown.

Rowland, J.—There are seven appellants the first five of whom have been sentenced to death under S. 302 read with S. 34. One Ananda Sahu has been sentenced to transportation for life under S. 302 read with S. 34, and one Jogi Sahu has been sentenced to transportation for life under S. 120-B, I. P. C. The first six appellants have also been convicted under S. 201 read with S. 311, no separate sentence being imposed.

The case comes before us on reference by the Sessions Judge under S. 374, Criminal P. C., as well as on appeal by the convicts.

The prosecution examined 245 witnesses to prove that in pursuance of a conspiracy to which the appellants and others not before us were parties, Banamali Pati was on 23rd May 1928, at about 11 a. m., murdered in the village street of Balanga by the first six appellants who thereafter dragged his body to the kacherry, loaded it on a cart and carried it to the burning ghat where they began to burn it but were

driven away and the half-burnt remains of the body rescued by villagers of Shambhu Bharathi, Patna. The defence was a denial of the facts alleged. No defence evidence was offered. The case may be divided into two parts. First, the incidents of the 23rd May and secondly, the motive and conspiracy.

Now the general outlines of the story of the occurrence of the 23rd May are established by such abundant and overwhelming evidence that the learned advocate for the appellants has not been able to challenge its correctness. The day was a market day at Balanga and the several stages of the occurrence are deposed to by seven witnesses who have spoken to the actual commencement of the assault on Banamali, 29 witnesses, who without claiming to have seen the first blow struck, witnessed the assault while it was still continuing, and a still larger number of witnesses who saw the removal of the body and the attempt to burn it at the ghat. It will, therefore, be sufficient to say with reference to the story in its outlines that the evidence in support of it is entirely unshaken. We have, however, been asked to hold that as regards the details of the actual killing the witnesses are discrepant and cannot be relied on as having observed correctly the parts played by individual accused. It is argued that the eyewitnesses of the first class who claim to have seen the first blow struck have given accounts which do not fit together and we are asked to infer that some if not all of these have confused what they saw with what they have heard from others and are not really to be regarded as eyewitnesses.

The first attack is made on the evidence of P. W. 1 Bhikari Sahu, who laid the first information in the case, Ex. 1. The witness is a gomashtha in village Balanga of the zamindar Babu Ashutosh Chandra Mitra under Banamali Pati who was the zamindar's naib. His information was laid at the police station, Nimapara, nine miles east of Balanga, at 6 p. m. on the afternoon of 23rd May 1928, the murder having been committed between 11 a. m. and noon. In his first information he states that Banamali Pati was going from the kacherry to his house to take his food, the witness accompanying him. When

they arrived before the house of Bhikari Pati, this accused came out of his house to the village road and asked Banamali to settle his paddy dispute. While the conversation was going on Bhikari was joined by Gobind Misra, brother of Bhikari Pati, Anand Pati, brother of Bhikari Pati and after them by Sama Khatua, Uchhab Sahu, Panchu Sahu and Nidhi Misra. All of a sudden Bhikari Pati brought out a curved knife and stabbed Banamali in the neck, Banamali fell down and Bhikari stabbed him on the belly with a three-forked spear; the other accused stood by. Someone suggested to beat the witness and he fled.

The beginning of the occurrence is differently described in the prosecution evidence at the trial where the case is that Banamali, as he went along the village street followed by Maga Barik, Bhikari Pati and Maguni Jena as well as Bhikari Sahu, was accosted by Anand Pati and Gobind Misra who complained that he had got their house thatched by Bowris (an untouchable caste; Anand and Gobind are Brahmins). Gobind and Anand caught the hands of Banamali and were then joined by Bhikari Pati, Shama Khatua, Panchu Sahu, Nidhi Misra, Uchhab Sahu and Ananda Sahu. The first blow was struck by Sama with a tara or lathi on the back of the neck of Banamali who fell down and was then stabbed in the stomach by Bhikari. Some witnesses have said that Panchu Sahu also stabbed Banamali in the neck. The explanation given by Bhikari Sahu for the discrepancy between his first information and his evidence in Court is that at the time of laying the first information he was both agitated and exhausted as he had had no food since early morning and, therefore, he made a confused statement. After laying this information he went away and had a bath and food. He then returned to the police station and asked to have his information read over to him. This being done he said that it was not correct in some particulars and made a second statement which was also recorded in first information form and is Ex. A. In this statement he mentions that Banamali leaving the kacherry was accompanied by Bhikari Satpathy as well as the witness; he does not mention Maguni Jena or Maga Barik; he

mentions Gobind Misra and Anand Pati as the first persons who met and accosted the naib and refers to the thatching of the house by Bowris as the subject of the conversation. As regards the remainder of the assailants' party he said that they came from the Khamar house of Gangadhar Pati, whereas in the first information they are apparently described as coming from the house of Bhikari Pati. His evidence in Court regarding the actual murder agrees generally with Ex. A but he says that he did not notice where Sama, Uchhab and Panchu came from and he is not sure whether Nidhi came out of his own house. The discrepancies between the successive statements made by Bhikari Sahu would be prima facie a good foundation for an argument that Bhikari was not a real eyewitness, but was telling a hearsay story and filling in details from his imagination; but that the evidence of other eyewitnesses has so abundantly proved the presence of Bhikari Sahu in the street at the time of the murder that I can feel no doubt that he is a genuine witness. It is however quite probable that he did not see or was unable to observe clearly the first onset and ought to be regarded as a witness falling in the second class of eyewitnesses, who did not see the first blow but saw the progress of the assault as it continued.

Another witness with regard to whom a somewhat similar conclusion can be arrived at is P. W. 5 Maguni Jena. This witness was following Banamali from the kacherry towards Banamali's house as he had some grievance to tell Banamali. Banamali said he would attend to the matter later and the witness turned his back and began to go towards the hat which is in the opposite direction. He had gone about 25 cubits when Banamali was attacked. In chief he described the assault as if he had seen it all, but in cross-examination it appears that he turned round on hearing a noise. By this time the whole party of the assailants had surrounded Banamali; the witness went nearer but was chased away by Sama. This witness perhaps should be classed like Bhikari Sahu with the witnesses who did not see the first onset, but witnessed the occurrence in its later course. Regarding Bhikari Satpathy (P. W. 4) I can

see no reason to doubt that he witnessed the occurrence from its very commencement. Maga Barik (P. W. 6) is a boy of, about 15 years of age who was working as personal servant to Banamali, and was following him from the kacherry to his house; he was carrying mangoes, a betel box and some cups when the assault began; he fled to the kacherry. I have no doubt that this witness is actually an eyewitness of the commencement of the assault and the first blow; he did not stay to witness its completion. The next witness who claims to have seen the first blow struck is Daitari Das (P. W. 8). He was rubbing his body with oil near the house of Mani Sahu. That house, as the map shows, is very close to the place of occurrence. Mani Sahu (P. W. 9) confirms the presence of Daitari Das outside the house; Mani himself was inside and came out and saw the later stages of the occurrence. Daitari Das confirms the description of the occurrence given by other witnesses. Raja Barik (P. W. 23) is not a resident of the immediate neighbourhood though he lives in the village. He says that he happened to be passing on the way from Hatsahi to his house. He is mentioned in the second statement of Bhikari Sahu (Ex. A) as one of the persons who had seen the occurrence, and I see no reason to doubt that he is a genuine witness. His account of the occurrence agrees with the prosecution case and he confirms the presence of Maguni Jena, Bhikari Sahu, Maga Barik and Bhikari Satpathy. He went towards the place of occurrence but was driven away by Sama.

There is one other witness Nidhi Misra. He is alleged to have been one of the conspirators and one of the party of murderers. He was made an approver and before the committing Magistrate supported the prosecution case. At the trial, however, he said that he did not see the murder and that he was on good terms with Banamali. He said that he had been drugged by Inspector Narsing and Inspector Khetra Mohan and tutored to make a false statement in the committing Magistrate's Court. Babu Khetra Mohan Das, Inspector, is P. W. 239. He denies that Nidhi Misra was drugged or tutored. Narsing Charan Das, Inspector, is P. W.

245 and he makes a similar denial and states that he did not see Nidhi Misra at any time in the jail or met him anywhere except in the Court or lock-up of the town thana. Nidhi had alleged that the intoxicant was administered to him in jail. The Assistant Jailor, Kripasindhu Panda (P. W. 147) has been examined and deposes that in the jail Nidhi had no interviews except with his wife and son and had no intoxicant. I have no doubt that Nidhi's statement at the trial is entirely false and has been invented by him to explain away his previous evidence.

The principles which will be followed by a Court of Session in deciding what use to make of evidence given in the committing Magistrate's Court and tendered under S. 288 at the trial when the witness has resiled from the previous statement have been fully discussed in the case of *Emperor v. Jehal Teli* (1). It is there laid down that the deposition given before the committing Magistrate is evidence to the same extent as it would have been evidence if it had been given before the trial Court. It is pointed out that such evidence cannot be effectively utilized unless it is shown by other evidence that the evidence given before the committing Magistrate should be preferred to and substituted for the evidence given at the trial. That is the view which prevails in the Patna High Court and all Courts subordinate to it. This Court has considered recently the case of a confessing accused who had retracted at the trial the confession previously made by him in *Sheonarain Singh v Emperor* (2) where it has been held that the law is not correctly stated by saying that a retracted confession carried no weight except against the maker and was not to be used against any one of the other co-accused. The correct position is that where a confession has been retracted the tribunal will consider whether it is corroborated in material particulars and whether the statement as a whole is a truthful statement and may in either of these cases give full weight to it. It has also been held in *Ratan Dhanuk v.*

(1) A. I. R. 1925 Pat. 51=84 I. C. 334=86 Cr. L. J. 270=3 Pat. 781.

(2) A. I. R. 1929 Pat. 212=117 I. C. 43=30 Cr. L. J. 716=8 Pat. 262.

Emperor (3) that the evidence of an approver is to be treated as on the same footing with that of any other witness if the initial suspicion attaching to an accomplice's evidence is removed and the trial Court considers the evidence to be truthful evidence. Applying these principles it is clear that there is no reason for not regarding the deposition of Nidhi in the committing Magistrate's Court as evidence along with the evidence of other witnesses both as to the murder itself and as to the conspiracy.

The Sessions Judge was of opinion that Nidhi's evidence before the committing Magistrate was substantially truthful evidence and the record contains ample corroboration of almost all the facts deposed to by Nidhi. His account of the murder itself agrees with that of the other witnesses in that Gobind Misra and Anand Pati accosted and detained Banamali on the road, while Bhikari, Sama Khatua, Ananda Sahu, Uchhab Sahu, Panchu and the witness came out. He adds another name Madhua Toka which is not given by the rest of the eyewitnesses. The first assault is described by other witnesses as given by Sama Khatua, whereas Nidhi says that Sama, Anand, Uchhab and Madhua all attacked Banamali with lathis. The witness says that Bhikari stabbed Banamali two or three times after he fell and that Gobind Misra and the witness kept people at bay on one side, while Panchu Sahu, Bhikari Pati, Uchhab and Anand Pati did the same on the other. There is one statement in Nidhi's evidence of which no direct corroboration is forthcoming but which is of importance. He says that at 9 a. m. or so Bhikari Pati had asked him to be ready for Banamali Pati at his front door, and there is one more statement of importance that Jogi Sahu had promised to send men to the cremation ground to help in setting fire to the body. This statement also is not corroborated though Baja Barik (P. W. 23) has said that on the day of occurrence before the murder he had seen Jogi talking with Sama. The above and other evidence as to the occurrence itself establishes the charge of murder against Gobind who with Anand Pati detained

Banamali, against Sama who made the first assault and against Bhikari who completed the slaughter of the victim.

Accused 4 to 6, it has been argued came later, and the part taken by them may not have been more than keeping off intruders after the murder was completed, so that they should be regarded as accessories after the act. It is true that some witnesses are not clear as to the exact stage at which the three Sahu accused came on the scene, but there are a good many others who are quite definite that these men were there and were actually driving off spectators while Bhikari was still continuing to stab Banamali. The weight of evidence certainly is that all these accused came on to the road armed before the murder was completed. If the murder was a pre-arranged matter and these accused had parts assigned to them from beforehand such as keeping away intruders, it is of no avail to them to say that they struck no blow on the deceased. The Sessions Judge quite rightly relies on and follows the Privy Council decision in the case of *Barendra Kumar Ghosh v. Emperor* (4).

The whole of the circumstances of the murder itself indicate that it was pre-arranged, and even if Sahu accused had arrived at a late stage their presence, armed and so conveniently near the scene could hardly be regarded as accidental. The Sahu accused are not near neighbours. The house of Ananda Sahu is at plot 148 of the map (Ex. 27) and is 330 feet east of the place of occurrence, that of Uchhab Sahu is plot 211 of the map and is 1,015 feet east, and that of Panchu Sahu is plot 217 of the map and is 1,260 feet east. They must have come beforehand prepared for the part they had to play. Nothing contradictory to the prosecution case appears in the medical evidence; the body was extremely charred by burning and no lathi marks were visible. The Civil Surgeon says that on flesh so charred he would not expect to find them. He speaks of three penetrating wounds in the chest and abdomen which were the cause of death. These, according to the direct evidence are all to be ascribed to Bhikari Pati. The

(3) A. I. R. 1928 Pat. 630=118 I. C. 329=8 Pat. 235.

(4) A. I. R. 1925 P. C. 1=85 I. C. 47=26 Cr. L. J. 431=52 I. A. 40=52 Cal. 197.

first six accused are, therefore, guilty under S. 392.

The last appellant Jogi, however, took no part in the murder and has been convicted only of conspiracy. I have, therefore, to examine the evidence as to the conspiracy and as to his part in it. The charge of conspiracy was not a part of the first information (Ex. 1) though that information mentions that at one time some of the accused had conspired to murder Banamali and there had been a police case about it. Bhikari Sahu the informant, filed a petition of complaint (Ex. 2) on 30th June 1928, the date on which the charge sheet of this case was submitted, alleging that there was sufficient evidence of conspiracy before the police and praying that the accused be put on their trial on a charge of conspiracy. It was on this petition that the Magistrate took cognizance of the conspiracy charge along with the case of murder. The prosecution case was that the conspiracy had its origin in January 1925, when the opponents of Banamali led by Sama and Jogi Sahu began to meet together to concert measures against him.

There is nothing criminal about the first steps taken which were to petition successively the Settlement Officer, the landlord, Banamali's master, and the Superintendent of Police against Banamali. These petitions had no result. Then come meetings at which a few of the party formed an inner circle and deliberated in secret; Jogi is one of them. Sama declares to Kela Behera (P. W. 133) that Banamali must be killed and says the same thing in the presence of Arjun Baral (P. W. 195) and Bhima Baral (P. W. 209), the latter of whom says that Jogi joined in the proposal. In July 1926 an attempt on Banamali's life was apprehended. He was to be attacked on leaving the train at Satyabadi. He was warned and took another route, but on 18th July 1926 a number of his enemies including Jogi had in fact collected at Satyabadi and one Baidhar Sahu was found in possession of a knife. The incident was reported to the police and Banamali desired a prosecution under S. 120, I.R.C., but sufficient evidence was not forthcoming. As a sequel to this incident

Sama, Jogi and others severely assaulted Bhalu Padhan (P. W. 183), a servant of Banamali, who had been a witness in the case. Sama and Jogi were convicted and sentenced to imprisonment. In jail Sama in Jogi's presence again declared his intention of killing Banamali as deposed to by Gokhulanand (P. W. 121).

There is evidence of other meetings which it is difficult to date exactly. In all of these Sama is prominent; in some Jogi is not mentioned but wherever he appears it is as Sama's companion and close associate. Jogi himself is said to have threatened the life of Dhuli alias Jogendra (P. W. 219), a gomastha under Banamali in presence of Narain Pati (P. W. 214) whose statement in evidence is corroborated by the fact of his having written at the time a warning letter (Ex. 67) to Banamali. There is evidence of several occasions on which an attack on Banamali was apprehended, but no attack was made as he got warning and took precautions. There can be no direct evidence that on those occasions the purpose of attacking him was formed until we come to the time regarding which Nidhi's evidence is available. Nidhi speaks of three occasions on which preparations were made to attack Banamali but proved abortive. Among the names given by Nidhi of persons who on these occasions went out to kill Banamali we do not find the name of Jogi, but it appears in Nidhi's evidence that Jogi, Sama and others persuaded him to join Sama's party and openly declared their intention to kill Banamali; that on the occasion of Banamali's visit to Bayabar tola it was Jogi who gave the conspirators information of his movements; and further that on the day of the murder Jogi had promised to send men to help in burning the body. There is independent evidence, which I have already referred to, that Jogi was seen talking to Sama on the morning of the murder and we have it from Chama Prusti (P. W. 148) that on the day after the murder Jogi told him that Banamali would have been killed a day sooner had he passed by the route by which he was expected to go. I have dealt already with the admissibility of Nidhi's evidence. I find, in agreement with the Sessions Judge, that his deposition before the committing Magistrate

was a substantially truthful statement and is corroborated in many particulars by independent evidence.

Taking the evidence as a whole there is, I think, no room for doubt that there was a conspiracy to put Banamali to death; that Jogi was a party to it, and that Jogi had not dissociated himself from the party of the conspirators up to the date of the crime. I would, therefore, uphold the conviction of Jogi also. It remains to consider the question of sentence in the case of accused 1 to 5. The murder, I have held, was deliberate and was done in pursuance of an intention formed long before and tenaciously pursued in face of repeated disappointments. It is difficult to see how any penalty other than the death penalty can be regarded as adequate. We have examined the record to see whether the character of the deceased was such as to furnish any extenuation of the guilt of those who killed him. Only an intolerable tyranny on his part would suffice to mitigate the crime and the evidence does not show that there was any such thing. The several accused had no doubt their grievances but these were ordinary personal grudges which though furnishing a motive do not supply any excuse for murder.

First, as regards Bhikari and Gobind, Bhikari was formerly a personal body-guard of Banamali. He was fined in a criminal case of which Banamali financed his defence. He resented Banamali's demand for repayment of money spent in the case and for payment of paddy due to the landlord and of advances made by Banamali to Bhikari's father. Sama Khatua was also formerly a personal guard of Banamali whom he left because the latter, after financing the defence of a case in which Sama was prosecuted, refused to help him in appealing against the conviction and demanded repayment of the money spent in defending the case. The petition to the Settlement Officer is an attempt to review an old claim of the tenants to some tanks and grazing ground which had been recorded in the name of the landlord as long ago as the previous Record of Rights. The visit to the landlord was in connexion with rent receipts and with settlement of waste lands. Sama Khatua's enmity was no doubt aggravated by the Khaturi case

and by his conviction of assault on Bhalu Padhan. Sama had also dispute with Banamali regarding certain lands which Sama had purchased, but over which Banamali's uncle Muli held a mortgage. Eventually the dispute terminated in favour of Muli. Accused 4 to 6 hardly appear to have any definite grievances of their own; they seem to have come in mainly as partisans of Sama. Jogi had a dispute with Banamali regarding land of one Panchei Bewa which was sold to each of them. Of the rival purchasers Banamali, was successful. Jogi was convicted under S. 352 in a case brought by Jaga Maharana which Jogi attributed to the influence of Banamali and was also convicted of assault on Bhalu Padhan. None of these matters furnish any justification or extenuation of the crime. I would, therefore, accept the reference and confirm the death sentence on accused 1 to 5 and dismiss the appeal of all the accused.

We desire to pay tribute to the care and patience displayed by the learned Judge in trying this case. His judgment, although in view of the volume of evidence necessarily of great length, is extremely clear and well ordered and deals most fairly with every contention which could be raised by the defence. We would also compliment Mr. Gupta upon the way in which he fulfilled his very onerous duties on behalf of the appellants. His task was hopeless but he faced it with great courage and discretion.

Courtney-Terrell, C. J.—I agree.
V.B./R.K. *Sentence confirmed.*

1930 Cr. Cases 1094

(Patna)

COURTNEY-TERRELL, C. J., AND
DHAVLE, J.

Banti Pande—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal.Revn. No. 257 of 1929, Decided on 2nd July 1929, from order of Sess. Judge, Muzaffarpur, D/- 2nd April 1929.

(a) Penal Code, S. 211—Proceedings erroneously taken and in good faith by Magistrate not empowered so to do—Complainant is not liable for false complaint under S. 211.

If a Magistrate not empowered by law to take cognizance of an offence under S. 190 (1) (a)

erroneously and in good faith does so, although his proceedings shall not be set aside merely on the ground of his not being so empowered, it will not have the effect of making the complainant liable for prosecution for a false complaint by reason of the Magistrate's having taken cognizance of it without power to do so: *A. I. R. 1928 Pat. 400, FolU: 17 Cal. 574 and 32 Mad. 258, Dist.* [P 1097 C 1]

(b) Criminal P. C., S. 4—"Complaint". presupposes accusation with view to action.

It is of the essence of a complaint that the accusation should have been made with a view to action being taken under the Code of Criminal Procedure. An express request to that effect is unnecessary, but whether a statement is made with a view to action being taken upon it as upon complaint must be determined in the light of the circumstances.

[P 1097 C 2]

(c) Penal Code, S. 211—"Falsely charging"—Meaning explained.

"Falsely charging" means a false accusation made to any authority bound by law to investigate it or to take any step in regard to it. *32 Mad. 258, Ref.* [P 1098 C 1]

(d) Penal Code, S. 211—"Accusation in dying declaration made to Magistrate stands on no better footing than one made to another."

An accusation contained in a dying declaration made to a Magistrate stands on no better footing than an accusation made to a private individual, such as the compounder in the hospital, without any statutory obligation to move in the matter at all: *11 I.C. 617; 17 Cal. 574; 30 Cal. 415; 19 Bom. 51 and 26 Mad. 640 Ref.* [P 1098 C 2]

(e) Penal Code, S. 182—Essential ingredient stated.

It is an essential ingredient of an offence under S. 182 that the offender should intend to cause, or should know it to be likely that the information given by him to the public servant will cause the public servant to do or omit anything which such public servant ought not to do or omit if the true state of facts respecting which such information is given or known by him, or to use the lawful power of such public servant to the injury or annoyance of any person. *A. I. R. 1925 Pat. 717, Ref.* [P 1099 C 1]

(f) Penal Code, Ss. 192 and 194—False dying declaration by man, who does nothing to communicate with authorities does not come under either S. 192 or S. 194.

While a false dying declaration may well, in certain circumstances, go in as evidence, the intent that it may appear in evidence in a judicial proceeding and cause an erroneous opinion to be entertained touching a point material to the result of such a proceeding, which is an essential ingredient in the definition, cannot easily be inferred of a man who was thought to be dying at the time and did nothing by himself or by his friends to communicate with or seek any redress from the authorities. The intent of knowledge necessary under S. 194 presents an even greater difficulty in the application of that section, for it postulates a feeling in the mind of the petitioner that his recovery was impossible.

[P 1099 C 2]

Manohar Lal and A. K. Mitra—for Petitioner.

Asst. Govt. Advocate—for the Crown.

Dhavlé, J.—This is an application in revision against a conviction of an offence under S. 211, I. P. C. with a sentence of one year's rigorous imprisonment. A rule was also issued by this Bench calling upon the petitioner to show cause why the sentence should not be enhanced.

The petitioner was sleeping in his verandah on the night of the 10th September last, when he received three injuries including a dangerous 10" cut across the face from near the right ala of the nose to the superior angle of the scapula on the right side. He was taken next morning to the Bettiah hospital, where his condition was found to be so precarious that a report was made to the Subdivisional Magistrate with a request that the man's dying declaration might be recorded immediately. The Sub-Divisional Magistrate sent Pandit Hriday Narayan, a Sub Deputy Magistrate with second class powers, to record the petitioner's statement if any. The petitioner was accordingly questioned by the Sub-Deputy Magistrate and stated that he had been attacked overnight by three persons, Kishundut Pande, Gorakh Pande and Subhnarain Upadhaya and had chased them upto a distance of ten or twelve kathas when he had to stop on account of loss of blood. He further stated that on the previous Saturday (that is to say, two days before the assault) he had overheard the Sub-Inspector of the thana asking Deonandan Ojha, Sheonarain (Subhnarain?) Upadhaya and Kishundut Pande to kill him.

The prosecution case was that the petitioner's accusation against the persons named in his statement to the Sub-Deputy Magistrate was false and malicious, that these persons had nothing to do with the assault on the petitioner, and that the petitioner himself had stated at the time that an unknown thief had attacked him. The defence was that the petitioner's statement was true and that after the assault the petitioner became unconscious and made no statement at all.

The trying Magistrate and the Sessions Judge concurrently found that the petitioner's statement was false.

while the malice between the parties was really common ground.

Mr. Manohar Lal for the petitioner has endeavoured to show that the prosecution evidence ought not to be accepted. He has referred to the evidence of the Sub-Assistant Surgeon that the petitioner was in a "somewhat sub-conscious state" and would not be able to speak for twelve or thirteen hours from four or five minutes after receiving the injury on the face which was dangerous to life. There is however no dispute that the petitioner did in fact make a statement to the Sub-Deputy Magistrate in which he spoke not only of chasing his assailants for ten or twelve kathas, but also of what had happened on the previous Saturday. The Sub-Assistant Surgeon's evidence is palpably over-coloured and goes the length of saying that the petitioner "probably could not run but could walk for ten, fifteen or twenty cubits or so"

after the injury on the face contrary to what the petitioner himself stated. Mr. Manohar Lal has also taken us into the evidence of the six prosecution witnesses, Nos. 6, 7, 15, 8, 16 and 19, on whom the learned Sessions Judge specially relied in support of the prosecution story that the petitioner said at the time that he had been attacked by an unknown thief. It is true that Tilakdhari Pande (P. W. 6) admits that he only heard the story not from the petitioner but from Phagu and Saudagar (P. Ws. 16 and 19), and true also that Harihardut Pande (P. W. 15) is not only a nephew of the petitioner's but also a son of Nageswar (P. W. 13) upon whom (an uncle of Gorakh) the learned Sessions Judge was not disposed to place much reliance, while Bahori Chamar (P. W. 8) does not really seem to have been on good terms with the petitioner; but even so there does not seem to be any sufficient reason to disbelieve the evidence of Bipat Chamar (P. W. 7), a servant of the petitioner, and Phagu and Saudagar, though these two witnesses have their houses on the land of Gorakh. As regards the conspiracy between the Sub-Inspector and Kishundut and others, Mr. Manohar Lal has referred to the admission of the Sub-Inspector that in walking back on the Saturday he passed some bushes, from behind which he could have been

overheard, but it is obvious that this does not go far to indicate the truth of the alleged conspiracy, and the incident is in itself so highly improbable that Mr. Manohar Lal himself has had to argue on the evidence not that the Sub-Inspector actually asked the man to kill the petitioner but that the petitioner may have been led by an over-heated imagination to think so. In my opinion the evidence leaves no doubt that there was in reality no conspiracy, that the petitioner did not in fact recognize in the dark any of his actual assailants as he next day claimed to have done, and that his accusation against Kishundut, the Sub-Inspector and others was both false and malicious.

The charge framed against the petitioner was that he :

"on or about the 11th day of September 1928, at the King Edward Memorial Hospital, Bettiah, with intent to cause injury to Kishundut Pande, Lyakat Hussain, Sub-Inspector and others, caused to be instituted a criminal proceeding against them before the Sub-Deputy Magistrate of Bettiah, charging the said Kishundut Pande and others with having committed an offence, viz., attempt to murder, under S. 307, I. P. C., and the Sub-Inspector of Police with abetment of such an attempt, knowing at the time that there was no just or lawful ground for such proceeding or charge, and thereby committed an offence punishable under S. 211, I. P. C. . . ."

If, as was apparently the prosecution case below, a criminal proceeding was actually instituted, a reference to Sch. 2, Criminal P. C., shows that the case under S. 211 should have been tried by the Court of Session alone, since the attempt to murder involved the causing of hurt and was accordingly punishable with transportation for life. The conviction of the petitioner by a First Class Magistrate would therefore be void: see S. 530 (p), Criminal P. C.

The charge speaks of causing a criminal proceeding to be instituted before the Sub-Deputy Magistrate of Bettiah. We are not concerned in this case with such modes of instituting criminal proceedings as lodging information of a cognizable offence with the police, *Karim Buksh v. Queen-Emress* (1), or in the case of certain grave offences giving information to village headmen or others who are under a statutory obligation to communicate such information forthwith to the nearest Magistrate or to the officer in charge of the nearest police

(1) [1890] 17 Cal. 574.

station: *Sessions Judge Tinnevely Division v. Sivan Chetti* (2). The petitioner could only have caused a criminal proceeding to be instituted before the Sub-Deputy Magistrate, if at all, by making a complaint to him. Now a complaint is defined in S. 4, Criminal P. C., as :

"the allegation made, orally, or in writing, to a Magistrate, with a view to his taking action under this Code, that some person has committed an offence."

This implies that the Magistrate to whom such an allegation is made must be duly empowered to take action on it, and S. 201 of the Code provides that if a complaint is made to a Magistrate who is not competent to take cognizance of the case, he shall direct the complainant to the proper Court and return the complaint, if made in writing, with a proper endorsement. Assuming for the present that the petitioner's statement to the Sub-Deputy Magistrate amounted to a complaint, the Sub-Deputy Magistrate could only take cognizance of the case if specially empowered by the Local Government or the District Magistrate; but it has not been suggested on behalf of the Crown that the Sub-Deputy Magistrate had any such authority. It is true that according to S. 529(e), Criminal P. C., if a Magistrate not empowered by law to take cognizance of an offence under S. 190 (1) (a) erroneously and in good faith does so, his proceedings shall not be set aside merely on the ground of his not being so empowered. But, as was expressly ruled in *Bengali Gope v. Emperor* (3) :

"this will not have the effect of making the complainant liable for prosecution for a false complaint by reason of the Magistrate's having taken cognizance of it without power to do so."

The charge as framed must therefore fail on the ground that no criminal proceeding could have been instituted before the Sub-Deputy Magistrate so as to attract the operation of S. 211, I. P. C.

It has been urged on behalf of the Crown that if the Sub-Deputy Magistrate was incompetent to take cognizance, the petitioner was still guilty of an attempt to cause proceedings to be instituted before that Magistrate. This contention must obviously fail if even apart from the incompetency of the Sub-Deputy Magistrate to take cognizance

on a complaint, the petitioner's statement or dying declaration did not amount to a complaint. Now, it is of the essence of a complaint that the accusation should have been made with a view to action being taken under the Criminal Procedure Code. The petitioner's statement does not ask for any action to be taken, but an express request to that effect is unnecessary. Whether the statement was made with a view to action being taken upon it as upon complaint must be determined in the light of the circumstances. In an ordinary case the complainant goes of his own accord to the Magistrate and makes his accusation, and it is thus easy to infer that he does so with a view to action being taken under the Code. In the present case it was not the petitioner who went to the Magistrate but the Sub-Deputy Magistrate who came to the petitioner, as ordered by the Sub-Divisional Magistrate on the report from the hospital that the petitioner's condition seemed to be very precarious and that his dying declaration might be recorded immediately. It was in this condition that the petitioner was approached by the Sub-Deputy Magistrate, who began by explaining that he was Magistrate and had come to take down the petitioner's statement. The Sub-Deputy Magistrate further informed the petitioner that the statement made by him would be used when occasion arose, a curious warning to administer to a dying complainant, though appropriate in the case of accused persons when their confessions are to be recorded under S. 164, Criminal P. C.

He did not, however, speak of having been sent by the Sub-Divisional Magistrate to record the petitioner's "dying declaration" or of the possibility of any statement made by the petitioner being treated as a complaint. Can it be said in the circumstances that the petitioner understood that he was being invited to make his complaint, if any, or that he made his statement with a view to action being taken on it under the Criminal P. C.? It is significant that when eight days afterwards the Sub-Divisional Magistrate, in the course of his enquiry, questioned the petitioner in the hospital, he found the petitioner unwilling to make any statement, though according to the Sub-Divisional Magistrate the rea-

(2) [1909] 32 Mad. 258=1 I.C. 187=9 Cr. L.J. 170.

(3) A.I.R. 1926 Pat. 400=34 I.C. 836=27 Cr. L.J. 704=5 Pat. 447.

son apparently was that the petitioner was very weak and wanted time. There is nothing in the circumstances to show that the statement made by the petitioner was intended by him as the complaint of an aggrieved party rather than, for example, as the statement of a witness. In my opinion the prosecution has not succeeded in establishing clearly that the petitioner's statement amounted to a complaint in this regard, and it is therefore impossible to deal with the petitioner on the footing that he attempted to cause a criminal proceeding to be instituted before the Sub-Deputy Magistrate.

Besides the institution of a criminal proceeding, S. 211, I. P. C., also deals with falsely charging any person with having committed an offence. The charge actually framed against the petitioner also speaks of his charging Kishundut Pande and others with having committed the offence of attempt to murder and the Sub-Inspector of Police with abetment of such an attempt. Unlike a "complaint" "false charging" is not defined by statute, but it has been repeatedly held to mean a false accusation made to any authority bound by law to investigate it or to take any step in regard to it. In the decision from *S. J., Tinnevely Division v. Siven Chetty* (2), to which I have already referred it is shown how such an accusation may be effectively made in certain cases to a person possessing no magisterial powers but bound by law to communicate it forthwith to the nearest Magistrate or the officer in charge of the nearest police station. The petitioner's statement clearly contains a grave accusation against four or five persons, and it was made to an officer with the powers of a Second Class Magistrate who had actually been deputed by the Sub-Divisional Magistrate to record it. But it was not recorded in the course of a police investigation and therefore does not come under S. 164 (2), Criminal P. C., under which (if applicable) it would have been the duty of the Sub-Deputy Magistrate to forward it to the Sub-Divisional Magistrate. Mr. Agarwala who appears for the Crown has not been able to point to any statutory provision requiring the Sub-Deputy Magistrate in the circumstances of this case to forward the petitioner's state-

ment to the Sub-Divisional Magistrate. The statement was recorded as a "dying declaration," but the law does not require dying declarations to be recorded by Magistrates, and while an individual Magistrate who records a dying declaration may happen to be empowered to take cognizance, Mr. Agarwala has to concede that, apart from such powers of cognizance, an accusation contained in a dying declaration made to a Magistrate stands on no better footing than an accusation made to a private individual, such as the compounder in the hospital in the present case, without any statutory obligation to move in the matter at all. As was observed in *Zorawar Singh v. Emperor* (4) :

"It has been held by the Calcutta, Madras and Bombay High Courts that the words "falsely charges" in S. 211, I. P. C., must be construed along with the words which speak of the institution of proceedings in the earlier part of the section, and further that the test is whether the person who made the statement which is alleged to constitute the charge did so with the intention and object of setting the criminal law in motion against the person against whom the statement is directed: *Karim Buksh v. Queen-Empress* (1), *Jugobundoo Karmakar v. Emperor* (5), *Queen-Empress v. Karigowda* (6) and *Rayan Kutti v. Emperor* (7) "

A false charge within the meaning of S. 211 must thus be made to a competent Magistrate or other person with a statutory standing in the matter and must further be made with the object of setting the criminal law in motion, the latter a requirement which I have considered when dealing with the question whether the dying declaration could, apart from the competency of the Sub-Deputy Magistrate, amount to a complaint. It follows that the petitioner did not by his statement to the Sub-Deputy Magistrate falsely charge any person within the meaning of S. 211, I. P. C.

It was observed in *Darega Gope v. Emperor* (8) that an offence under S. 211, I. P. C., must always include an offence under S. 182, I. P. C., and that some false accusations may come within S. 182 without constituting offences under S. 211. It is, however, an essential ingredient of an offence under

(4) [1911] 12 Cr. L. J. 433=11 I. C. 617.

(5) [1903] 30 Cal. 415.

(6) [1895] 19 Bom. 51.

(7) [1903] 26 Mad. 640.

(8) A. I. R. 1925 Pat. 717=88 I. C. 1045=5 Pat. 83.

S. 182 that the offender should intend to cause, or should know to be likely that the information given by him to the public servant will cause, the public servant .

(a) to do or omit anything which such public servant ought not to do or omit if the true state of facts respecting which such information is given were known by him, or

(b) to use the lawful power of such public servant to the injury or annoyance of any person.

I have already referred to the circumstances in which the petitioner made his statement to the Sub-Deputy Magistrate, how he was thought to be dying, and only spoke when questioned by the Sub-Deputy Magistrate, and did not ask for any action. It seems to me that these circumstances negative the intent or knowledge without which there can be no offence under S. 182, to say nothing of facts that the Sub-Deputy Magistrate, as a public servant, had no lawful power or authority in the matter at all, even though he chose to put the petitioner on oath, and that the petitioner's statement would have been forwarded by him to the Sub-Divisional Magistrate irrespective of its truth or falsehood.

In dealing with the question of sentence the learned Sessions Judge has observed that:

"it was a grave offence to make false statements of the kind before a Magistrate, knowing that such statements might be used in evidence with all the sanctity attached to a dying declaration, and might possibly have led to innocent persons being convicted on a capital charge."

The mention of the possible use of the dying declaration as evidence leading to a conviction on a capital charge suggests an offence under S. 194, I. P. C., and it was in fact when the learned Assistant Government Advocate argued that the petitioner was guilty of an offence under this section that we issued the rule for enhancement of the sentence. S. 194 runs:

"Whoever gives or fabricates false evidence, intending thereby to cause, or knowing it to be likely that he will thereby cause, any persons to be convicted of an offence which is capital . . . shall be punished with transportation for life . . ."

It is not suggested that the petitioner

gave false evidence within the meaning of the section. Did he fabricate false evidence? Fabricating false evidence is defined in S. 192, and while a false dying declaration may well, in certain circumstances, go in as evidence, the intent that it may appear in evidence in a judicial proceeding and cause an erroneous opinion to be entertained touching a point material to the result of such a proceeding, which is an essential ingredient in the definition, cannot easily be inferred of a man who, like the petitioner, was thought to be dying at the time and did nothing by himself or by his friends to communicate with or seek any redress from the authorities. The intent or knowledge necessary under S. 194 presents an even greater difficulty in the application of that section, for it postulates a feeling in the mind of the petitioner that his recovery was impossible. There is nothing in the evidence to show that such was the mental condition of the petitioner at the time he made the statement to the Sub-Deputy Magistrate.

It seems hardly necessary to refer to other difficulties in the case. If a criminal proceeding was instituted or attempted before the Sub-Deputy Magistrate or if an offence under S. 194 was committed in or in relation to such a proceeding, cognizance of the offence could only have been taken on the complaint of the Sub-Deputy Magistrate or of some other Court to which his Court is subordinate. The subordination applicable is given in sub-S. (3), S. 195, and is different from that given in S. 17 (2), Criminal P. C. For the purpose of a prosecution under S. 211, I. P. C., the complaint of the Sub-Divisional Magistrate was thus not a sufficient compliance with the law, and the evidence of the Sub-Divisional Magistrate, together with the complaint made by him, and his statement that he made his enquiry under S. 159, Criminal P. C., suggests a good deal of confusion about the actual position.

In my opinion the petitioner is not guilty of the offence charged or of any other offence that can properly be taken into consideration at present. I would reverse the conviction and sentence passed upon him, and dis-

charge the rule for enhancement of the sentence.

Courtney-Terrell, C. J.—I agree.

V.B./R.K. *Rule discharged.*

1930 Cr. Cases 1100

(Patna)

JAMES, J.

Saddique and others—Accused—Petitioners,

v.

Sheikh Mohid and others—Opposite Parties.

Criminal Revn. No. 394 of 1930, Decided on 28th July 1930, from an order of Sess. Judge, Saran, D/- 2nd June 1930.

(a) Criminal P. C. (5 of 1898), Ss. 144 and 145—Order under S. 144 must be ignored as evidence of possession in proceedings under S. 145.

A definite order, or an order refusing to take action or rescinding an order under S. 144, must be ignored when evidence regarding possession is being taken under S. 145: 27 Cal. 785, *Rel. on.*; A. I. R. 1925 Pat. 610, *Ref.*

[P 1101 C 1]

(b) Criminal P. C. (5 of 1898), S. 107.—Dispute regarding immovable property—Breach of peace imminent—Before taking proceedings under S. 107 proceedings under S. 145 may conveniently be taken.

Where there is a dispute regarding possession of immovable property and there is imminent danger of breach of peace before a Magistrate proceeds against a party under S. 107, it is advisable in order to ascertain the fact of possession that the proceedings under S. 145 may conveniently be taken.

[P 1100 C 2; P 1101 C 2]

S. P. Varma and Syed Hasan—for Petitioners.

Pandey and N. K. Sahay—for Opposite Parties.

Judgment.—There is a dispute between the four petitioners and three men named Mohid, Wahid and Mazhar regarding possession of certain land in the Siwan subdivision. In August 1929 the Subdivisional Magistrate of Siwan issued an order under S. 144, Criminal P. C., against Mohid, Wahid and Mazhar which was rescinded by the District Magistrate on 23rd September with an expression of opinion that possession was with the persons against whom the Subdivisional Magistrate had made his order absolute. At the beginning of 1930 the parties were quarrelling again. Mohid prosecuted the petitioners who are now before this Court alleging that they had committed an offence punishable under S. 323, I. P. C., in a quarrel arising out

of this disputed claim to possession. The case was tried by an Honorary Magistrate who found that Mohid had not been assaulted as he alleged and acquitted the four petitioners. At the same time treating the order of the District Magistrate under S. 144 as practically amounting to *res judicata* he found that the complainant was in possession of the disputed land. Mater Chamar made a counter-complaint against Mohid's party which was summarily dismissed under S. 203, Criminal P. C., on the strength of the decision of the Honorary Magistrate. In April last the Subdivisional Magistrate drew up proceedings under S. 107, Criminal P. C., against the four petitioners remarking that there had already been findings on the question of possession by two Courts by the Court of the District Magistrate in his order of 23rd September and by the Honorary Magistrate in his order of 18th February. On this ground he rejected the petition of the opposite party praying for the initiation of proceedings under S. 145, Criminal P. C., or in the alternative that proceedings under S. 107 of the Code might be instituted against the opposite party also.

Mr. Varma on behalf of the petitioners argues that the dispute which has led to these proceedings is a dispute regarding possession of land so that the Magistrate, before he can take action under S. 107, must decide which of the two parties is in possession, that is to say, he must decide what practically amounts to a case under S. 145 before he can take proceedings against one of the parties under S. 107 so that it would be a simpler course to take proceedings under S. 145.

It is true that where one party who is clearly in the wrong threatens to disturb the rights of another who is in actual possession of the land, the provisions of S. 145 have no application, as was pointed out in *Shama Charan v. Emperor* (1). But in that case it was also pointed out that the proper course when there is a real dispute regarding land is to proceed under S. 145, since otherwise the effect might be to bind down one of the parties to the dispute, without any adjudication on the ques-

(1) A. I. R. 1925 Pat. 610=90 I. C. 442—Cr. L. J. 1562.

tion as to which of the two parties is in possession. The learned Sub-Divisional Magistrate in this case takes the view that one party is shown to be clearly in the wrong by the order of his superior officer made under S. 144, Criminal P.C., and by the Honorary Magistrate's order acquitting four petitioners on the charge framed under S. 323, I. P. C.

The decision of the learned District Magistrate of 23rd September 1929 merely rescinded the order which had been made under S. 144. If the learned District Magistrate had affirmed the order under S. 144, and if the Subdivisional Magistrate had now been hearing the matter under S. 145, he would have been obliged to hold that no evidence could be offered to show the possession of either party for the period during which the order under S. 144 was in force: *Joyanti Kumar Mukherji v. J. B. Middleton* (2). But if a definite order under S. 144 must be ignored when evidence regarding possession is being considered in proceedings under S. 145, a decision refusing to take action under S. 144 or rescinding an order under S. 144, must certainly also be ignored. The remark of the learned District Magistrate that one party or the other was in possession cannot be treated as proving in any way that they were in possession, and the petitioners themselves cannot take advantage of the fact that they enjoyed possession during the period between the date of the Subdivisional Magistrate's order under S. 144 in their favour and 23rd September, when the order was rescinded. The learned Sub-Divisional Magistrate remarks that there was no motion against any of these orders, including the order of 23rd September. If the petitioners had moved, against the District Magistrate's order of 23rd September their application would have been summarily rejected, because the High Court would not have entertained an application in which it was impossible to grant any relief. The High Court could not have restored the order of the Subdivisional Magistrate after it had expired by lapse of time, and an application for revision would not have been admitted when no relief could be granted.

(2) [1900] 27 Cal. 785=4 C. W. N. 562.

Similarly the learned Sub-Divisional Magistrate must not treat the obiter dicta of the Honorary Magistrate who disposed of the case instituted by Mohid as excusing him from examining the evidence on the question of possession. All that is finally decided by that case is that the four petitioners did not assault Mohid. The learned Magistrate's remarks on the question of possession are obiter dicta, since if Mohid was not assaulted by the petitioners the question of who was in possession of the land did not arise. Similarly the fact that Matar Chamar's counter-claim was dismissed under S. 203, Criminal P. C., is evidence of nothing more than of the fact that the Magistrate did not believe that the persons accused in that case had assaulted Matar Chamar. It has no bearing of any kind on the question of possession.

It will therefore be necessary before proceedings under S. 107 Criminal P. C., can be properly instituted against the petitioners, to ascertain which of the parties to this dispute is in possession of the land, which can more conveniently be done by proceedings under S. 145. No justification has been made out for selecting the four petitioners as the persons against whom proceedings should be taken instead of the members of the opposite party, and in the circumstances I consider that the proceedings under S. 107, Criminal P.C., should be quashed. If the learned Magistrate considers that danger of a breach of the peace renders proceedings under Part 4, Criminal P. C., necessary he should proceed under S. 145.

V.B./R.K. *Proceedings quashed.*

1930 Cr. Cases 1101

(Nagpur)

JACKSON, A. J. C.

Diwan Singh—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 197 of 1930, Decided on 7th August 1930, from order of Addl. Sess. Judge, Hoshangabad, D/- 5th June 1930, in Criminal Revn. No. 10/6 of 1930.

Criminal P. C. (1898), S. 201—Magistrate having two jurisdictions, taking cognizance of complaint under one jurisdiction but later on under another jurisdiction may be deemed to have returned the complaint for

presentation to proper Court and to have accepted it as represented—States (Protection Against Disaffection) Act, (1922) S. 3.

Inspector-General of Police, Bhopal, with the sanction of the Governor-General in Council lodged a complaint in the Court of a Magistrate having two jurisdictions, that of a Headquarters Magistrate and that of a Magistrate exercising jurisdiction over railway lands in Bhopal State. The complaint was against the editor, printer and publisher of an Urdu Weekly "Riyasat" for publishing an article tending to excite disaffection towards the Chief of Bhopal State or his government or administration in Bhopal. The Magistrate was subordinate to different High Courts in two different jurisdictions. The complainant applied for amplification of his complaint by the inclusion of Itarsi as one of the places of publication of the above offending article. The Magistrate passed the following order: "The result of this petition for amplification will be that the case will henceforward cease to be a railway case for State-administered areas if it was one and be transferred to my ordinary file of criminal cases of this Court. This is done." After this order the accused objected that the Magistrate had no jurisdiction to hear the case as he had transferred a case from a Court subordinate to one High Court to another Court subordinate to the other High Court, which the Governor-General in Council could alone do by a notification in the Gazette of India.

Held: that the trying Magistrate in his capacity as the Railway Magistrate for Bhopal was incompetent to deal with the complaint of an offence committed at Itarsi but in his capacity as Headquarters Magistrate was competent to do so. [P 1103 C 2 ; P 1104 C 1]

Held further: that as the original papers filed by the complainant contained material clearly amounting to an allegation of publication at Itarsi, the Railway Magistrate for Bhopal was no longer bound to dismiss the complaint in its entirety: he was entitled to return the complaint for presentation to the Court that could try the offence committed at Itarsi and this was in effect what he did. [P 1104 C 1]

B. B. Tawakley, Bhagwan Singh and M. B. Kinkhede—for Applicant.

V. Bose—for the Crown.

Abdur Rahman, S.C. Dube and J. Sen—for Non-Applicant.

Order.—The applicant in the present case is alleged to have committed an offence punishable under S. 3, States (Protection Against Disaffection) Act, 1922. The complaint, with the sanction of the Governor-General in Council, was laid by the Inspector-General of Police of the Bhopal State in the Court of the Railway Magistrate, Hoshangabad. In it it was alleged that the accused was the editor, printer and publisher of the Urdu Weekly called "Riyasat", that an article in that paper headed "Pandit Moti Lal Nehru and

Bhopal" published in the issue of 17th August 1929 brought or was intended to bring His Highness the Nawab of Bhopal or the government or administration established in Bhopal into hatred or contempt, or excited or intended to excite disaffection towards the Chief of the Bhopal State or his government or administration in Bhopal.

The complaint was made on 4th December 1929. The complainant when examined made the following statement:

"The publication of the offending article having taken place at the Bhopal Railway Station, the offence under S. 3, States (Protection Against Disaffection) Act, 1922, has been committed by the accused within the jurisdiction of this Court."

Some time thereafter the accused applied to the Government of India for an order of transfer, apparently on the ground that on conviction the appeal would lie to the Political Agent, Bhopal and an application for revision to the Agent to the Governor-General in Central India. Before orders were received on this application the complainant made an application to amplify the complaint, with the purpose of making it clear as to the jurisdiction of the Court, and for that purpose it was alleged that the offending article in the said issue of the Riyasat was published at the Itarsi Railway Station in Hoshangabad and other places within the jurisdiction of the Court and that the said article was also published at the Bhopal Railway Station.

It must here be explained that Mr. Royzada, in whose Court the complaint has been laid, exercises two jurisdictions: he is the Headquarters Magistrate of Hoshangabad and he is also the Magistrate exercising jurisdiction over railway lands in the Bhopal State. In his latter capacity the Political Agent, Bhopal, is the Sessions Judge to hear appeals from his decisions and the Agent to the Governor-General is the High Court. The application for transfer was thus on the assumption that Mr. Royzada had entertained the complaint as the Magistrate exercising jurisdiction in the railway lands in Bhopal. The amplification of the complaint by the inclusion of Itarsi as one of the places where the offending article is alleged to have been published gave Mr. Royzada jurisdiction in his

other capacity as the Headquarters Magistrate and on 8th March 1930 he passed an order containing the following :

"The result of this petition for amplification will be that the case will henceforward cease to be a railway case for State administered areas if it was one and be transferred to my ordinary file of criminal cases of this Court. This be done."

After this order the accused objected that the Headquarters Magistrate, Mr. Royzada, had no jurisdiction to hear the case ; but the objection was overruled on 15th April 1930, and an application for revision was rejected by the Additional Sessions Judge, Hoshangabad, on 5th June 1930, against whose order further application for revision has now been made to this Court. The objection taken is that Mr. Royzada, as a Railway Magistrate, has by his order dated 8th March 1930, transferred the case from a criminal Court subordinate to one High Court to a criminal Court subordinate to another High Court, as such a transfer can only be made by the Governor-General in Council by notification in the Gazette of India.

It would appear from the paragraph I have cited from the order passed on 8th March 1930 that Mr. Royzada expressed a doubt as to whether the case had ever been a railway case for State-administered areas: it seems quite clear from that order that he thought he had taken cognizance of it as such a case, though that is immaterial, if the complaint was of an offence within his other jurisdiction. Whether it was one in reality will depend on the allegation, as to the place where the offence is alleged to have been committed on which the Magistrate took cognizance. The complaint itself does not mention a specific place of publication: it mentions in para. 2 that the *Riyasat* has a fairly wide circulation in India generally and the Indian States particularly, and is also received in Bhopal. In para. 6 it merely says that the *Riyasat* issue of the 17th August 1929 was published within the jurisdiction of this Court. The terms of the complaint thus do not show whether the Magistrate took cognizance of an offence committed at Bhopal or at Itarsi.

It is the examination of the complainant, from which I have quoted a passage in para. 2 foregoing, that shows

that the Railway Magistrate was asked to take cognizance of an offence committed at the Bhopal railway station. It is urged that Bhopal railway station is not in British India: the States (Protection Against Disaffection) Act applies only to British India and so no offence under it can be committed at that station. From this it is argued that the complaint can only be directed against an offence committed in British India; but it does not follow: the view seems to have been taken that the offence could be committed at that station though it was a mistaken view. It is urged that the intention was not to complain of an offence committed there because there is no certificate from the Political Agent, as S. 188, Criminal P. C., requires. I doubt however if such a certificate is necessary when the trial is to be held by a Magistrate exercising jurisdiction within the Bhopal State. I am satisfied that the complaint made to the Railway Magistrate was *prima facie* of an offence alleged to have been committed at Bhopal railway station, and it was of that offence he took cognizance.

It was not however a complaint of that offence that was transferred to the Headquarters Magistrate for trial but an offence alleged to have been committed at Itarsi railway station, which the Magistrate for Bhopal could not try. S. 527, Criminal P. C., contemplates transfer from a competent Court; and the only objection, I think, that the accused can raise is that the procedure adopted has resulted in the Headquarters Magistrate assuming illegal jurisdiction in a case in which no valid complaint has been made to him.

It is suggested on behalf of the prosecution that what has taken place is a return, under S. 201, Criminal P. C., of a complaint for presentation to the proper Court by a Magistrate not competent to take cognizance of the case. It would be unfair to rule out this contention because Mr. Royzada transferred the case from one of his Courts to the other without handing back the complaint to be formally represented. It is also immaterial that the Magistrate probably did not realize that S. 201 applied. The question however, is whether the Railway Magistrate for Bhopal was incompetent. He certainly

was incompetent to deal with the complaint of an offence committed at Itarsi. The complaint itself is in very general terms and does not exclude an allegation of publication at Itarsi or any other place. It was only the examination of the complainant that made it clear that complaint of an offence committed at Bhopal railway station was primarily intended. Such a complaint the Railway Magistrate for Bhopal was not incompetent to deal with. He could have dismissed it as disclosing no offence; but he did not do so and when the application for amplification was made other points arose for consideration. If that amplification introduced matter extraneous to the complaint, then I think it would have had no justification; but it did not. The application, after stating that publication had taken place at Itarsi railway station as well as at Bhopal, went on to point out that a list of witnesses to prove publication at these places had been given with the complaint. That list of witnesses shows that the agent of the book stall at Itarsi Station was to be called with his newspaper register showing the account of newspapers for the months of August, September and October 1929, and the only intention could be to prove sale of the Riyasat at Itarsi and consequently publication at that place. When thus it was apparent that the papers originally filed by the complainant contained material clearly amounting to an allegation of publication at Itarsi, the Railway Magistrate for Bhopal was no longer bound to dismiss the complaint in its entirety; he was entitled to return the complaint for presentation to the Court that could try the offence committed at Itarsi and this is in effect what he did.

In this view of the case I must hold that the Headquarters Magistrate has jurisdiction to try the case, and I dismiss the application for revision.

„ K.N./R.K. *Application dismissed.*

1930 Cr. Cases 1104

(Calcutta)

JACK, J.

Abdul Sovan—Accused—Petitioner.

v.

Ramani Mohan Chatterjee—Opposite Party.

Criminal Revn. No. 389 of 1930, Decided on 15th July 1930.

Penal Code (1860), S. 485—Trade-mark consisting of impression moulded on glass and label—Person found only with mould with intention of counterfeiting trade-mark—Person can be convicted under S. 485.

Where a trade-mark consists of an impression moulded in the glass of which the bottles are made together with label and the person is found in possession of the mould in question with the intention of counterfeiting that trade-mark, although the apparatus for counterfeiting the label which would complete the trade-mark has not been found, the person can be convicted under S. 485. [P 1104 C 2]

Amiruddin Ahmed—for Petitioner.

D. N. Bhattacharjee—for Opposite Party.

Judgment.—The petitioner has been convicted under S. 485, I. P. C., and sentenced to a fine of Rs. 500 on the ground that he was in possession of a mould for counterfeiting the trade-mark of G. Ghose, the manufacturer of hair oil. The rule was issued on the ground that the trade-mark was a combination trade-mark and possession of moulds for counterfeiting a part of the mark did not amount to an offence under S. 485, I. P. C. It appears that the trade-mark consisted of an impression moulded in the glass of which the bottles are made together with the label, and these moulds were for making the impression on the glass of the bottle. Under S. 485, I. P. C., whoever has in his possession any die for the purpose of counterfeiting the trade-mark is liable under the section. There can be no doubt in this that the mould in question was intended for the purpose of counterfeiting this trade-mark although the apparatus for counterfeiting the label, which would complete the trade-mark has not been found, and inasmuch as this mould was certainly meant to be used in order to counterfeit the trade-mark the petitioner has rightly been held liable under S. 485, I. P. C.

The Rule is therefore discharged.

The petitioner will surrender to his bail bond and serve out the remainder of his sentence.

v.B./R.K.

Rule discharged.

1930 Cr. Cases 1105 (Calcutta)

PEARSON AND JACK, JJ.

Satis Chandra Mallik and others —
Accused.—Petitioners.

Emperor—Opposite Party.

Criminal Revision No. 1451 of 1929, Decided on 16th May 1930, from order of Dy. Magistrate, Pabna, D/- 16th August 1929.

Criminal P. C., S. 476—Opinion that there may be prima facie case against persons but no finding as required by S. 476 on expediency of prosecution in interests of justice—Case held not to come under S. 476.

In connexion with the conduct of a proceeding under S. 145, Criminal P. C., the order of the Magistrate was as follows: "Considered. Cause shown and heard pleaders. There is material for prosecution of (1) B under Ss. 465, 467 and 193, Penal Code; (2) S under Ss. 467, 114 and 193, Penal Code; (3) R under Ss. 467, 114, 477, 193 and 196, Penal Code. Draw up formal complaint against them for their prosecution and trial for the above-noted offences."

Held: that in stating that there was "material for prosecution" of these persons the Magistrate indicated that in his opinion there may be a prima facie case against them. But nowhere within the four corners of this order could it be said that there was any finding recorded such as is referred to in S. 476, nor has he in any way directed his mind to the question as to whether any such order as he makes is expedient in the interests of justice as to bring the order within S. 476.

[P 1105 C 2]

*N. K. Basu and Rameni Mohan Chatterjee—*for Petitioners.

*B. C. Chatterjee—*for the Crown.

Judgment.—This rule was directed against an order for a complaint to be made against certain persons for the offence of perjury and kindred offences in connexion with the conduct of a proceeding under S. 145, Criminal P. C. The Magistrate made the order and the learned Sessions Judge has confirmed it.

One ground that is taken is that having regard to the fact that in the proceeding under S. 145 it was held that it was not maintainable, the order of complaint was bad. There is no substance in this because the proceedings themselves were perfectly in order and were in no sense illegal, and therefore the utmost that can be said is that it is a matter which might be considered as a possible element upon the question whether it was expedient in the interests of justice to make the complaint.

Another ground is that the order

should not have been made because the dakhilas in respect of which the offence is alleged were not material to the case. But that however does not appear to be in accordance with fact because they were intended to support the case made by the party producing them that he was in exclusive possession of the particular portion of the land.

The other point raised is that the order of the Magistrate is not in conformity with the provisions of S. 476, Criminal P. C. That section lays down that when any Court is of opinion that it is expedient in the interests of justice that an enquiry should be made into any offence . . . such Court may after such preliminary enquiry if any as it thinks necessary, record a finding to that effect and make a complaint thereof in writing. The order of the learned Magistrate in the present case is as follows:

"Considered. Cause shown and heard pleaders. There is material for prosecution of (1) Baroda Kinkar Ghose under Ss. 465, 467 and 193, I. P. C.; (2) Surendra Krista Dutta under Ss. 467, 114 and 193, I. P. C.; (3) Satis Chandra Maulik under Ss. 467, 114, 471, 193 and 196, I. P. C. Draw up formal complaint against them for their prosecution and trial for the above-noted offences."

In stating that there is "material for prosecution" of these persons we apprehend the learned Magistrate to indicate that in his opinion there may be a prima facie case against them. But nowhere within the four corners of this order can it be said that there is any finding recorded such as is referred to in S. 476, nor is it to be discovered that the learned Magistrate has in any way directed his mind to the question as to whether any such order as he makes is expedient in the interests of justice. On this ground the order of the learned Magistrate is set aside. It will of course be open to him if so advised to reconsider the matter in the light of the above remarks on the questions whether further proceedings should be instituted.

In these terms the rule is made absolute.

V.B./R.K.

Rule made absolute.

1930 Cr. Cases 1106

(Calcutta)

RANKIN, C. J. AND PATTERSON, J.

Khadem and others — Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 70 of 1929, Decided on 14th August 1929, from order of Addl. Sess. Judge, Midnapur, D/- 4th December 1928.

(a) Criminal P. C., (1898), S. 297—While charging jury, Judge saying nothing about particular witnesses' evidence while considering whether offence was committed on that day or not—But while dealing with evidence against particular accused bringing in evidence of that witness—Evidence not given before Sessions nor his deposition before committing Magistrate put in Sessions—Such evidence should not have been brought in, as being extremely damaging to general case of accused.

While charging the jury the Sessions Judge said nothing at all about the evidence of a certain witness in that part of the charge in which he considered whether the offence was committed on that day or not. But when he came to that part in the charge in which he dealt with evidence against particular accused, he referred to evidence of that witness. It was not given before the Sessions but had been given before the committing Magistrate. But his deposition before the committing Magistrate had also never been put in before the Sessions.

Held: that under the circumstances such evidence should not have been brought in while charging the jury as it is of an extremely damaging character to the general case of the accused. [P 1107 C 2]

(b) Criminal P. C. (1898), S. 288—Examination-in-chief of prosecution witness before committing Magistrate, without his cross-examination on a vital point, brought on record before Sessions—Though Sessions Court had discretion it was not allowed in as being unfair to defence.

The evidence of a prosecution witness during his examination-in-chief before the committing Magistrate without his being cross-examined was brought on record before the Sessions Court.

Held: that though a Sessions Judge has discretion to put in depositions before the committing Magistrate, that discretion must be carefully exercised. Under the present circumstances the evidence should not be put in before the Sessions, as being very unfair to the defence. [P 1107 C 2]

Sasmal and Phanindranath Das—for Appellants.

Debendranarayan Bhattacharya—for the Crown.

Rankin, C. J.—In my opinion, this appeal must succeed, the conviction and

the sentences must be set aside and the case must be retried.

The allegation against the seven appellants was that they had committed a dacoity in the house of the complainant on Saturday night, 16th June, at about 8 o'clock in the evening. The first information was lodged at the thana, some two or three miles away, by 9 o'clock. The amount of property taken away was in value only some Rs. 50 and the case for the prosecution is that the inmates of the house were allowed to leave the house and that, in a very short time, the neighbours were assembling with the result that the dacoits could not continue with their endeavours and in the end managed to get away with very little. The defence clearly denied that there was any dacoity at all and they laid stress upon certain suspicious features in the prosecution case, and maintained that there were reasons why the prosecution witnesses had enmity against these accused, who lived not far off, in a neighbouring village and why the attempt to make out that they were guilty of dacoity should be indulged in. The accused people were persons who were known to the inhabitants of the house and it appears that a number of them were said to be identified by different witnesses for the prosecution.

So far as can be gathered from the charge of the learned Judge, there is undoubtedly a substantial body of evidence called by the prosecution to the effect that this dacoity took place. There are the first six prosecution witnesses, who are inmates of the house. P. W's. 7, 9 and 10 appear to be close neighbours and P. W. 8 appears to be a co-villager.

The jury had before them the question whether they would or would not believe the general story told by these prosecution witnesses; and, if this case had been tried upon evidence that was on the record there can be no doubt that very strong reasons indeed would be required before this Court, on appeal, would think of interfering with the verdict of the jury.

What has happened in the present case is that a witness, who appears to be a Mahomedan witness (P. W. 13) and who lived in the same village as the accused persons, gave evidence before the committing Magistrate and

in the course of that evidence, as recorded, he stated, among other things, that, on this very night, he saw 18 or 19 persons coming out of the barhi of the accused man Bhuta. When the case was tried in the Sessions Court this piece of evidence, which, if true, was extremely important, was not thought of such importance by the prosecution that they were minded to examine this witness before the jury at all. He was tendered merely for cross-examination. He was asked one or two harmless questions about the topography of his own village and about certain persons which affected only the fringe of the case, and nothing more happened as regards this witness. He did not tell before the jury any story about seeing 18 or 19 people leaving the barhi of Bhuta on the night of the occurrence. Then, when the learned Judge comes to charge the jury, he says nothing at all about the witness' evidence in that part of the charge in which he is considering the question whether there was dacoity at all on that night or not. But when he comes to the part of the charge, in which he deals with the evidence against particular accused, he says :

"Prosecution witness 13 says that he saw 18 or 19 persons coming out of Bhuta's barhi on Saturday evening. Of course he did not say he recognized the men."

Prosecution witness 13 had never given any such evidence before the Sessions. His deposition before the committing Magistrate had never been put in. No reference had been made to it accordingly, and the learned Judge in bringing in this as a piece of evidence, to my mind, brought in a piece of evidence which was of an extremely damaging character. To begin with, it was extremely damaging as regards Bhuta, and the learned Judge introduces it apparently with the idea that it is evidence identifying and implicating Bhuta.

It is said that, as the learned Judge has not introduced it in that part of the charge where he is considering whether there was a dacoity or not, we should not pay too much attention to this statement in the case of the other accused. It appears to me, on the contrary, that what Mr. Sasmal has represented to us may well be the true state of affairs, namely, that the evidence of this co-

villager and co-religionist to the effect that he saw such a large number of people on that night proceeding from the barhi of Bhuta in this neighbouring village, may well have appeared to the jury to be remarkable confirmation of the evidence as regards the existence of a dacoity. I do not feel disposed to speculate too closely as to the effect it would have on the mind of the jury. It appears to me that, on the whole, the probability is that if the jury noticed this part of the charge, as they must be supposed to have done, it would have a highly prejudicial effect upon the general case of the accused.

It is said that this evidence could have been put in under S. 288, Criminal P. C. A Sessions Judge certainly has a discretion to put in depositions before the committing Magistrate, but I am bound to say that, in this case, I am somewhat clearly of opinion that, if the learned Judge had, in the circumstances, put in this evidence about this gang of men by means of S. 288, he would have exercised his discretion in a manner that was anything but fair to the defence. For the first time, in this way, there would have come upon the record an extremely damaging piece of evidence, a piece of evidence which should have been got from the mouth of the witness in the examination-in-chief; and, speaking for myself, I cannot imagine I should have allowed such evidence to go in, there being no cross-examination directly or indirectly affecting or purporting to impinge upon this very cardinal question. In my judgment, the discretion to let in such evidence under S. 288, Criminal P. C., is one that must be carefully exercised, and in this case I have no hesitation in saying that nothing would have induced me to let this piece of evidence in by this round-about method. But, apart from that, there remains the fact that the deposition was not put in under S. 288, Criminal P. C. Had it been put in, the pleader for the defence would have had his chance to represent to the jury that this was a way of making out the prosecution case which rendered the prosecution case highly suspicious. He would have been able to deal with it. He would have notice of it. He might apply for a further opportunity to cross-examine the witness. In my judgment

this is a case where a quite important matter, which is not on the record, has been treated as being in evidence, and I am not prepared to let the conviction stand either in the case of Bhuta or in the case of any other appellant.

The appeal must therefore be allowed, the convictions and the sentences must be set aside and the case must be remanded for a retrial. The appellants may continue on the same bail as before to the satisfaction of the District Magistrate.

Patterson, J.—I agree.

B.V./R.K.

Case remanded.

1930 Cr. Cases 1108

(Calcutta)

JACK AND PANCKRIDGE, JJ.

Nababali and others — Accused—Appellants.

Emperor—Opposite Party.

Criminal Appeal No. 30 of 1930, Decided on 9th July 1930, from judgment of Asst. Sess. Judge, Mymensingh.

(a) Criminal P. C., S. 221—Mere slip in form of charge whereby accused is not prejudiced does not make conviction bad.

Where in the form of the charge there was a mere slip, the word "or" being used for "and" between two charges framed under Ss. 221 and 242, Penal Code, and none of the accused was in any way prejudiced by the fact that in form the charge was in the alternative whereas in substance two quite distinct offences were charged.

Held: that the conviction of the accused in respect of both the charges was not bad.

[P 1108 C 2]

(b) Criminal P. C., S. 297—Non-direction — Prosecution failing to produce material witnesses—No explanation offered in case of one witness—Judge not specifically mentioning to jury of non-acceptance of explanation offered—Omission is non-direction amounting to misdirection.

Where the prosecution failed to produce material witnesses on the ground that they were relatives of the accused and where the trying Judge drew the attention of the jury to the explanation suggested by the prosecution for their absence and said that it was for the jury to accept or reject it without saying that the jury would be at liberty to draw an inference adverse to the prosecution if the explanation suggested were not acceptable to them and where no specific mention was made to the jury by the Judge regarding the fact that no explanation was offered about the non-production of one of the material witnesses for the prosecution.

Held: that the omission of the trial Judge to direct the jury as to the inference they were

entitled to draw if they were not satisfied with the explanation suggested for the absence of material witnesses was a non-direction amounting to a misdirection and to be a good reason for setting aside the conviction of the accused person: *A. I. R. 1921 Cal. 257, Foll.*; *36 Cal. 281, Ref.*; *A. I. R. 1930 Cal. 481, Dist.*

[P 1109 C 2]

Suresh Chandra Taluqdar — for Appellant.

B. M. Sen and Anil Chandra Roy Chaudhury—for the Crown.

Panckridge, J.—This is an appeal on behalf of the accused persons, Nababali, Biswanath Das and Rameswar who have been convicted by the Assistant Sessions Judge of Mymensingh and sentenced to various terms of imprisonment under Ss. 221, 388 and 342, I. P. C. The jury returned a unanimous verdict of guilty against all the accused in respect of the charge under S. 342, a unanimous verdict of guilty against Rameswar in the case of the charge under S. 221, a majority verdict of three to two guilty in the case of the charge under S. 388, I. P. C., against all the accused. The Judge accepted the verdict of the majority of the jury and sentenced the accused to various terms of imprisonment.

A preliminary technical point is taken on behalf of the accused persons, namely that the convictions are bad because the jury have returned a verdict of guilty against Rameswar under S. 342 and S. 221, whereas the charge was framed in the alternative. No one could suppose from reading the charge of the learned Judge that the charges had been framed in this way, and indeed the only fact that supports this is the word "or" appearing at the beginning of the charge under S. 342 against Rameswar. Logically, there was no justification for charging Rameswar in the alternative as will appear from the facts of the case when we come to deal with him. We think that the form of the charge was a mere slip and that none of the accused was in any way prejudiced by the fact that in form the charge was in the alternative, whereas in substance two quite distinct offences were charged and, in the view of the jury, proved against the accused. There is however another point which we consider is of some importance. The story for the prosecution was that the complainant Jogendra met the first two accused Nababali and Biswanath in a certain bazar where it is

the practice of persons so disposed to gamble. A dispute arose owing according to the prosecution, to the fact that Nababali tendered to the complainant Jogendra a counterfeit currency note in payment of gambling loss. Thereupon Jogendra according to the prosecution case called on the third accused Rameswar to take Nababali and Biswanath into custody. This Rameswar refused to do and at the instigation of the first two accused proceeded to apprehend Jogendra. Thereafter Jogendra was removed to a place which has been referred to as the bari of one Santosh where by threats of violence a sum of Rs. 105 was extorted from him, and he was not successful in obtaining his release until this sum had been made over. This is the story of the prosecution in respect of which the charges were brought and the accused persons were convicted.

Now the passage in the learned Judge's charge to which exception is taken is that which deals with the stage when the gambling was going on. It is evident that the place where the occurrence is alleged to have happened is, as one would expect not unfrequented and it is also evident that some of the prosecution witnesses spoke to the presence of other persons at the scene of the occurrence in addition to those who were directly concerned. Prosecution witness 5, for example, said that 10 or 12 elderly men were present at the time of the occurrence, and with reference to the witnesses named in the complaint Jogendra said that of them, Dwijendra Gurudayal, Phanindra and Narendra Sukladas saw the occurrence. None of these witnesses was called in support of the prosecution case. This aspect of the matter is dealt with as follows: The learned Judge says that Jogendra said that Gurudayal belonged to the party of gamblers and that another prosecution witness said that Dwijendra and Phanindra are cousins of Biswanath, that is to say, accused 2 and he adds that as it was not likely that they would depose against their uncle the prosecution did not call them. He goes on as follows:

"It is for you to consider if you will accept this explanation for the non-production of those witnesses."

Then he proceeds to observe that the occurrence admittedly took place near

the shop of one Kunja Saha and he alludes to the fact that Kunja Saha has not been called nor any other person frequenting the bazar. Then he proceeds to make some general observation as to the likelihood of the persons engaged in the gambling being desirous of assisting the prosecution. With regard to Kunja and the witnesses who are described as "the bazar people" we do not think that any harm has been done by the omission of the learned Judge to carry the matter further. But we do consider that the learned Judge failed to direct the jury properly as regards the absence of those persons who according to the complainant's case were witnesses to the occurrence. He does, it is true, with regard to three out of the four draw the attention to the explanation which is suggested by the prosecution for their absence and he says that it is for the jury to accept or reject it. But what he does not say is that the jury would be at liberty to draw an inference adverse to the prosecution story if the explanation suggested by the advocate for the prosecution is not acceptable to them.

With regard to witness 4 apparently no explanation was offered but the learned Judge does not call the attention of the jury specifically to this fact. Our attention has been directed to the case of *Tenaram Mondal v. Emperor* (1) where in circumstances which we do not feel justified in distinguishing from the present, the omission of the trial Judge to direct the jury as to the inference they were entitled to draw if they were not satisfied with the explanation suggested for the absence of material witnesses was held to be a non-direction amounting to a misdirection and to be a good reason for setting aside the conviction of the accused persons. A previous decision of this Court was referred to in that case namely the case of *Phanindra Nath Banerjee v. Emperor* (2) in which it was said that it is not necessary that the actual word "presumption" should be used. But the two cases taken together seem to indicate that it is necessary that there should be a substantive direction on the part of

(1) A.I.R. 1921 Cal. 257=61 I.C. 1003=22 Cr. L.J. 475.

(2) [1909] 36 Cal. 81=9 Cr. L.J. 452=1 I.C. 970.

the learned Judge as to the view of the prosecution which the jury is entitled to adopt if they are not satisfied with the explanation offered for the absence of a witness who is material. We have also been referred to the case of *Hachanikhan v. Emperor* (3). But this in our opinion merely shows that there may be a case where this omission in the particular circumstances is unimportant.

In that case it does not seem that it was clearly established that the witness who, it is alleged should have been called, was really a material witness at all. That case differs from the present case. As I have pointed out, from the evidence of the complainant himself there were at least four eyewitnesses to the beginning of the transaction in respect of which the prosecution was eventually launched who were not called. It has been urged that this omission only affects the case in so far as some of the charges are concerned and with regard to the charge of extortion the convictions can stand, inasmuch as it cannot be suggested that the witnesses could have testified as to the subject matter of that charge. We do not agree. Although the charges are concerned with different incidents yet all the incidents are parts of one transaction and we think that it is quite possible that if the jury under a proper direction of the learned Judge were not disposed to accept the prosecution evidence with regard to the commencement of the transaction they would probably have been equally loth to accept the prosecution story with regard to the subsequent transactions.

In the circumstances we direct that the convictions and sentences of the appellants be set aside and that the case be retried. Pending the retrial the appellants will be released on bail to the satisfaction of the District Magistrate.

Jack, J.—I agree.

K.N./R.K.

Order accordingly.

(S) A.K.R. 1930 Cal. 481.

1930 Cr. Cases 1110

(Calcutta)

SUHWARWADY AND COSTELLO, JJ.

Tura Sardar—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 1404 of 1929, Decided on 16th May 1930.

(a) Evidence Act (1872), S. 25—Excise officer is not police officer.

An excise officer is not a police officer within the meaning of S. 25: *A. I. R. 1927 Cal. 527*; 45 *I. C. 284* and 46 *Cal. 411, Foll.*; *A. I. R. 1927 Bom. 4, not Foll.* [P. 1111 C 1]

(b) Criminal P. C. (1898), S. 162—Statement to excise officer not being statement to police officer during investigation is not inadmissible—S. 162 has no application to accused persons.

The accused was charged under S. 46, Excise Act. A statement was made by his co-accused to the Excise Inspector to the effect that as soon as the Excise Inspector came, there was a man with him who ran away.

Held: that it was not a statement made to the police officer in course of investigation under Ss. 160 and 170, Criminal P. C., and was not inadmissible in evidence. Nor was the statement, reduced to writing so as to be inadmissible under S. 162, Criminal P. C. Even if the statement was taken as confession under S. 25, Evidence Act, S. 162, Criminal P. C. did not apply in cases of accused persons: *A. I. R. 1927 Cal. 17, Rel on.* [P. 1111 C 1, 2]

Santosh Kumar Pal for *Sarat Chandra Jana*—for Petitioner.

Anil Chandra Ray Chaudhury—for the Crown.

Judgment.—The petitioner in this case *Tura Sardar* has been convicted under S. 46, Excise Act, and sentenced to six months' rigorous imprisonment. He was also charged under S. 61, Excise Act read with S. 109, I.P.C., but no sentence was passed under that charge. This rule was granted on two grounds. The first is that any statement made by the co-accused *Faizuddin*, who was also convicted, to the Excise Inspector and Sub-Inspector is inadmissible under S. 25, Evidence Act. The second ground is that the District Magistrate has not in his judgment found all the facts necessary to sustain the conviction. With regard to the second ground, it may be dismissed in a few words. The learned District Magistrate in a careful judgment has dealt with all the points taken in the grounds of appeal before him. In discussing the points he has entered sufficient findings of his own with regard to the points that require to be proved in support of the conviction. He says that *Faizuddin* said that on the approach of the Excise Officer the accused ran away and he was caught shortly after in circumstances that showed that he had come hurriedly through mud. The learned Judge believed the witness *Santosh* and his evidence is enough to convict the accused of the offence charged.

As regards the first ground, Mr. Pal argues that an excise officer is a police officer within the meaning of S. 25, Evidence Act. The point may be arguable, but so far as this Court is concerned it is now *res integra*. It has been held in several cases that he is not, in *Harbhajan Sao v. Emperor* (1), *Rokumali v. Emperor* (2) and *Ah Foong Chinaman v. Emperor* (3). Reference has been made to a Full Bench decision of the Bombay High Court in *Naroo Sheikh Ahmed v. Emperor* (4). The learned Chief Justice giving the judgment of the Full Bench at p. 93 of the report distinguished the Calcutta case on the ground that Abkari law in Calcutta was different from that in Bombay and that the latter was more stringent than the former. This point is settled by authorities of this Court and as the law now stands an excise officer is not a police officer within the meaning of S. 25, Evidence Act. As a branch of this ground Mr. Pal has also argued that under S. 74, Bengal Excise Act of 1909, an excise officer is a police officer within the meaning of S. 162, Criminal P. C. and any statement made to him cannot be proved against the accused.

Under S. 74, Excise Act whenever an excise officer suspects the commission of an offence he is empowered to investigate it and in carrying on such investigation the powers of a police officer under Ss. 160 to 170, Criminal P. C. have been conferred upon him. It may be reasonable to argue that when the power of investigation under this section has been conferred upon an excise officer it must be taken to have been conferred with all the limitations which the law imposes. But in the present case the question does not arise. The statement objected to by Mr. Pal is the statement of Faizuddin the co-accused who said that as soon as the Excise Inspector came he said that a man had been with him who had run away. That is not a statement which was made in the course of the investigation held under Ss. 160 to 170, Criminal P. C. Nor was that statement reduced in writing as to be

made inadmissible under S. 162. What happened was that Faizuddin was arrested on the spot and as soon as the Excise Inspector came there Faizuddin told him that there was a man with him who ran away. This is not a statement made to a police officer under the provisions of any section of the Criminal Procedure Code. Besides, if the statement is taken as a confession under S. 25 which apparently it is not, S. 162, Criminal P. C. does not apply in cases of accused persons: see the case of *Azimaddi v. Emperor* (5). Both the grounds therefore fail and the rule is discharged.

The petitioner must surrender to his bail and serve out the remainder of the sentence.

R.M./R.K. *Rule discharged.*

(5) A. I. R. 1927 Cal. 17=99 I. C. 227=28 Cr. L. J. 99=54 Cal. 237.

1930 Cr. Cases 1111

(Calcutta)

CUMING, J.

Topzal Hossain—Accused—Petitioner.

v.

H. C. Hunt—Complainant—Opposite Party.

Criminal Revn. No. 1399 of 1929, Decided on 22nd January 1930, against order of Sub-Divisional Magistrate, Feni, D/- 25th June 1929.

(a) Criminal P. C., S. 260—Offence under S. 211, Penal Code cannot be tried summarily.

An offence falling under S. 211, Penal Code, cannot be tried summarily. [P 1112 C 1]

(b) Criminal P. C., S. 260—Offence not triable summarily, tried summarily—High Court set aside conviction.

Where an offence as disclosed was not summarily triable and the Court adopted the summary procedure the High Court set aside the conviction and remanded the case for retrial.

[P 1112 C 1]

(c) Penal Code, S. 211—False information to Superintendent of Police as to wrongful confinement of informant by police officer constitutes institution of criminal proceedings.

Lodging false information with Superintendent of Police that the informant and his mother were wrongfully confined by a police officer constitutes institution of criminal proceedings within the meaning of S. 211.

[P 1112 C 1]

Nurul Hug—for Petitioner.

Debendra Narain Bhattacharji—for Opposite Party.

Judgment.—The petitioner in this case is found guilty in a summary trial on a charge under S. 182, I. P. Cr. and was sentenced to pay a fine of Rs. 200.

(1) A. I. R. 1927 Cal. 527=102 I. C. 547=28 Cr. L. J. 579=54 Cal. 601.

(2) [1917] 19 Cr. L. J. 529=45 I. C. 284.

(3) [1918] 46 Cal. 211=20 Cr. L. J. 94=48 I. C. 504.

(4) A. I. R. 1927 Bom. 4=99 I. C. 330=28 Cr. L. J. 122=51 Bom. 78 (F.B.).

The charge against him was that he gave false information to a certain public servant, the Superintendent of Police, that he and his mother had been unlawfully confined by a certain police officer and that money was extorted wrongly from them. He has moved this Court and has obtained this Rule.

The only ground which it is necessary for me to deal with is ground 3, namely that the offence falls under S. 211, I. P. C., and therefore not triable summarily. Mt. Bhattacharji who appears for the Crown admits himself that the case is an important one and that he would prefer that the accused should be, under the ordinary procedure, tried on a charge under S. 211. There is, I think, no question but that the charge against the petitioner does fall under S. 211, I. P. C. This point was decided by the decision of a Full Bench of this Court in the case of *Karim Buksh v. Queen-Empress* (1) where it was held that a person who sets the criminal law in motion by making a false charge to the police of a cognizable offence institutes criminal proceedings within the meaning of S. 211, I. P. C. In this case the allegation against the petitioner is that he has made a false report to Mr. Hunt, the Superintendent of Police, that certain persons had wrongfully confined him and his mother. Now the wrongful confinement of the petitioner's mother would fall under S. 342, I. P. C. S. 342 admittedly is a cognizable offence. Therefore it is clear that the present charge against the accused does fall under S. 211 and that therefore he should not have been tried summarily. I therefore set aside the conviction and sentence against the accused and order that the petitioner should be retried under S. 211, I. P. C., or any other section that may be applicable.

In this view it is unnecessary to deal with the other grounds on which also the Rule was issued. The Rule is accordingly made absolute. The fine if already paid will be refunded.

V.B./R.K. *Rule made absolute.*

1930 Cr. Cases 1112

(Calcutta)

JACK AND PANCKRIDGE, JJ.

Hafezali Haldar—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 25 of 1930, Decided on 25th July 1930.

Criminal P. C., Ss. 367 and 423 (2)—Head of charges to jury enumerated only by sections—Before High Court can interfere with verdict on ground of insufficiency of record, misdirection and misunderstanding of law causing erroneous verdict must be proved.

Although it is desirable that the record of heads of charges should indicate far more fully than mere enumeration of the numbers of the sections, in order to entitle the High Court to interfere with the verdict of the jury and set it aside, it must be affirmatively proved that there has been misdirection and misunderstanding and the verdict is erroneous owing to misdirection by Judge and misunderstanding on the part of the jury of the law as laid down by him: *Cr. App. No. 248 of 1929 and 47 Cal. 796, Ref.* [P 1119 C 1]

Gregory and Sures Chandra Taluqdar—for Appellant.

Debendra Nath Bhattacharjya and Kiron Mohan Sircar—for the Crown.

Panckridge, J.—This is an appeal by one Hafezali Haldar who has been convicted by a verdict of a jury of offences punishable under Ss. 148 and 326, I. P. C.

The ground of appeal which has been urged before us is that the recording of the heads of the charge is insufficient and the criticism is based upon the fact that the heads of the charge do not reveal the way in which the learned Sessions Judge explained the sections under which the accused has been charged. Nor the sections concerned with the exercise of the right of private defence on which the accused relied. In the heads of the charge there is a paragraph which runs as follows :

"Sections 141, 142, 146 to 148, 319 to 322, 326, 201, I. P. C., explained; Ss. 96, 97, 99 to 106 I. P. C. explained. Charges explained."

The learned advocate appearing for the Crown concedes that it is highly desirable that the heads of the charge should indicate far more fully than has been done here what the learned Sessions Judge has said in his explanation of the law to the jury and there are many reported cases dealing with the form which record of the learned Sessions Judge's direction on the law

should take. Among others we were referred to the observation of Sanderson, C. J., in the case of *Kasimuddin Nasya v. Emperor* (1). But in spite of this the learned advocate for the Crown argued that before we were justified in setting aside the verdict of the jury on the ground which I have indicated we must be in a position to come to the conclusion under S. 423, sub-S. (2), Criminal P. C., that the verdict is erroneous owing to misdirection by the Judge or misunderstanding on the part of the jury of the law as laid down by him, and he says that it is for the appellant to show affirmatively that there has been such misdirection or misunderstanding. He is supported in this contention by an unreported case decided by Graham and Lort-Williams, J.J., in *Appeal No. 248 of 1929* where the point urged here on behalf of the appellant was taken and the Court pointed out that in no case had the verdict of a jury been set aside solely on the ground that the heads of a charge were in the form with which we are dealing in the present case, and that in the opinion of the Court the provisions of sub-S. (2), S. 423, were effective to prevent a Court from interfering with the verdict of a jury on this ground alone. It is also pointed out on behalf of the Crown that, although we do not know exactly what the learned Judge said to the jury as to the right of private defence, yet in concluding his charge he gave direction to the jury that, unless they were satisfied with the evidence of possession by the complainant's party they were bound to acquit the accused, thereby leaving out of account the possibility of their right of private defence being exceeded. We do not think that there is any substance in the other criticism which has been directed against the charge and it seems to us that the learned Judge dealt with sufficient fullness with the inference which the jury were entitled to draw from the failure to examine witnesses who in his opinion should have been examined.

In the circumstances, we do not think that the present case is distinguishable from the unreported case to which we have already referred and we agree with the reasons given therein.

(1) [1920] 47 Cal. 795=21 Cr. L. J. 694 = 57 I. C. 934.

The appeal is therefore dismissed.
Jack, J.—I agree.

V.B./R.K. *Appeal dismissed.*

• 1930 Cr. Cases 1113
(Calcutta)

SUHWARDY AND JACK, JJ.

K. T. Hing—Applicant.

v.

I. N. Silas—Opposite Party.

Criminal Revn. No. 857 of 1929, Decided on 31st July 1929, from order of Ch. Presy. Magistrate, Calcutta, D/- 19th June 1929.

Penal Code (1860), S. 290—Annoyance to members of single house is not public nuisance.

Per Jack, J.—To constitute a public nuisance as contemplated by S. 290, the annoyance must actually be caused to people in general occupying property in the vicinity. Consequently, because the residents of a single house are annoyed by the noise of a theatre, the house holder is not entitled to prosecute unless he can show that the noise annoys other people living in the vicinity: *Soltan v. de Helit*, (1851) 2 Sim. (N.S.) 193; *Allen v. Lloyd*, (1802), 170 E. R. 691, Ref.; *A. I. R. 1924 All. 194*, Dist. (Suhrawardy, J., Dubitante). [P 1114 C 1]

S.N. Banerji, S. K. Sen and Satindra-nath Mukherji—for Applicant.

B. C. Chatterji and Manindra Nath Mukerji—for Opposite Party.

Jack, J.—The petitioner is one of the proprietors of the Chinese Theatre Studio on Chittaranjan Avenue. He has been convicted under S. 290, I. P. C., of committing a public nuisance by the annoyance caused by the sounds made by his theatre band, in connexion with performances at the theatre from 12 noon to 4 p. m. and 8 p. m. to midnight every day.

The only ground for revision seriously urged is that the prosecution has failed to prove the existence of a public nuisance inasmuch as it has not been shown that annoyance has been caused to the public or to the people in general who dwell or occupy property in the vicinity in accordance with the terms of S. 268, I. P. C. defining "public nuisance." On this point the finding of the learned Chief Presidency Magistrate is as follows:

"It is suggested that this is not a public but a private nuisance. Some Mahomedans have been called by the complainant to help him over the difficulty. I doubt if their grievance is very genuine. I imagine they are less susceptible to noise. But, in the peculiar circumstances of this case, as shown by the plans, the complainant and his tenants, represent sub-

stantially the public in general who dwell and occupy property in the vicinity. The complainant's house is at present the only substantially inhabited property in the neighbourhood. The rest is mostly open space, or covered by small huts. If these were occupied by buildings inhabited by people who would say they did not mind the noise (e.g., Chinese) the matter might be different. But the accused has not called a single person living in the vicinity to contradict the evidence given by the prosecution."

The learned Magistrate finds that:

"partly owing to the proximity of the theatre to the complainant's building and partly owing to the unusual nature of the sounds which constitute Chinese music, the complainant and his tenants have a genuine grievance."

On the findings, it appears that the only persons affected are those occupying the end of the complainant's building next the theatre. Not more than seven or eight persons in all occupy these rooms. Of these four including the complainant, have been examined and say that they are annoyed by the noise from the theatre especially at night. The question then is whether the annoyance of these few residents of a single house is sufficient to show that the noise made by the theatre band constitutes a public nuisance, i. e., whether it can be said to cause annoyance to the people in general who dwell or occupy property in the vicinity. There are practically no other people occupying property in the vicinity except the occupants of some huts, the nearest of which is 30 or 40 yards from the front of the theatre. That the other people are affected I do not believe on the evidence or findings of the Magistrate. Taking it for granted that, at the time complained of, the noise was sufficiently loud to seriously annoy the residents of the end rooms of the Silas building, which is built almost right against the stage end of the theatre, it does not follow that it would necessarily cause annoyance to the residents of other buildings in the vicinity, except those very close to the stage end of the theatre. But there are in fact no other people dwelling in the vicinity within unpleasant range of the noise or music of the band. In these circumstances the noise can hardly be called a public nuisance.

In the case of *Soltan v. De Held* (1), the Vice-Chancellor held that a peal of bells which caused a nuisance to the

residents of the adjoining house could not be called a public nuisance. "If," he says,

"the thing complained of is such that it is a great nuisance to those who are more immediately within the sphere of its operation but no nuisance or inconvenience whatever, or is but advantageous or pleasurable to those who are more removed from it, it does not, I conceive, come within the meaning of the term "public nuisance." •

In the case of *Allen v. Lloyd* (2) it was held that the noise made by a tinman which was a nuisance to occupants of three sets of chambers of Clifford's Inn close by, did not constitute a public nuisance, not being sufficiently general in extent to support an indictment. This decision is authority for the contention that where only a very limited number are affected the nuisance does not amount to a public nuisance.

The learned advocate for the prosecution has referred the case of *Lallu Ram v. Emperor* (3). This was a case apparently under a Municipal Act affecting people passing along a public thoroughfare and has no application to the facts of the present case. It is not, in my opinion sufficient to say that the complainant and three or four of his tenants represent the people in general who occupy property in the vicinity. To constitute a public nuisance as contemplated by S. 290 the annoyance must actually be caused to people in general occupying property in the vicinity. Because the residents of a single house are annoyed by the noise of a theatre, the house holder is not entitled to prosecute, unless he can show that the noise annoys other people living in the vicinity. There is not sufficient proof of this in the present case. I therefore think that the conviction and sentence should be set aside, the accused acquitted and the fine if paid refunded.

Suhrawardy, J.—I agree with my learned brother, though not without some hesitation. It may be argued that the evidence falls short of establishing an indictable nuisance.

V.B./B.K.

Conviction set aside.

(1) [1851] 2 Sim. (N.S.) 138=16 Jur. 826=21 L. J. Ch. 153.

(2) [1802] 4 Esp. 200=170 E. R. 631.

(3) A. I. R. 1924 All. 194=77 I. C. 188=25 Cr. L. J. 332.

1930 Cr. Cases 1115

(Calcutta)

SUHRAWARDY AND COSTELLO, JJ.

Anadi Lal Mukherjee and others—
Petitioners.

v.

Sukh Chand Mandal and others—Op-
posite Parties.

Criminal Revn. No. 788 of 1929, De-
cided on 9th May 1930.

Criminal P. C., S. 145 — Order under
S. 145 presupposes the existing likelihood
of breach of peace.

It is necessary for making an order under
S. 145 that the Magistrate should be satisfied
at the time of drawing up the proceedings
that there is then existing a likelihood of
breach of the peace arising from the disputes
between the parties with regard to the land
in question. The making of an order, there-
fore, some months after the report on which
it was purported to be passed, cannot be
supported. [P 1116 C 1]

*Narendra Kumar Bose and Nalin
Chandra*—for Petitioners.

*K. N. Choudhury and Anilendra Nath
Roy Choudhury*—for Opposite Parties.

Costello, J.—This is an application
under S. 439, Criminal P. C., in respect
of an order made by the Sub-Divisional
Magistrate of Satkhira on 22nd Decem-
ber 1928 under the provisions of S. 145,
Criminal P. C. The proceedings which
eventually resulted in making that
order were protracted to a most re-
markable extent. For it appears that
the proceedings out of which the order
finally emerged, began by a report made
by the police to the Magistrate in
question on 18th January of the year
1926 when he reported that there was
a likelihood of trouble between the con-
tending parties who were disputing pos-
session to a certain plot of land. Ac-
tually before that date some of the
parties had been brought before a Court
for the purpose of being bound over
under the terms of S. 107, Criminal
P. C. These proceedings ultimately
terminated. But apparently nothing
more was done in respect of the
proceedings under S. 145 until 9th
June 1926 when they were dropped
and fresh proceedings with amended
boundaries with regard to the prop-
erties were drawn up on 27th, July
1926 and the lands in dispute were then
attached. The matter, as I have said,
dragged on from that date until Decem-
ber 1928. The real question which we
have to decide is whether or not the

learned Magistrate was right in draw-
ing up proceedings in July 1926 which
were purported to be based on the
police report of January 1926 and upon
nothing else.

It has been urged before us that it
cannot rightly be said that in July
1926 there was a likelihood of a breach
of the peace between the contesting
parties by reason of the situation as
it had previously existed in January
1926. We are not concerned with the
question of the subsequent delay as
between July 1926 and December 1928.
But one cannot help remarking in pass-
ing that this proceeding seems to have
taken a course which never could have
been contemplated by the terms of
S. 145 which after all are designed to
secure that a status quo should be pre-
served and a breach of the peace pre-
vented as between the two disputing
parties or sets of disputing parties pen-
ding the time one side or the other
should have recourse to a civil Court in
order that their rights with regard to
the land might be finally determined.
It is to be borne in mind that by S. 145,
sub-S. (1), the Magistrate of the class
therein referred to is to make an order
in writing if he is satisfied that a dis-
pute likely to cause a breach of the
peace exists concerning any land or
water or the boundaries thereof. The
condition precedent for making an
order of the kind contemplated is that
a breach of the peace is likely. The
meaning of the word "likely" has been
considered in a number of reported
cases and on the whole the decisions
indicate, I think, that the word "likely"
indicates some degree of futurity though
it has been said that the word "likely"
does not mean imminent or immediately
to happen. We may take it for the pur-
pose of this section that the word
"likely" is to be treated as if it is
synonymous with the word "probable."
In the present instance the police re-
ported as far back as January 1926 that
a breach of the peace was then likely
or anticipated if no steps were taken,
and the matter was recorded by the
Magistrate as one of emergency; in
other words it was considered in Jan-
uary 1926 that the matter was urgent.
So that the position was that in Jan-
uary 1926 a dispute likely to cause a
breach of the peace existed. I use the

word "existed" advisedly, because the word in the section is "exists." That means that there must be a dispute in existence which is likely to cause a breach of the peace at the time when the order is made. Now there is nothing to show that the state of affairs which existed in January 1926 still existed in July 1926 so far as it appears from the order which the Magistrate made some two years later. We therefore think, from the actual wording of the section itself, that the making of an order some months after the report on which it was purported to be passed, cannot be supported. There are authorities for that view in cases which unfortunately we have not had the advantage of seeing because the reports in which they appear are not available. Apparently it was held in 2 *Criminal Law Review* 85, which is cited in Aiyar's Book of Criminal Procedure Code that if the circumstance was that there was danger in the past, proceedings based on a likelihood of a breach of the peace six months previous to the date of the preliminary order would be illegal. There is also another case *Chhidalal* reported in 2 *P. L. T.* 650, where it appears to have been decided that proceedings cannot be started on the basis of a police report more than three months old, there being no likelihood of a breach of the peace when the Magistrate actually drew up the proceedings. Now that seems to me to be a reasonable interpretation to be put upon the terms of the section. It is necessary for making an order of this description that the Magistrate should be satisfied at the time of drawing up the proceedings that there is then existing a likelihood of breach of the peace arising from the disputes between the parties with regard to the land in question.

Taking that view of the matter we think that this order of the Magistrate must be set aside. That will be without prejudice to the making of any fresh order if this or any other Magistrate is satisfied that there is a likelihood of any breach of the peace existing at the time when the matter comes before him. The rule is made absolute in these terms.

Suhrawardy, J.—I agree.

y.B./R.K. *Rule made absolute.*

* 1930 Cr. Cases 1116

(Calcutta)

PEARSON AND JACK, JJ.

Superintendent and Remembrancer of Legal Affairs, Bengal—Appellant.

v.

Benozir Ahmad—Accused — Respondent.

Criminal Appeals Nos. 455, 525, 543 and 590 of 1929, Decided on 28th March 1930, from order of Sess. Judge, Noakhali, D/- 18th May 1929.

*Criminal P. C., S. 537 — Accused jointly tried under Penal Code Ss. 302 and 304 and other sections—Jury constituted of seven persons only—Judge not considering whether it was not practicable to have jury of nine — Such constitution of jury is illegality not curable under S. 537 — No appeal against acquittal under Ss. 302 and 304 is immaterial.

Where accused are tried jointly under Ss. 302 and 304 and some other sections, Penal Code, and the jury is constituted only of seven persons, the Judge speaking of nine as the required number, and never considering the question whether it was not practicable to have a jury of 9 persons, the jury is illegally constituted, and the illegality cannot be cured by S. 537, Criminal P. C. The fact that no appeal was preferred against acquittal under Ss. 302 and 304 makes no difference. All the accused are affected by the illegality; *A. I. R.* 1930 Cal. 60, *Appl.* [P 1117 C1]

Jogesh Chandra Sinha, B. C. Chatterjee, Suresh Ch. Talukdar and Mohendra Kumar Ghose — for Appellant.

D. N. Bhattacharjee—for Respondent.

Judgment.—The nine accused in this case were charged with offences under Ss. 120-B/395, 399, 402, I. P. C., also under Ss. 304/34 and 326/34 and 326/109 in respect of the death of one Idris. In addition, two of the accused namely Shamsul Huda and Benozir Ahmad, were charged under S. 302 with the murder of one Harimohan Roy and another accused Oliulla with abetment of the murder.

The jury found all the accused not guilty of the charges relating to the deaths of Idris and Harimohan. Six of the nine accused were found guilty under Ss. 120-B, 395, 399 and 402, in the case of Oliulla by a majority of 4 to 3, and in the case of the other five unanimously. Benozir Ahmad was found not guilty and acquitted also of the charges under those sections by a majority of 5 to 2. In the case of Benozir Ahmad the Government has appealed against his acquittal of the

charges under Ss. 120-B/395, 399 and 402 and the accused who have been convicted have appealed against their conviction.

It is argued first of all that the trial has been vitiated owing to the defective constitution of the jury, which consisted of only seven persons. Only fourteen jurors were summoned in the case, of whom six were absent when called, one was exempted and one discharged on objection, leaving therefore six empanelled without objection. Another person who was on the list of special jurors and happened to be present in Court was taken in "to complete the number of seven." From the record it would appear that the learned Judge never applied his mind to the question whether nine jurors were not required under the provisions of S. 274 Criminal P.C. He speaks of seven as being the "required number." It does not appear anywhere that it was not practicable to have a jury of nine persons, or that the Judge ever took that question into consideration. The result is that the trial has been held with a jury illegally constituted, and this has been utilized as a ground of appeal not only by the accused appellants but by the Crown appellant. It is true that the Crown is not appealing in so far as the acquittal was on the charges under Ss. 302 and 304, I. P. C., but that can make no difference to the illegality of the trial, and as the accused were tried jointly they are all affected by the illegality. He thinks it is clear that this is not a class of illegality which can be treated as curable under S. 537, Criminal P. C. It is a case where we think that the principle of *Dwarika Malo v. Emperor* (1) must be applied.

We accordingly allow the appeals. The verdict of acquittal in Benozir's case is reversed and we direct that he be retried. In the case of the accused appellants we reverse the findings and sentences and direct that they be retried. The retrial in all cases will be limited to the charges under Ss. 120-B/395, 399 and 402, I. P. C.

The accused Benozir Ahmad who is now on bail will remain on the same

bail until further orders of the Sessions Judge.

S.N./R.K.

Retrial ordered.

• 1930 Cr. Cases 1117

(Calcutta)

SUHWARDEY AND COSTELLO, JJ.

Rahim Bux Sarkar — Accused — Appellant.

v.

Emperor — Opposite Party.

Criminal Appeal No. 577 of 1929, Decided on 16th April 1930, from order of Sess. Judge, Pabna, D/- 27th June 1929.

(a) Criminal P. C., Ss. 234 and 222 (2) — Charge under S. 408, Penal Code, specifying gross sums as also items misappropriated in one year is good charge.

Where an accused person is charged under S. 408, I.P.C., with having committed criminal breach of trust in respect of a gross sum of money misappropriated by him within the period of one year and the charge not only specifies the gross sum taken and the dates between which it was taken, but also sets out the items composing such gross sum giving the dates and the amounts alleged to have been misappropriated, the charge comes within the provisions of Cl. (2), S. 222, Criminal P. C., and that if by specifying the items composing the gross sums the charge went beyond what was necessary instead of prejudicially affecting the accused it is to that extent favourable to the accused : 31 Cal. 928, *Foll.*; 24 All. 254; 29 Mad. 558 and 33 All. 36, *Ref.* [P 1119 C 1]

(b) Criminal P. C., S. 303 — Offence under S. 408, Penal Code — Wrong charge to jury on items held not prejudicial.

Where in his charge to the jury in a trial for an offence under S. 408, I. P. C., with regard to a gross sum said to have been misappropriated within a year, and composed of items more than three in number, the Judge instead of inviting verdict in respect of charge under S. 408 asked the jury to give their verdict in respect of the charge as laid against the accused on the several items and the jury returned a verdict of guilty as regards some of the items only and not guilty as regards others and the Judge convicted the accused under S. 408. *Held*: that though the form in which verdict was asked for and expressed was wrong, proper form being simply to ask jury their verdict in respect of an offence under S. 408, the defect was one of form and did not prejudicially affect the accused. [P 1119 C 2]

A. K. Fazlul Huq and Jogesh Chandra Sinha — for Appellant.

B. M. Sen — for the Crown.

Costello, J. — In this case the appellant Rahim Bux Sarkar was charged under S. 408, I. P. C., for having committed criminal breach of trust as a servant and he was sentenced to four years' rigorous imprisonment and to pay a fine of Rs. 1,000 in default of, payment of which he was to undergo a further term of one year's imprison-

(1) A. I. R. 1930 Cal. 60 = 1930 Cr. C. 12 = 122 I. C. 219 = 31 Cr. L. J. 377 = 56 Cal. 1154.

ment. The main point urged before us is that the form of the charge is bad in law as being contrary to the provisions of S. 234, Criminal P. O. The facts are that the accused had been employed as a supervisor under the Pabna Central Bank to which there were affiliated various rural co-operative societies in police stations Pabna and Sujanagar and the charge against him is that between November 1925 and October 1926 he at various places within the jurisdiction of the police stations at Pabna and Sujanagar, being a servant in the employment of the Pabna Central Co-operative Bank, Ltd. and being entrusted as such servant with the duty of realising for and crediting to the said bank the debts due to the said bank from various co-operative societies within the said jurisdiction committed criminal breach of trust in respect of Rs. 7,745-12-0 which he realized from rural societies on behalf of the said Central Bank in various sums as shown in some 38 exhibits and that he wrongly misappropriated the same without crediting the said amounts to the Pabna Central Bank. It appears that on the report of an auditor by name Bhujanga Bhusan Maitra dated 25th December 1926 the police took up the case but the accused was not to be found until 26th November 1928 when he was arrested in Calcutta. The defence put forward was that the whole matter was a false prosecution, that he never had any written or verbal directions that he should realize money from the village societies and credit the same to the Central Bank, that the exhibits on which the prosecution was based were all forged and that the secretaries of the rural societies combined against him because he enforced certain duties on them. He explained his disappearance by saying that he had gone to Calcutta by reason of some illness. The objection taken by Mr. Huq is, as I have already stated, to the form of the charge and that is the fact that the prosecution specified not only the gross sum said to have been misappropriated but also the items of which that sum was made up. Mr. Huq argues that S. 234, Criminal P. O., controls the provision of S. 222. S. 234 provides :

"When a person is accused of more offences than one of the same kind committed within

the space of 12 months from the first to the last of such offences, whether in respect of the same person or not, he may be charged with and tried at one trial, for any number of them not exceeding three."

It is to be observed that that section relates to a number of offences of the same kind whether charged in respect of the same person or not, whereas S. 222 relates specifically to a charge of the kind with which we are now concerned. The object of that section is to ensure that the accused may have as full particulars as possible of the accusations made against him; and in sub-S. (1) it provides that the charge shall contain such particulars as to the time and place of the alleged offence, and the person (if any) against whom or the thing (if any) in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged. To put the matter in other words, it provides that all reasonable information shall be given as to enable the accused person to know the nature of the charges he has to answer. Sub-S. (2), which is the one material in the present case, in a sense is a qualification of the general proposition contained in sub-S. (1) because it says that when the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates and the charge so framed shall be deemed to be a charge of one offence within the meaning of S. 234. It is obvious from the language of that section that in a case of charge of the character mentioned in the subsection the necessity for particularity is cut down in that it provides that it is sufficient for the prosecution merely to specify the lump sum without stating the particular items of which it is made up, provided that the lump sum is said to have been misappropriated within the space of one year. In the case now before us the prosecution so far from confining themselves to their exact rights as given in the subsection went out of their way to give more than what the subsection requires. That is to say, not only was

the gross sum specified but also the several items of which it is composed. Mr. Huq argues that that was an embarrassment and would prejudice the accused. It is obvious that so far from that being the case, the giving of particulars was an advantage to the accused and not the reverse. This matter has been before this Court on previous occasion and it was not really open to argument. The case of *Samiruddin Sarkar v. Nibaran Chandra Ghose* (1) is exactly in point. The head-note is as follows:

"Where an accused person was charged under S. 408, Penal Code with having committed criminal breach of trust in respect of a gross sum of money misappropriated by him within the period of one year and the charge not only specified the gross sum taken and the dates between which it was taken, but also set out the items, 22, in number composing such gross sum giving the dates and the amount alleged to have been misappropriated on each date: *Held*, that the charge came within the provisions of Cl. 2, S. 222, Criminal P. C., and that by specifying the items composing the gross sum the charge went beyond what was necessary and was to that extent favourable to the accused."

This case followed the previous case of *Emperor v. Gulzari Lal* (2). The matter has not only been considered by this Court but has also come before other High Courts. In 1906 in the case of *Thomas v. Emperor* (3) it was held that S. 222, Criminal P. C., does not apply only to cases where there is a general deficiency and the prosecution is unable to specify the particular items of the deficiency but also the cases where the items may be, but are not, specified. In other words, if the prosecution are in a position to specify the items which show exactly how the gross sum is made up, they can either content themselves by putting the gross sum without any further detail or they can if they wish go beyond what the section requires them to do and specify the items of which the amount is composed. It has been pointed out by the Court in the case just mentioned that

"if the legislature intended only to apply S. 222 to cases where there is a general deficiency in an account and the prosecution is unable to specify the particular items of the deficiency, it could have found apt words in which to express the intention." The words used do not contain any such limitation and we are not justified in reading into the section a limitation which its language will not support."

The same point was before the Allahabad High Court in 1910 in the case of *Emperor v. Ibrahim Khan* (4) where a similar decision was arrived at. It seems to us therefore that the point raised by Mr. Huq is not open to question.

In this particular case it is to be regretted that the learned Judge put his judgment in the form in which we find it. He had previously asked the jury what their verdict was in these terms:

"What is your verdict in respect of the charge under S. 408, I. P. C., and laid against the accused on the 38 items set forth in the charge?"

Thereupon the foreman said:

"Our unanimous verdict is that the accused is not guilty in respect of 3 items viz., Exs. 25 (6), 25 (7) and 25 (8), but that he is guilty under S. 408, I. P. C., in respect of the remaining 35 items."

And then the learned Judge in passing the sentence in respect of the 35 items which he mentioned says:

"the accused Ibrahim is convicted under S. 408, I. P. C., and sentenced to rigorous imprisonment for four years. The accused stands acquitted in respect of the 3 items Exs. 25 (6), 25 (7) and 25 (8)."

The form in which that was expressed seems to suggest that the misappropriation of each item constituted a separate offence. It is perhaps by reason of that that Mr. Huq was able to light upon what might be a good point of attack in this appeal. At first sight that may seem to be covered by S. 234. But it is obvious from an examination of the whole case that that is merely a question of form and not of substance because the charge against the accused was primarily of misappropriation of the total sum of Rs. 7,745-12-0. The right way of looking at it is that the prosecution charged him with having misappropriated a specified sum of money. It would have been sufficient for the Judge to have asked the jury "what is your verdict in respect of the charge under S. 408? Is the accused guilty or not," without requiring the jury to specify the items for which they convicted him. However it is clear to us that it in no way prejudiced the accused; and we are satisfied that there is nothing in the suggestion made. The summing up is perfectly clear and quite

(1) [1904] 81 Cal. 928=8 C. W. N. 807.

(2) [1903] 24 All. 254=(1902) A. W. N. 44.

(3) [1906] 29 Mad. 558=5 Cr. L. J. 132.

(4) [1911] 33 All. 86=11 Cr. L. J. 442=7 I.C. 186.

intelligible to the jury. That being so, this appeal must be dismissed.

Suhrawardy, J.—I agree.

V.B./R.K.

Appeal dismissed.

1930 Cr. Cases 1120

(Calcutta)

CUMING, J.

Abdul Sattar—Petitioner.

v.

Moti Bibi—Opposite Party.

Criminal Revn. No. 1622 of 1929,
Decided on 30th January 1930.

(a) Penal Code, S. 448—Entry by decree-holder accompanied by officer of Court in execution of decree for possession is not criminal trespass.

Entry into a house by a decree-holder accompanied by officers of the Court deputed to make over possession of the house does not constitute an offence of criminal trespass.

(b) Penal Code, S. 323—Removing by force a person other than judgment-debtor in decree for ejectment and possession is assault within meaning of S. 323.

Removing by force a person other than a person against whom a decree for ejectment from house and possession is obtained, is punishable under S. 323, I. P. C. [P 1120 C 2]

N. K. Bose and Nurul Huq Chowdhury—for Petitioners.

N. N. Bose—for Opposite Party.

Judgment.—In the case out of which this rule arises the petitioners Abdul Sattar and Abdul Hamid have been convicted under S. 448 and S. 323, I. P. C., and sentenced under S. 448 to pay a fine of Rs. 250 each. No separate sentence was passed with regard to the conviction under S. 323, I. P. C. The case for the prosecution was that the two petitioners went with a Naib Nazir of the civil Court and some peons to execute a decree for ejectment from a house in Dacca which they had obtained against their sister's husband Muhammad Ali. On their arrival the delivery of possession was opposed by the complainant in the case on the ground that the house belongs to her and that she was not a party to the decree. It is alleged that in the absence of Mohammad Ali the complainant's husband, the petitioners and other persons forcibly dragged the complainant out of the house. The case for the defence was that they went to execute the civil Court decree and that they had not assaulted the complainant.

On the facts as found by both the lower Courts it is quite clear that the

conviction under S. 448, I. P. C., cannot stand. It is clear from the facts found that the two petitioners went to the house with civil Court officers and entered the house not for the purpose of intimidating, insulting or annoying any person or to commit any offence, but to execute a civil Court decree which they had obtained against one of the occupants of the house. It does not seem to be suggested that the decree was obtained by fraud. The Naib Nazir had to make over possession to them, and to do that they could enter the house with him as they did and receive possession from him. In such circumstances no conviction for criminal trespass can possibly stand.

So far as regards the charge of assault is concerned the learned Judge has found that the petitioners dragged the complainant who happens to be their sister out of the house. O. 21 R. 35, provides that

"where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged or to such person as he may appoint to receive delivery on his behalf, and, if necessary by removing any person bound by the decree who refuses to vacate the property."

The complainant was not a party to the decree and therefore the two petitioners were not entitled to forcibly remove her. The proper procedure so far as she was concerned no doubt would have been by way of an application under O. 21, R. 98; therefore by forcibly removing the complainant from the house they were clearly guilty of assault. The conviction under S. 323, I. P. C., must therefore stand. As far as can be understood from the evidence the assault was not a very serious one. No doubt she alleged that they kicked her and beat her. The learned Judge found that they merely removed her forcibly from the house. I think the ends of justice will be met by sentencing the petitioners to pay a fine of Rs. 20 each under S. 323, I. P. C., and I order accordingly. In default of payment of fines they will undergo simple imprisonment for one week. The fines, if realized, will be given to the complainant as compensation.

The convictions and sentences under S. 448, I. P. C., are set aside and the fines, if paid, must be refunded.

V.B./R.K.

Order accordingly.

1930 Cr. Cases 1121

(Madras)

PANDALAI, J.

(Kanta) Venkanna—Petitioner.

v.

(Inuganti) Venkata Surya Neeladri Rao—Respondent.

Criminal Revn. No. 739 of 1929, and Criminal Revn. Petn. No. 669 of 1929, Decided on 13th March 1930, from order of Sub-Divisional Magistrate, Peddapur, D/- 4th June 1929.

(a) Criminal P. C. (as amended in 1923). S. 147—As to the right of person to flow of water Magistrate need not find that easement strictly so called is established.

As to the right of the person to the flow of water down a channel, it is not necessary for the Magistrate to find that a right of easement strictly so called is established. All that he has to find is that the person has been for long time using the water flowing down the channel and has in fact used it during the last season.

[P 1121 C 2]

(b) Criminal P. C. (as amended in 1923), S. 147—Order prohibiting counter-petitioner from putting up bunds across channel in their field and from retaining any obstruction to petitioner's use of water flowing along the channel in their field is competent even under amended S. 147.*

Where the Magistrate passes under S. 147 an order prohibiting the counter-petitioners from putting up any bunds across a channel in their field, and from interfering with the petitioner's removing the obstructions already put up, the order requires to be amended by omitting the words "from interfering with the petitioner's removing the obstructions already put up" and substituting therefor the words "from retaining any obstruction to the petitioner's use of the water flowing along the channel in their field," inasmuch as such an order is likely to cause a recurrence of breach of the peace, which such orders are intended to prevent, but the Magistrate is competent to pass an order in the amended form, even under S. 147 as amended in 1923: *A.I.R. 1925 Cal. 991, not foll.*; 26 I.C. 730, *Appl.* [P 1122 C 1; P 1123 C 1]

V. Ramadoss and K. Subba Rao—for Petitioner.

Ramchandra Rao—for Respondent.

Order.—This is a petition by the first counter-petitioner in the lower Court to revise an order of the Sub-Divisional Magistrate of Peddapur passed under S. 147, Criminal P. C., "prohibiting the respondents from putting up any bunds across the channel in their field and from interfering with the petitioner's removing the obstructions already put up," namely

"the four small cross-bunds and that part of the bund higher up which is across the channel and no further."

Three objections are raised to this order:

(1) That there was no likelihood of a breach of the peace on which such an order could be justified; (2) that the Magistrate had not found, as he ought to have done, that the petitioner was entitled to the use of the water flowing down the channel in question; and (3) that the terms of the order passed by the Magistrate are in violation of S. 147 according to which an order in the nature of a mandatory injunction ought not to be passed.

As to the likelihood of a breach of the peace, the Magistrate has in my opinion given good reasons for thinking that there was such likelihood. Proceedings were started on 27th December 1928 by an application by the petitioner in the Magistrate's Court for action under S. 144. The counter-petitioners sought to defeat that petition by the plea that the apprehended obstruction to the water-course was already completed, but the petitioner represented that such was not the case. Thereupon on 19th February 1929, a preliminary order under S. 147 was passed, the previous order under S. 144 being vacated. In these circumstances the Magistrate was justified in thinking that the danger of a breach of the peace was not over.

As to the right of the petitioner to the flow of water down this channel, it was not necessary for the Magistrate to find that a right of easement strictly so called was established. S. 147 says "whether such right be claimed as an easement or otherwise." All that he had to find, and which he has in fact found, is that the petitioner had been for a long time using the water flowing down this channel and had in fact used it during the last monsoon.

The last is perhaps the most important objection and arises upon the form of words, used by the Magistrate in framing the order, which I have already set forth at the beginning of this judgment. To the first portion no objection can be taken because it merely prohibits the counter-petitioners from putting up any bunds across the channel in their field. But objection is taken that the latter half of the order, where it prohibits interference with the petitioner's removing the obstructions already put up, amounts really to an order requiring the counter-petitioners to remove the bund which they have already put up

and this, it is contended, the Magistrate has no power to do. This portion of the order as it stands indicates that the Magistrate thought that the petitioner might lawfully remove any portion of the bund which was obstructing the flow of the water and that he intended to prevent the counter-petitioners from interfering with the petitioner in exercising such right of removing the obstruction. The order does not really require the counter-petitioners to do anything. All that it says is that if the petitioner removes the obstruction, the counter-petitioners are to do nothing. I think this form of order is unsuitable, if not objectionable, if for no other reason than that it is likely to produce a recurrence of breach of the peace which such orders are intended to prevent. It contemplates the petitioner going upon the counter-petitioner's land and removing the bund and it requires the counter-petitioners to let him do so without hindrance. Such a situation is easily capable of producing a breach of the peace. That portion of the order therefore requires amendment.

But I will first deal with the objection of the learned advocate for the petitioner here (counter-petitioner below) that an order in the nature of a mandatory injunction must not be passed under S. 147. For this reliance was placed upon a decision of a Bench of the Calcutta High Court in *Hari Mati Dasi v. Hari Dasi Dasi* (1). In that case the first party complained that the second party raised a wall on her own land blocking the windows of the house of the first party thereby shutting out light and air from the rooms of the house. The Magistrate having found that light and air was obstructed as alleged made an order upon the second party that she should demolish the new wall within a period of one month. The learned Judges said that sub-S. 2, S. 147, does not give the Magistrate any power of directing one of the parties to do a positive act by way of a mandatory injunction directing him to demolish the wall built by her, and they further said that the power given under S. 147 (2) is analogous to the power of a civil Court to grant a temporary injunction. Against that decision of the Calcutta High

Court, there is the decision of a Bench of this Court in *Karuppanna Goundan v. Kandasami Goundan* (2). In that case a pathway had been obstructed and the Magistrate had ordered that the obstruction, which was a fence, should be removed by the party who had put it up. The point being raised that that order was incorrect on the same ground as that now urged for the petitioner here, this Court held, after referring to two earlier decisions of this Court that such an argument was not maintainable. Their Lordships said that they were not prepared to follow those decisions if it was intended to decide therein that the fact that S. 133, Criminal P. C., expressly provides for an order by the Magistrate directing the removal of obstruction to pathways necessarily implies that a similar order cannot be passed in proceedings taken under S. 147, Criminal F. C. This decision of a Bench of this High Court is binding upon me. But it is said that that decision was given under the old Criminal Procedure Code and that S. 147 as amended in 1923 makes such an order illegal though it may have been possible under the old Code. With that argument I cannot agree.

Section 147, Criminal P. C., before it was amended in 1923, dealt, like the present section, with disputes concerning the right of use of any land or water and it enabled the Magistrate, if such right was found to exist, to make an order permitting such a thing to be done or directing that such a thing should not be done. The corresponding provision of the section as it now stands is that if a dispute exists "regarding any alleged right of user of any land or water" the Magistrate is empowered on his being satisfied about the existence of such a right, whether it be claimed as an easement or otherwise, to "make an order prohibiting any interference with the exercise of such right." The order under the old section was directed to the person alleging that he was entitled to the right. The order under the new section is, where the right exists, directed to the person who is interfering with the right. Such an order is valid so long as it merely prohibits the interference with the exercise of the right. I do not see how from this difference

(1) A.I.R. 1925 Cal. 991=88 I.C. 1041=26 Cr.L.J. 1265.

(2) [1914] 15 Cr.L.J. 362=28 I.C. 730.

any inference is to be derived as to the propriety or otherwise of what may be generally called mandatory injunctions. Indeed Form No. 24, Sch. 5, Criminal P. C., seems rather to favour the argument that what might in effect amount to a mandatory injunction is permissible. In that form, in para. 2, the words of the order that the Magistrate may pass are:

"I do order . . . shall not take (or retain) possession of the said land (or water) to the exclusion of the enjoyment of the right of use aforesaid." . . .

That form is applicable to the use of land or water and it contemplates an order against a person who has interfered with another man's use of land or water that he shall not retain possession of that land or water in violation of that user. In one sense it may be said that that is a mandatory injunction because it requires the person enjoined to give up possession to the other party. I do not see what objection can be raised to using the same form as against a person who has put up an obstruction to the flow of water to which another man is entitled, modified in the following way.

"I order that . . . shall not retain any obstruction to the flow of water along the said channel to the exclusion of the enjoyment of the right of user of . . ."

or words to that effect; or alternatively,

"I order that . . . shall not retain possession of the said water to the exclusion of the enjoyment of the right of user of . . ."

Either form would amount to the same thing in effect and involve upon the person enjoined the removal of any obstruction which he had put up. I am therefore unable to say that the amendment of S. 147 has had any effect in so far as making the decision in *Karuppanna Goundan v. Kandasami Goundan* (2) inapplicable.

As however the form of order used by the Magistrate is not suitable, that order will be amended by omitting the words

"from interfering with the petitioner's removing the obstructions already put up"

and substituting therefor the words

"from retaining any obstruction to the petitioner's use of the water flowing along the channel in their field."

With this amendment the petition is dismissed.

P.R.S./P.N.

Order accordingly..

1930 Cr. Cases 1123

(Madras)

SUNDARAM CHETTY, J.

(*Velivalli*) *Brahmaiah and others* —

Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 990 of 1929 and Criminal Revn. Petn. No. 893 of 1929, Decided on 23rd July 1930, from order of First Class Bench Magistrate, Guntur.

(a) Criminal P. C. (1898), S. 265—Judgment of Bench of Magistrates must be signed, i. e. not merely initialled but full name of Magistrate must be written—If one of Magistrates of Bench merely initials, that irregularity cannot be cured by Criminal P. C., S. 537.

A judgment of a Bench of Magistrates has to be signed as required by law and the requirements of public policy necessitate the writing of the full name of the Magistrate who signs the judgment and the mere putting in of the initials is not a sufficient compliance with the mandatory provisions of S. 265 of the Code. Where one of the three Magistrates of a Bench merely initials instead of signing his name, the irregularity cannot be cured by S. 537: 25 Cal. 911; 82 I. C. 393; 23 Cal. 896 and A. I. R. 1926 Mad. 827, *Rel. on.* [P 1124 C 1, 2]

(b) Criminal P. C. (1898), S. 265—Copies of judgments of Bench Magistrates—Signature of presiding Magistrate alone copied—Copies are incorrect—(*Obiter*).

If, when copies of the judgments of Bench Magistrates are taken, the signature of the presiding Magistrate alone is copied omitting the signatures of the other Magistrates, such copies are incorrect. (*Obiter*). [P 1124 C 2]

V. Pattabirama Sastri—for Petitioners.

K. Venkataraghavachariar for Public Prosecutor—for the Crown.

Order.—This is a petition by accused 1 to 3 against the conviction and sentence of fine passed by the First Class Bench at Guntur. The charge against these accused was under Ss. 504 and 352, I. P. C. Apart from the merits of the case, one objection that is taken against the legality of the conviction is, in my opinion, sufficient to set it aside. It is clear from the register of summary trials, maintained by the aforesaid Bench, that the judgment has in fact been signed only by two of the three Magistrates who heard and decided the case, the other having only initialled it. The mandatory provision in S. 265, Criminal P. C., is to the effect, that

"a judgment shall be signed by each member of the Bench present taking part in the proceedings."

There is no definition of the word "sign" in the Criminal Procedure Code.

preted in some judicial decisions and that meaning can be safely adopted for purposes of the present case. In the two decisions of the Calcutta High Court, namely *Nirmal Chunder Bandopadhyaya v. Saratmoni Debya* (1) at p. 915 and *Mohabarsha Bankapore v. Secy. of State* (2), the word "signing" has been taken to mean the writing of the name of the person who is the signatory, so that it may convey a distinct idea to others that the writing indicates a particular individual whose signature it purports to be. This question was considered in the first case in respect of a will, and in the other case as regards a risk-note to be signed and delivered to the Railway Company. In another Calcutta case, namely *Abdul Gafur v. Queen-Empress* (3), the same question arose in connexion with a warrant of arrest issued by a criminal Court. That warrant was not signed by the Magistrate as required by S. 75, Criminal P. C., but it bore only his initials. The legality of the warrant so issued was questioned and it was held that the warrant was not signed as required by law. In view of this defect and some other defect pointed out in that judgment it was held that the person obstructing the execution of such a warrant could not be convicted under S. 186, I. P. C. In a decision of this Court reported in *Lakshmanacharyulu v. Venkataramanujacharyulu* (4) it was held that for purposes of a valid acknowledgment under S. 19, Lim. Act, initials are not equivalent to signature. Though there is no direct authority in respect of the word "signed" occurring in S. 265, Cl. 2, Criminal P. C., the meaning attached to that word in the aforesaid decisions can well nigh be applied to it. A judgment of a Bench of Magistrates has to be signed as required by law and the requirements of public policy necessitate the writing of the full name of the Magistrate that signs the judgment, and the mere putting in of the initials is not, in my opinion, a sufficient compliance with the mandatory provisions of S. 265 of the Code.

In this connexion it must be considered whether the initialing by one of

the Magistrates in the judgment in question, instead of signing, is only an irregularity which can be cured under S. 537, Criminal P. C. In the old Code, an illustration was added to S. 537 as follows:

"The Magistrate being required by law to sign a document signs it by initials only. This is purely an irregularity and does not affect the validity of the proceedings."

But in the amended Code this illustration is omitted. The repeal of this illustration in the amended Code clearly indicates that the legislature no longer views the defect pointed out in the aforesaid illustration, as a mere irregularity not affecting the validity of the proceeding. The inference from the omission of this illustration is that the defect affects the validity of the proceeding and vitiates the conviction and sentence.

In the case of trials by a Bench of Magistrates, the practice of some of the Magistrates not signing the judgments or putting in merely their initials instead of the full signatures is to be deprecated. There seems to be also another practice, namely that when copies of such judgments are given, the signature of the presiding Magistrate alone is copied, omitting the signatures of the other Magistrates (as was done in this case). Such a copy is obviously an incorrect one and it is inconceivable why the copy should be defective in this important particular. It is hoped that in future the Benches of Magistrates would strictly follow the mandatory provisions of the Code in the matter of signing judgments.

For these reasons stated by me, the conviction and sentence are vitiated by non-compliance with the mandatory provisions of S. 265, Criminal P. C. The conviction and sentence have therefore to be set aside.

But in the circumstances of this case it seems to me that the ordering of a retrial is useless and not in furtherance of public interests. I may also point out that though the offences complained of in the present case fell under Ss. 504 and 352, I. P. C. (as shown by the register), the conviction was under S. 323. There is absolutely nothing in the judgment to show how the accused could be convicted for hurt under S. 323, while the finding seems to be that their guilt was under Ss. 504 and 352. In the re-

(1) [1898] 25 Cal. 911=2 O. W. N. 642.

(2) [1916] 32 I. C. 393.

(3) [1896] 23 Cal. 893.

(4) A. I. C. 1926 Mad. 827=96 I. C. 700.

sult the revision petition is allowed and the conviction and sentence are set aside. The fine, if levied, will be refunded to the petitioners.

P.R.S./S.N. Conviction set aside.

1930 Cr. Cases 1125

(Madras)

PANDALAI, J.

Thadi Subbi Reddi—Accused 1—Petitioner.

Emperor—Opposite Party.

Criminal Misc. Petn. No. 59 of 1930, Decided on 27th February 1930, from order of Asst. Sess. Judge, East Godavari, D/- 10th January 1930.

(a) Criminal P. C. (1898), S. 195—Registrar, Co-operative Society, is a Court with regard to suits before him.

The Registrar, before whom a Co-operative Society files its suit, or its claim for enforcing a bond, is a "Court" within the meaning of S. 195: 45 Cal. 585, *Rel. on.* [P 1126 C 1]

(b) Criminal P. C. (1898), (as amended in 1923), S. 195 (c)—Use of forged document as genuine prior to proceedings before Court—Complaint of Court before whom document was filed is necessary.

Even where the use as genuine of a forged document under S. 471, I. P. C., is prior to the proceedings before the Court, the complaint of the Court before which that document was filed or used is necessary under S. 195: 39 Mad. 677; A. I. R. 1925 Bom. 433; A. I. R. 1925 Lah. 266 and A. I. R. 1926 All. 90, *Rel. on.* [P 1126 C 1]

(c) Practice—Precedents.

Where there are decisions of a High Court, it is the duty of Courts subordinate to that High Court to be guided by them rather than by the decisions of other High Courts.

[P 1126 C 1]

D. Suryaprakasa Rao—for Petitioner.

Parakot Govinda Menon for Public Prosecutor—for the Crown.

Order.—This is a reference under S. 215, Criminal P. C., by the Assistant Sessions Judge of East Godavari requesting this Court to quash the committal under S. 213 to that Court of the respondent Thadi Subbi Reddi. The respondent was the President of a Co-operative Society. Another person who was committed along with him to the lower Court was the Secretary of the same Society. They and three other people were charged with having got up a bond for Rs. 750 purporting to be executed by one Karri Venkatareddi in favour of the Society, the respondent Subbi Reddi signing it as a surety. The respondent and the Secretary are alleged to have,

after putting this upon the record of the Co-operative Society, handed it over to their successors when they left the office on 2nd November 1928. When the new President filed a suit on the bond before the Assistant Registrar against Karri Venkatareddi, the alleged maker, and the respondent as surety, Karri Venkatareddi brought a criminal complaint of forgery against the respondent, the Secretary, and three others. The respondent and the Secretary were also charged with having used the bond knowing it to be a forgery by handing it over to their successors in office. The Magistrate committed the five accused.

In the Sessions Court the charge of forgery was ordered to be dealt with separately from the charge of using a forged document as genuine, because the latter charge only affected the respondent and the Secretary, whereas the former affected all the five accused persons. But in the Sessions Court it was discovered that, the bond having been filed before the Assistant Registrar for the purpose of the suit, the case of forgery against the respondent, and of using the document as a genuine document against the respondent, could not proceed for want of the necessary complaint under S. 195, Criminal P. C. As the trial on the forgery section had begun the learned Sessions Judge discharged the respondent in that case relying upon certain decisions which show that that is the proper course when the defect is discovered after the trial has begun. But the trial under S. 471 against the respondent not having actually commenced he has reported the matter to this Court for the committal being quashed.

The two questions which arise are: (1) whether the Assistant Registrar before whom the Co-operative Society has filed its suits or its claim for enforcing the bond is a Court within the meaning of S. 195, Criminal P. C.; and (2) if so, whether the fact of the alleged use of the document having been before the institution of that suit, S. 195 (c) applies to the case at all.

On the first question, Cl. (2), S. 195, as amended in 1923, states that in Cls. (b) and (c), sub-S. (1) of the same section the term "Court" includes a civil, revenue or criminal Court, etc. It has been held that the term "Court" in this sep-

tion has a wider meaning than the expression "Court of Justice" in the Penal Code and includes a tribunal entitled to deal with a particular matter and authorized to receive evidence bearing thereon in order to enable it to arrive at a determination upon the question: vide *Nanda Lal Ganguli v. Khetre Mohan Ghose* (1). According to R. 14 of the Rules made by the Local Government in pursuance of S. 43 (1), Co-operative Societies Act, the Registrar to whom a dispute touching a debt due to a society by a member is referred has power to administer oaths, to require the attendance of all parties concerned and of witnesses, and to require the production of all books and documents relating to the matter in dispute. By the same rule the Registrar is required to give a decision in writing, and when it is given the decision may be enforced on application to the civil Court having jurisdiction over the subject-matter of the decision as if it were a decree of Court. The Registrar acting under this R. 14 falls clearly within the description of 'Court' given in the decision cited and I therefore hold that the Assistant Registrar before whom the suit was filed was a Court. On the second question the learned Sessions Judge has referred to *In re Bhan Vyankatesh* (2), *Khairati Ram v. Malawa Ram* (3) and *Kanhaiya Lal v. Bagwan Lal* (4), to show that, even where the use as genuine of a forged document under S. 471 is prior to the proceedings before the Court, the complaint of the Court before which that document was filed or used is necessary under S. 195. But there is a decision of our own Court to the same effect; and where there are decisions of this Court it is the duty of subordinate Courts to be guided by them rather than by the decisions of other High Courts. In *re Perameswaram Nambudri* (5) with respect to a case which fell under S. 195(b) it was held that

"it [Cl. (b)] aims at doing so by providing that where, prior to the institution of the criminal

prosecution, a properly constituted judicial tribunal has placed itself in a position to determine whether the facts constituting the offence really exist, the criminal Court should decline cognizance unless that tribunal has, in effect, certified that in its opinion the complaint is one worthy of investigation."

Cases under S. 195 (c) are as regards this matter on exactly the same footing as those which fall under Cl. (b). If anything, the matter has been put beyond controversy by the wording of Cl. (c) as amended which is:

"when such offence is alleged to have been committed by a party to any proceeding in any Court, etc."

The word "alleged" shows that the use complained of may be before the proceedings in Court commenced. It follows that a complaint by the Assistant Registrar was in this case necessary before any Court could take cognizance of the charge under S. 471 against the respondent. The whole of the proceedings therefore before the Magistrate were incompetent and the commitment by him must therefore be and hereby is quashed.

P.R.S./S.N. Commitment quashed.

1930 Cr. Cases 1126

(Madras)

WALLACE AND JACKSON, JJ.

Chinna Gangappa—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 640 of 1929, Decided on 8th April 1930, from order of Sess. Judge, Bellary.*

(a) Penal Code (1860), Ss. 201 and 203—Person not free from suspicion of actual murder, though acquitted, can none the less be convicted under Ss. 201 and 203.

There is no misjoinder in charging an accused in the alternative with the main offence and under Ss. 201 and 203, nor is there anything irregular or improper in a Judge holding that, while the accused, though acquitted, is himself not free from the suspicion of being the actual murderer, he can be nonetheless convicted under Ss. 201 and 203: (1903) *P. R. Judl. Cr. Jud. 1, Foll.*; 8 *Bom. H. C. R.* 126; 2 *All. 718*; 8 *All. 252*; 22 *Cal. 638*; 4 *Cr. L. J.* 89, *not Appr.*; 46 *Cal. 427* and *A. I. R.* 1923 *Bom.* 262, *Rel. on.* [P 1128 C 2]

(b) Penal Code (1860), S. 201—Factors for consideration in awarding sentence under S. 201.

For the purposes of calculating the punishment to be awarded under S. 201, it is necessary for the Court to decide, not so much what offence, the evidence of which has been conceded has been committed, as what offence the accused knew or had reason to believe had been committed. Where, therefore, a person himself

(1) [1918] 45 Cal. 585=19 Cr. L. J. 315=44 I. C. 331.

(2) *A. I. R.* 1925 *Bom.* 433=91 I. C. 245=27 Cr. L. J. 69=49 *Bom.* 608.

(3) *A. I. R.* 1925 *Lah.* 266=85 I. C. 377=26 Cr. L. J. 537=5 *Lah.* 550.

(4) *A. I. R.* 1926 *All.* 30=89 I. C. 1053=26 Cr. L. J. 1485=48 *All.* 60.

(5) [1916] 39 *Mad.* 677=16 Cr. L. J. 721=31

convicted under S. 201 the Court must treat him as a stranger to the crime, as one who had merely witnessed it, while calculating the sentence to be passed. [P 1129 C 1]

V. L. Ethiraj and M. C. Sridharan—for Appellant.

Public Prosecutor—for the Crown.

Judgment.—The appellant has been convicted by the learned Sessions Judge, of Bellary under S. 201, I. P. C., for giving false evidence about the murder of his wife in order to screen the real offender, and also under S. 203 for giving false information about the murder. He was also himself charged with the actual murder of his wife, but was acquitted on that. The facts of the case briefly were:

On 12th August 1929, at about 10 a. m., the deceased woman took food to her husband. P. W. 4 saw her there. He next saw her being carried in an unconscious state by the accused and his brother towards her house. P. W. 5 saw people in her house applying restoratives to her, while the accused and his brother were giving out that the woman had been stung by a scorpion or bitten by a snake. She died at 4 p. m. The accused himself made the report to the Village Munsif (P. W. 6), saying that he suspected that she had been stung. The woman's father (P. W. 8) was suspicious and reported to the police who sent the body for post-mortem. The Medical Officer, P. W. 1, found on the body four contusions, three of them on the skull, and on dissecting he found there had been cerebral haemorrhage. He was of opinion that that was the result of blows by sticks or stones on the head. He found no signs or symptoms of poisonous bite or sting.

The charge of murder was not pressed against the accused in the trial Court and the learned Sessions Judge held that the evidence did not prove that it was the accused who inflicted the injuries on his wife. He held, however, that he must have known who inflicted them on his wife and that his story to the Village Munsif was a false one, intended to screen the real offender. He, therefore, convicted him under Ss. 201 and 203, I. P. C.

The learned counsel for the defence raises a point of fact and a point of law. The point of fact is that as the injuries on the woman were hidden under her hair the accused did not genuinely

know that she had been assaulted. But we do not think that there is any substance in this. For, the woman having been assaulted, the accused's story that she cried out she had been stung cannot be true. She must have cried out that she was being beaten and accused must have known that.

The point of law is that unless the Court is satisfied beyond reasonable doubt that accused was not himself the murderer, he cannot be convicted under Ss. 201 and 203. This rests upon a proposition, affirmed in several rulings of various High Courts, that Ss. 201 and 203, I. P. C., have no application to the person who actually committed the main offence mentioned in the sections, and that the person who committed the main offence cannot be himself found guilty of causing evidence of that offence to disappear or of giving false information about it. The earliest pronouncement on this point was in 1871 in a case, *Reg v. Kasinath Dinkar* (1), and this ruling has been followed, mostly without discussion or comment as if the proposition were self evident in various other cases: cf. *Empress of India v. Kishna* (2); *Queen-Empress v. Dungar* (3); *Torap Ali v. Queen-Empress* (4) and *Emperor v. Ghansham* (5). The only pronouncement of this High Court on this subject which has been traced, is in a parenthesis and obiter dictum at p. 277 of *Ramaswami Goundan v. Emperor* (6). Nowhere is the ratio decidendi of *Reg v. Kasinath Dinkar* (1) examined. It seems to us to rest on a petitio principii. The reason given is that:

"as there is no law now which obliges a criminal to give information which would convict himself, it is evident that Ss. 202 and 203 could not apply to a person who committed that offence, that is, the offence which he knew had been committed."

Obviously if there is no law to that effect then Ss. 202 and 203 will not apply. The question rather is whether Ss. 201 to 203 do not embody such a law. On the face of them there is nothing to show that they do not apply to the main offender himself. S. 44, Criminal P. C., which is the general sec-

(1) [1871] 8 B. H. C. R. 126.

(2) [1880] 2 All. 713.

(3) [1885] 8 All. 252=(1886) A. W. N. 71.

(4) [1895] 22 Cal. 633.

(5) [1906] 4 Cr. L. J. 89.

(6) [1904] 27 Mad. 271.

tion relating to the duty of persons to give information about grave offences including murder, and S. 45 (d) of that Code which lays on any owner or occupier of land the duty of giving information regarding the occurrence in his village of any sudden or unnatural death, do not in terms exclude the offender himself. These sections of the Criminal Procedure Code would be relevant in a case under S. 202, I. P. C. where it is necessary that the accused should be legally bound to give information regarding the offence but even this qualification does not appear under S. 201 or S. 203. What is required there is merely that there should have been an offence and that the accused has given false information about it, with the added intention in the case of S. 201, I. P. C. of screening the offender. We cannot therefore see wherefrom comes the proposition which is the foundation of *Reg v. Kashinath Dinkar* (1), that there is no law which obliges a criminal to give information which would convict himself. There is such a law in the case of grave offences and sudden deaths, and in theory the offender himself could be convicted for breach of that law under Ss. 201 to 203, I. P. C. In practice, no doubt, if he has been convicted of the offence itself, no Court will think it worth while to convict him also under Ss. 201 to 203, I. P. C. If the proposition laid down in *Reg v. Kashinath Dinkar* (1) is carried to its logical conclusion it would appear that it is improper to try an accused person, as the present accused has been tried, in the same trial under both Ss. 202 and 201, I. P. C., because a perfect defence to S. 201 would be a plea and proof that he himself was the murderer, and an accused would be entitled to say that the plea he proposes to make to the charge under S. 201 will depend on whether he is acquitted or convicted of the principal offence; and that to call upon him to plead to the charge under S. 201 before and until he knows what the verdict of the murder charge is would be to deprive him of his legitimate defence. It would also in a case where the Court regards proof of his complicity in the actual offence is insufficient to establish his guilt, compel the Court to let him go free, even though it is satisfied that he gained his ac-

quittal on the main offence by his own concealment of the traces of the crime. This was exactly what happened in the *Bombay H. C. R.* case, and it is hardly compatible with justice that the actual offender should escape conviction under Ss. 201 to 203 because he is the actual offender in the main crime, while those who merely witnessed it but gave false information about it are punishable under Ss. 201 and 203. This means that the more successful a criminal is in concealing his own offence the more the law will assist him in escaping justice altogether, and unless the Court holds without reasonable doubt that the accused did not take part in the murder the Court is bound to give him the benefit of doubt and acquit him of offences under Ss. 201 to 203. The case reported in *Torop Ali v. Queen-Empress* (4) is another practical example of how justice is defeated by such a theory of the law.

The true principle seems to be that there is no law preventing the main offender being convicted under Ss. 201 to 203, but in practice no Court will convict an accused both of the main offence and under these sections. But if the commission of the main offence is not brought home to him, then he can be convicted under Ss. 201 to 203. Therefore there is no misjoinder in charging an accused in the alternative with the main offence and under Ss. 201 and 203, I. P. C., nor is there anything irregular or improper in a Judge holding, as the learned Sessions Judge has done in this case, that, while the accused is himself not free from the suspicion of being the actual murderer, he can be nonetheless convicted under S. 201 or S. 203. This position is not without authority, though, as noted above, most of the reported cases have followed *Reg v. Kashinath Dinkar* (1). Most of these rulings have been considered in a judgment of the Punjab Chief Court in 1903. In *Buch v. Emperor* (7), wherein it was held that an accused acquitted of the charge of committing a crime can be convicted under S. 201 in respect of the offence "with the commission of which he is no longer charged or liable to be charged;" and the mere suspicion that an individual is the actual murderer, or the facts that he has even had his trial and been ac-

(7) [1908] 39 P. R. Jud. Cr. Jud. 1.

quitted of the offence of murder will not prevent his conviction under S. 201. A mere suspect or an acquitted accused is not in the eyes of the law an offender within the meaning of S. 201. The reported ruling in *Tapriinessa v. Emperor* (8) is practically to the same effect, and also the ruling of a Bench of the Bombay High Court in *Hanumanappa Rudrappa v. Emperor* (9). Therefore there is no illegality in the conviction under Ss. 201 and 203.

This does not however conclude the case. It is clear that for the purpose of calculating the punishment to be awarded under S. 201, it is necessary for the Court to decide, not so much what offence the evidence of which has been concealed has been committed as what offence the accused knew or had reason to believe had been committed. So it was necessary to believe, on the assumption that the accused did not commit the main offence because he has not been convicted of that, what offence he believed or knew to have been committed. The Court must treat him as a stranger to the crime, as one who had merely witnessed it.

From that point of view we cannot on the evidence say that more is proved than that the accused knew that someone had hit his wife and that she had died in consequence. We are unable to conclude that he knew that the person who struck her had the criminal intention of killing her. It must have been clear however to the accused that his wife had died as a result of the blows given and that she at least suffered grievous hurt, and that is punishable under S. 325, I. P. C. with imprisonment for seven years. Under S. 201 the accused is then liable to be sentenced to a maximum of one-fourth of that seven years. The learned Sessions Judge has sentenced the accused to rigorous imprisonment for five years. At the most he can be sentenced to one year and three-fourths. We think that it will be sufficient if he undergoes rigorous imprisonment for one year and we reduce the sentence accordingly.

P.R.S./S.N.

Sentence reduced.

(8) [1919] 46 Cal. 427=19 Cr. L. J. 903=47 I. C. 275.

(9) A. I. R. 1923 Bom. 262=82 I. C. 709=25 Cr. L. J. 1349.

* 1930 Cr. Cases 1129

(Calcutta)

SUHRAWARDY AND COSTELLO, JJ.

Purna Chandra Dutta and others—
Petitioners.

v.

Sheikh Dhalu—Opposite Party.

Civil Revn. No. 20 of 1929, Decided on 9th May 1930, from appellate order of District Judge, Dacca.

* (a) Criminal P. C. (5 of 1898), S. 439—Revision against order under Ss 476, 476-A and 476-B, by civil Court does not lie under S. 439—In such matters High Court can only interfere under Civil P. C. (5 of 1908), S. 115 or Government of India Act (1919), S. 107.

Revision application against order passed under Ss. 476, 476-A and 476-B, Criminal P. C., by civil Court does not lie under S. 439 of the Code as it is not a matter connected with any proceedings before any inferior criminal Court within the meaning of S. 435 of the same Code. In such matters the High Court can only interfere under S. 115, Civil P. C., or S. 107, Government of India Act, and the order can therefore only be challenged for wrong, illegal or irregular exercise of jurisdiction: 40 Cal. 477, *Rel. on.* [P 1130 C 2]

(b) Criminal P. C. (as amended by Act 18 of 1923), S. 476—Words "such Court" in S. 476 include "successor to office."

A Court of law does not consist of the particular individual or individuals who may be presiding over the proceedings therein at any particular moment but it is a permanent institution and therefore any judicial officer who sits in the Court is just as competent to deal with the matters coming before the Court as any other incumbent of the office. Therefore the words "such Court" in S. 476 includes the successor of the office: 10 I. C. 66; A. I. R. 1922 Lah. 479 and A. I. R. 1925 Rang. 195, *Rel. on.* [P 1134 C 2]

* (c) Criminal P. C. (as amended by Act 18 of 1923), S. 476—It is not prudent in every case to hold preliminary enquiry before making complaint under S. 476.

In each individual case the Court has to decide whether in the interests of justice a preliminary investigation is necessary. In a case where an offence has been committed outside the Court and not in the presence of the Judge it would certainly be judicious if not incumbent upon the Court to hold a preliminary enquiry in order to find out for itself whether such an offence was really committed. But where an offence is committed in the presence of the Court or from a perusal of the record, it is of opinion that it is necessary in the interests of justice that a further enquiry into the matter should be made in the criminal Court, it may make a complaint to that effect to the nearest Magistrate without making any preliminary enquiry. But it cannot be laid down as a proposition of law that in every case it is prudent to hold a preliminary enquiry before making a complaint under S. 476. Each case must be judged on its own facts and there may be a case where the revising authority may think that an action under S. 476 was too has-

tily taken and that there should be further investigation in the matter : 20 Cal. 349 ; 10 I. C. 66 ; 37 Cal. 642 ; 37 I. C. 469, *Rel. on.* ; A.I.R. 1930 Cal. 282, *Diss. from.* [P 1132 C 1]

(d) Criminal P. C. (as amended by Act 18 of 1923), S. 476 — S. 476 contemplates action on part of Court of its own initiative and it cannot be held that because application is made irregularly that of itself debars Court from taking action in the matter.

Per Costello, J.—Under the wordings of S. 476 there is no restriction made as to the person or persons by whom an application can be made to the Court and therefore even if the pleader is in one sense an unauthorized person, he is nonetheless competent to make an application to the Court if he chooses. He does nothing more than to bring the matter to the attention of the Court. The section definitely contemplates action on the part of the Court of its own initiative and it cannot be held that because the application is made irregularly that of itself debars the Court from acting in the matter at all. [P 1135 C 1]

(e) Criminal P. C. (as amended by Act 18 of 1923), S. 476—Matters under S. 476 cannot be held to be mainly matters inter partes.

Per Costello, J.—It is very much to be deprecated that the idea should become prevalent that matters under S. 476 are mainly matters inter partes. Whether a matter of this kind comes before a Court upon a complaint or whether the Court acts of its own motion, the Court ought to deal with it not so much as a piece of litigation between private parties but as a matter of public duty undertaken for the purpose of vindicating and ensuring the purity of the administration and public justice.

[P 1135 C 1, 2]

(f) Criminal P. C., Ss. 476 and 439—Discretion about withholding enquiry should not ordinarily be interfered with.

Per Costello, J.—The High Court ought to be reluctant to interfere with the Court's discretion to hold or not to hold an enquiry before making a complaint under S. 476. [P 1135 C 2]

(g) Civil P. C. (5 of 1908), O. 3, R. 4 — Vakalatnama.

Per Subrawardy, J.—Vakalatnama filed in a suit remains in force in all the different stages of the case. [P 1132 C 2]

Camell, Nanda Gopal Banerjee and Gopal Chandra Mukherjee — for Petitioners.

Sures Chandra Talukdar and Sachindra Kumar Roy—for Opposite Party.

Subrawardy, J.—This is an application in revision by six persons against an appellate order of the District Judge of Dacca affirming an order of the Munsif of that place passed under S. 476, Criminal P. C., lodging a complaint against the petitioners under Ss. 209 and 120-B, I. P. C., and Ss. 210 and 511 and 120-B, I. P. C. Before proceeding to deal with the merits of the case I should like to make one observation with regard to the scope of the rule issued by

this Court. This application in revision does not lie under S. 439, Criminal P. C., inasmuch as it is not a matter connected with any proceedings before any inferior criminal Court within the meaning of S. 435, Criminal P. C. By an order made by the Chief Justice the Bench taking criminal matters is authorized to receive and hear appeals and revision applications against orders passed under Ss. 476, 476-A and 476-B, Criminal P. C., by civil Courts. If the revision application is not entertainable under S. 439, Criminal P. C., in such matters this Court can only interfere under S. 115, Civil P. C., or S. 107, Government of India Act : *Empegor v. Har Prasad Das* (1). This rule being under S. 115 Civil P. C., is very much limited in its scope and we have not the freedom which we generally assume in dealing with criminal matters under S. 439, Criminal P. C. The order of the lower Court passed in appeal under S. 476-B, therefore can only be challenged for wrong, illegal or irregular exercise of jurisdiction. I refer to this matter as this feature of these cases is not generally kept in view when dealing with them along with cases under S. 439, Criminal P. C.

The facts out of which this matter arises are that the first petitioner Purna brought a suit for money against the opposite party Dhalu in the Munsif's Court at Dacca. The other petitioners were examined as witnesses in the case. The Munsif who heard the suit was of opinion that the bond on which the suit was brought was a forgery. An application was made by Dhalu inviting the Munsif who had disposed of the suit to take action under S. 476, Criminal P. C. The Munsif refused to pass any final order on that application on the ground that an appeal was then pending from his decree. After the disposal of the appeal affirming the decree of the trial Court that the bond was a forgery Dhalu again applied to the successor of the Munsif who had disposed of the suit for action under S. 476, Criminal P. C. The learned Munsif apparently went through the record of the case and made a complaint under S. 476, Criminal P. C. On appeal that order was affirmed by the District Judge.

(1) [1918] 40 Cal. 477=19 I.O. 197=14 Cr. L.J. 197.

Mr. Camell who appears for the petitioners has urged three points not one of which in my judgment is a point covered by S. 115, Civil P. C. The first point which has been strenuously pressed is that the Munsif not being the officer who had decided the suit should have held a further enquiry into this matter, before making a complaint under S. 476, Criminal P. C. The section itself does not show that a further enquiry before making a complaint is imperative under the law. The section as it originally stood before its amendment in 1923 read :

"After making any preliminary enquiry that may be necessary."

These words even were construed as making it discretionary with the Court to hold or not to hold an enquiry before making a complaint : *Choudhuri Mahmmed Izharul Huq v. Queen Empress* (2). The law has now been made clearer by the amendment of 1923 and the section now reads as :

"after such preliminary enquiry, if any, as it thinks necessary."

So that as a matter of law the Court is not bound to make any enquiry before making a complaint. But it is argued that in a case when the officer making the complaint is not the officer who has decided the case :

"It is prudent that he should make an enquiry."

That of course is not a question which comes within the purview of S. 115, Civil P. C. Reliance has been placed on some observations made in the judgment in *Sarat Chandra Bhattacharji v. Hari Charan Dey* (3). The facts of that case were that after the suit was dismissed and the order of dismissal upheld by the High Court one of the defendants applied to the Munsif who had tried the suit for action under S. 476, Criminal P. C. That application was dismissed. Another defendant, a week after, made a similar application and that application was granted by the Munsif. On appeal the learned District Judge summarily rejected it under S. 41, R. 11, Civil P. C. Against that order of the appellate Court a rule was obtained from this Court. It was held that the District Judge was not right in summarily rejecting the appeal under O. 41, R. 2, Civil P. C., but that he should have heard it under S. 476-B, Criminal P. C. After disposing of the

case on this ground the learned Judges went into the merits of the case and they were of opinion that the order made by the Munsif for an enquiry by the criminal Court against the petitioner was not justified on the facts of the case, and they accordingly set aside the complaint made by the Munsif. I take it that when a matter comes up to this Court and this Court thinks that in the interest of justice the order of the lower Court should be set aside it can do so in its supervising jurisdiction. But in the judgment of that case some observations have been made which seems to me to be in the nature of obiter dicta and from which I most respectfully dissent. It is there said :

"It is true that under the provisions of S. 476, Criminal P. C., a preliminary enquiry may not be legally necessary. But it has been laid down ever since the enactment of the present S. 476, Criminal P. C., that although a preliminary enquiry may not be legally necessary it should in common prudence be held by every Court before it passes an order under S. 476, Criminal P. C. That, as we understand, is the present case law in this Court."

We asked Mr. Camell to place before us any case where the practice referred to in the above observation has been followed or insisted upon, but we were not referred to any such case. On the other hand we have a weighty decision of this Court in *Darpa Narayan Bera v. Bepin Behari Mitra* (4), where the facts were very similar to those in the case before us. The learned Judges, Mookerji and Teunon, JJ., held, following the Full Bench decision in *Shaikh Bahadur v. Eradatulla* (5), that the power to direct prosecution under S. 476, Criminal P. C., was conferred not upon any particular individual as for instance the trying Judge, but on the "Court" which might be at the time when the order was made presided over by another officer. The learned Judges further held that the successor of the officer before whom the original trial took place was not bound to hold any independent investigation before making an order under S. 476, Criminal P. C., that the holding of a preliminary enquiry in a proceeding under S. 476 was discretionary and that the person against whom an order was passed

(2) [1898] 20 Cal. 349.

(3) A.I.R. 1930 Cal. 282=1930 Cr. C. 362.

(4) [1911] 12 Cr. L. J. 203=10 I. C. 66.

(5) [1910] 37 Cal. 642=11 Cr. L. J. 407=6 I. C. 801.

without such an enquiry could not complain unless he was prejudiced by the omission. Mr. Camell has not pointed out any circumstance in this case which would go to show that his clients have been prejudiced in any way by the Munsif not holding a preliminary enquiry before making the order under S. 476, Criminal P. C. He has argued the case upon the general principle that in every case it is prudent if not necessary that a preliminary enquiry should be held before a complaint is made under S. 476, Criminal P. C. I am unable to accept this view of the law as flowing from the statute or even as reasonable for practical purposes. The true rule of law seems to me to be as observed in *Darpa Narain Bera's* case, that the Court has to decide in each individual case whether in the interests of justice a preliminary investigation is necessary. In a case where an offence has been committed outside the Court and not in the presence of the Judge it would certainly be judicious if not incumbent upon the Court to hold a preliminary enquiry in order to find out for itself whether such an offence was really committed. But where an offence is committed in the presence of the Court or from a perusal of the record it is of opinion that it is necessary in the interests of justice that a further enquiry into the matter should be made in the criminal Court, it may make a complaint to that effect to the nearest Magistrate without making any preliminary enquiry. What in short is the view which I entertain in the matter is that it cannot be laid down as a proposition of law that in every case it is prudent to hold a preliminary enquiry before making a complaint under S. 476, Criminal P. C. Each case must be judged on its own facts and there may be a case where the revising authority may think that an action under S. 476, Criminal P. C., was too hastily taken and that there should be further investigation in the matter. In the case before us the learned Munsif though he did not try the case went through the record and in the concluding portion of his order says :

"Now, it appears to me on a careful examination of the record that a prima facie case has been made out that all the opposite parties

above named have committed an offence punishable under S. 209/120-B, I. P. C., and also under S. 210/511/120-B of the said Code."

It is difficult to see what further investigation in the matter the Munsif could have made. Nor do I think any useful purpose would have been served if the Munsif had examined the petitioners over again, and probably taken some more evidence of the same kind. The suit was filed upon a bond and it was supported by the evidence of not less than six witnesses. The Munsif who had decided the suit went thoroughly into the matter, and from the circumstances and evidence in the case was clearly of opinion that the bond was a forgery. That decision was upheld by the appellate Court. I do not think that the petitioners were in any way prejudiced by the Munsif not making a further investigation in the matter.

The second ground urged by Mr. Camell is that the pleader who moved this petition on behalf of the opposite party before the Munsif was not authorized by a fresh vakalatnama by the party and therefore the action taken by the Munsif on that petition was ultra vires. There is no substance in this contention as under S. 476, Criminal P. C., the Court may take action of its own motion and what the pleader did on behalf of the opposite party was to bring the matter to the notice of the Court. Further, the rule is that a vakalatnama filed in a suit remains in force in all the different stages of the case. The objection, even if there is any substance in it, is highly technical and ought not to be given effect to.

It is lastly argued that the judgments of the Courts below did not contain sufficient materials for making the complaint against petitioners 2 to 6. What the Munsif held was that a false suit was brought in his Court as the result of a conspiracy between the plaintiff in that suit and his witnesses. Though the false suit was brought by the first petitioner the other petitioners helped him in prosecuting it in the Court. Some of these petitioners, all of whom were witnesses in the suit, spoke to the execution of the bond by Dhalu; some others spoke to the fact that they went to Dhalu and made demand for the payment of the debt covered by the

bond and Dhalu admitted the debt and applied for time for payment. When the matter will be tried before the criminal Court these petitioners will have an opportunity of showing that they did not conspire with the plaintiff in bringing a false suit. Matters, as they now stand, justify the order passed by the Magistrate that all these persons had conspired to make a false claim in a Court of justice. These are all the grounds urged before us and all of them having been overruled, the Rule is discharged.

Costello, J.—I entirely agree with what has fallen from my Lord. I think however that I ought to add a few words of my own with regard to this matter, because reliance has been placed upon the case of *Sarat Chandra Bhatlacharjee v. Hari Charan Dey* (3) from some of the observations in which I respectfully dissent. I cannot altogether accept the view of the case law which seems to be enunciated in the judgment of C. C. Ghose, J. With the greatest respect to him and all due deference to his experience in matters of this kind, I cannot help in coming to the conclusion, that the proposition laid down on p. 49 of the report is far too wide. The passage to which I refer reads as follows :

"But it has been laid down ever since the enactment of the present S. 476, Criminal P.O., that though a preliminary enquiry may not be legally necessary, it should in common prudence be held by every Court, before it passes an order under S. 476, Criminal P.O. That as we understand, is the present case law in this Court."

If that statement really represents the present case law on this point, I can only say that personally I think the case law goes considerably further than the words of the statute themselves warrant. It is to be observed in the first place that there are a number of decisions (to some of which my brother Suhrawardy has already referred) which unquestionably make it clear that even under the old corresponding section of the Criminal Procedure Code a preliminary enquiry was in no sense obligatory. The previous words of the section were "such Court after making any preliminary enquiry that may be necessary." So even under that phraseology it was not a necessary condition precedent to the making

of an order under S. 476, that there should be any preliminary enquiry at all. The section did not say so, and therefore to hold that there was any rigid rule of law on the point, is to my mind to go beyond the words of the section. The section says "that may be necessary," thus assuming that there were cases in which an enquiry might be necessary and cases in which an enquiry might not be necessary. It follows therefore that an order made under the terms of the old section was not necessarily bad, because no enquiry at all had in fact been made before the Court concerned made an order.

Now when one looks at the words of the present section one can only take the view, in my judgment that a fortiori no preliminary enquiry is necessary as a matter of law, because the words of the section now run thus on this point: "Such Court may, after such preliminary enquiry, if any, as it thinks necessary." It follows from the form of the words used that it is entirely a matter for the discretion of the Court concerned whether any enquiry is necessary or not. It is quite true that the circumstances of a case may require as a matter of caution, or to use the words which my brother C. C. Ghose used in the judgment to which I have referred "as a matter of prudence" that, the Court in dealing with the matter should hold some kind of enquiry before making an order under S. 476. But as my brother Suhrawardy has already pointed out it cannot be necessary, or even a matter of prudence, that any enquiry should be held in cases where for example all the facts which are material to the charge which is to be made have already come out in the course of the hearing of the case itself or where they have already been brought to the notice of the Court in such a form that the Court can rely on the information before it. In this connexion, I refer to a judgment of this Court in the case of *Taru Babu v. Emperor* (6), in which Sanderson, C. J., said this :

"It may be that in a case where the Judge is trying the case, and all the facts which are material to the charge have been brought to the notice of the learned Judge, or have come out during the course of the hearing of the case, it would be mere waste of time and

quite unnecessary to hold a preliminary enquiry because the learned Judge is already in possession of all the material facts on which it is necessary for him to form the judgment."

The learned Chief Justice went on to say with reference to the facts of the case then before him :

"But in such a case as this, where the incident took place outside the Court, and as to which the learned Judge himself could have no knowledge, and as to which evidence must be called for, in my judgment, unless he does hold such a preliminary enquiry as may be necessary to enable him to determine whether or not there is any case, fit to be sent to the Magistrate, he has no jurisdiction to send the accused under S. 476."

I respectfully agree with what the learned Chief Justice said, and it seems to me that his observations draw a reasonable line of demarcation between cases where an enquiry is not necessary and cases where the enquiry is at any rate prudent if not altogether necessary. If we were to hold that in all cases, an enquiry, if not absolutely necessary is at any rate desirable as a matter of common prudence, we should in my opinion, be travelling a very long way outside the scope of the words of the section itself and at the same time we should be opening the door to a flood of unfounded and unwarranted applications to this Court on matters arising out of orders made by virtue of the terms of S. 476.

With regard to the actual case, now before us, I ought to add one or two observations. This case manifestly falls within the class of cases referred to by Sanderson, C. J., where all the facts material to the making of the decision as to whether there should be a complaint or not, were before the learned Munsif to whom the application was made. It is true that the particular Munsif who made the order which is now impugned, was not the Munsif who had heard the case out of which the charge arose, but he had before him the official record of the proceedings from which he could see that his predecessor in office in that particular Court, and also the District Judge to whom an appeal had been taken, had both come to the conclusion that the document on which the plaintiff's case was based, was not a genuine document and that the persons against whom the complaint was made, were all jointly implicated in

putting it forward in the course of the case if not actually fabricating it, for the purpose. Therefore the learned Munsif before whom the application was made, in my opinion, could not do otherwise than to accept the records as being correct and they set forth the considered opinion of the two judicial officers who had heard and considered the whole of the evidence and had come to a finding upon the facts as presented in course of the case.

A point was sought to be made by Mr. Camell on behalf of the present petitioners that it was not competent to the learned Munsif who made the order to deal with the matter in the way he did because in fact he was not the Munsif who had heard the original case. My learned brother has already referred to one authority, *Durpa Narayan Bera v. Bepin Behary Miller* (4) where it was held that the successor of the officer before whom the original trial took place is not bound to hold an independent investigation before making the order under S. 476, Criminal P. C., for the reason that the power to direct a prosecution under that section is conferred on "the Court" and not merely on the individual judicial officer who happens to hold office at the time of the original trial. In other words, as I pointed out in the course of the argument before us, it is not a question of the particular incumbent in office at the time when the application is made, but it is a question of the particular Court to whom the application is made. In this connexion I would refer to the case of *Tara Chand v. Emperor* (7), where it was held that the Court of a Subordinate Judge is a permanent Court; therefore a Subordinate Judge is competent to continue an enquiry under S. 476, Criminal P. C., begun by his predecessor: see also *Maung Shwe Phe v. Ma Me Hmoke* (8). A Court of law does not consist of the particular individual or individuals who may be presiding over the proceedings therein at any particular moment, but it is a permanent institution and therefore any judicial officer who sits in the Court is just as competent to deal with the

(7) A. I. R. 1922 Lah. 479=67 I. O. 723=28 Cr. L. J. 451.

(8) A. I. R. 1925 Rang. 195=85 I. O. 244=26 Cr. L. J. 500=3 Rang. 48.

matters coming before the Court as any other incumbent of the office. Therefore the words in the section "such Court" include the successor to the office: cf. *Grish* 42, C. 667 at p. 670).

One other point I desire to refer to and it is this: Mr. Camell sought to make something of the fact that the application in this proceeding was made to the learned Munsif by a pleader who is said not to have been properly authorized by any client to make the application which he did. My learned brother has already dealt with one aspect of that matter. I may also add that under the wording of the section itself there is no restriction made as to persons by whom an application can be made to the Court under S. 476, Criminal P. C., and therefore, even if the pleader is in one sense an unauthorized person, he is none the less competent to make an application to the Court if he so chooses. He does nothing more than to bring the matter to the attention of the Court. Clearly in my opinion it is then open to the Court, if it thinks fit in the interests of justice, to take action in the matter in the same way as it might take action suo motu without any application at all, as the section definitely contemplates action on the part of the Court of its own initiative. It seems to me impossible to hold that because the application is made irregularly that of itself debars the Court from acting in the matter at all. If the Court can act on its own motion, the Court cannot be prevented from acting merely because it was prompted to take action by some application which might be said to have been irregularly made. What is overlooked, I am afraid, in connexion with matters arising under S. 476, Criminal P. C., is that all the offences referred to, that is to say, offences mentioned in S. 195, Criminal P. C., are offences against public justice and therefore I think any Court which, from any source acquires knowledge that there is a probability that one of such offences has been committed, ought then as a public duty in suitable cases to make a complaint as contemplated under S. 476, Criminal P. C. To my mind it is very much to be deprecated that the idea should become prevalent that matters under S. 476 are mainly matters inter partes. In the particular case with which we

are now concerned, I observe that the learned Munsif treated the applications before him as if they were contests as between two private contesting parties and the applications were accordingly denominated as Miscellaneous Cases Nos. 61 and 62. It may be that for the purpose of record it is necessary that all applications should be described in some form or other, but all the same I do not think that they ought to be treated as if in fact they were merely matters of private litigation between individual parties. One of the objects of S. 476 is to prevent a private person who happens to be an unsuccessful and disappointed litigant, from captiously retaliating upon his successful opponent by instituting or seeking to institute criminal proceedings against him. Whether a matter of this kind comes before a Court upon a complaint or whether a Court acts of its own motion, the Court ought to deal with it not so much as a piece of litigation between private parties but, as I have already said, as a matter of public duty undertaken for the purpose of vindicating and ensuring the purity of the administration for public justice. It is quite true that in S. 476 a right of appeal is given not only to persons against whom an order is made but also to persons who make an application for an order to be made, and whose application has been refused. To that extent undoubtedly the matter must be dealt with in one sense as being one of private litigation, but I do not think that anything should be done unnecessarily to encourage that view of the matter. With that in mind I think this Court ought to be very reluctant to interfere with the discretion which is undoubtedly conferred upon a Court when making a complaint under S. 475.

In the particular case before us, as my learned brother Suhrawardy says, it is quite obvious that there is not the slightest justification for putting forward the matter as one arising under S. 115, Civil P. C. For the reasons I have given, I agree that the rule must be discharged.

P.N./R.K.

Rule discharged.

1930 Cr. Cases 1136

(Calcutta)

PEARSON AND PATTERSON, JJ.

Aswini Kumar Pal — Accused — Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 670 of 1929, Decided on 27th January 1930.

Penal Code, S. 486—Proper test is whether ordinary unwary purchaser would be deceived.

In a case under S. 486 the proper test is not whether a purchaser if literate would be deceived if he had the two articles side by side, but the matter should be considered from the point of view of the ordinary unwary purchaser. [F 1136 O 1]

P. C. Chatterjee and Bireswar Chatterjee—for Appellant.*A. K. Basu and Santosh Nath Mukerjee*—for the Crown.

Judgment.—The appellant has been convicted of an offence under S. 486, I. P. C., and sentenced to pay a fine of Rs. 500. The charge against the accused was that he had in his possession for sale or purposes of trade certain tins of corn-flour bearing a trade-mark or property mark which was a counterfeit of the mark of Messrs. C. & E. Morton Ltd. Of the marks forming the subject matter of the charge only one described as "Matrons" has been held by the learned Chief Presidency Magistrate to be a counterfeit under the section, but although this is so, it is nevertheless relevant in the present case to observe that at the search which resulted in the prosecution certain other brands of this commodity were found in the accused's possession in which he also traded, bearing different labels, namely "Nortons" "Motor" "Leton's" and "Newtons." "Nortons" has been the subject of injunction proceedings in the High Court and as the Magistrate notes is a closer counterfeit than the others. The conviction, as already stated, is only in regard to "Matrons." We have had an opportunity of comparing the tins and labels for ourselves. As the learned Magistrate observes, no one could possibly mistake them if he were in the least on the alert, and knew the original at all well. It is equally clear that the purchaser (if literate) would not be deceived if he had the two tins side by side. But that is not the proper test; it must be considered from the point of view of the ordinary un-

wary purchaser. There are no doubt, as has been pointed out to us, a large number of differences, chiefly in detail; among these may be mentioned the fact that the offending label states that the goods are "made in Calcutta" whereas the complainant's tins are embossed at the foot "Manufactured in England;" other considerable differences may be noted in the colour, or rather in the shade of colour used and the price at which the articles were sold, Rs. 13-4-0 per lb as opposed to Rs. 7-8-0 per lb. The resemblances in the get-up are also fairly numerous, the chief ones being the name G. & I. Matrons as against C. & E. Mortons, the shape and size of tin, the "Eagle" or "bird" brand in a white oval forming a prominent part of the label design, and the general similarity of get-up in the mixture of red and green employed on the label. We are satisfied that upon the whole there is ground to support the finding of the learned Magistrate, that the resemblance is such that a person might be deceived thereby, and the presumption is that the accused intended thereby to practise deception or know it to be likely that deception would thereby be practised. This presumption under S. 28, I. P. C., the accused contends, is rebutted by the fact that he purchased the rights in the offending label and design with dies, etc., at a receiver's sale in 1924, and he relies on that to show that he "acted innocently" under S. 486 (c), I. P. C. This may help him as far as it goes, but the other circumstances in the case, and particularly the possession of "Nortons," would rather go to show that the accused is concerned to see how near the line he can go in trading on the reputation of another manufacturer. A further point was taken that S. 15, Merchandise Marks Act, was a bar to the prosecution as having been commenced more than three years after the commission of the offence. This however is of no substance: that part of this section is designed to prevent stale claims from becoming the subject-matter of criminal prosecution, and cannot apply to a case such as this where the offence is a continuing one.

The appeal is accordingly dismissed and the conviction and sentence upheld.

R.M./R.K.

Appeal dismissed.

1930 Cr. Cases 1137 (1)
(Allahabad)

BOYS, J.

Aslep—Accused.

v.

Emperor

Criminal Ref. No. 272 of 1930, Decided on 17th June 1930, made by Second Addl. Sess. Judge, Meerut, on 14th April 1930.

Penal Code (1860), S. 498.—First husband absolutely abandoning his wife and she marrying another man by recognized marriage—Person so married is competent to institute complaint under S. 498.

Where the husband of a woman absolutely abandons her, and she marries another man by a marriage which is recognized as valid among the people to which the parties belong, the second husband of the woman has full authority to institute complaint for enticing the woman away. [P 1137 O 2]

K. C. Mukerji—*for Accused.*

M. Wajidullah—*for the Crown.*

Order.—This case would have never been referred if the Sessions Judge had not applied to the circumstances of the case and evidence given in it the same sort of tests that might have been appropriate had he been dealing with the question of whether some large estate was impartible or not, or whether there was a custom of some unusual nature existing in some particular family. The facts are simple. One Mt. Mulhu was first married to a man called Juma who proceeded to marry another woman, to ignore Mt. Mulhu and to leave her apparently entirely to her own devices and unprovided for three years and to ignore her going through the ceremony of marriage with another man. This the learned Sessions Judge does not consider constituted desertion, and apparently he holds that it does not amount to desertion because Juma could at the end of the three years, if he had liked, have reclaimed his wife. The next step is that Mt. Mulhu, by a well-recognized form of marriage, the karao form, marries a man called Bhagwana; and the accused had been found guilty of taking her away from the custody of Bhagwana and punished under S. 498. The accused have succeeded in persuading the Second Additional Subordinate Judge of Meerut to refer the case to this Court on the ground that Bhagwana was not the lawfully married husband of Mt. Mulhu and had therefore no authority to institute a complaint under S. 498, I. P. C.

1930 Cr. C. 143 & 144

It is admitted that the karao form of marriage is a well-recognized form amongst people of the caste and class of those with whom we are concerned. The admission that such a marriage can be regarded as a legally valid marriage presupposes that it is possible for the first marriage to be regarded as dissolved. Whether the Hindu law in its highest form recognizes or does not recognize divorce is immaterial. The fact that a second marriage in the karao form during the lifetime of the first husband is recognized and is admittedly recognized as valid amongst the class of people with whom we are concerned carries with it inevitably the proposition that the first marriage can under some circumstances be regarded as no longer a valid marriage. In the present case we have all the facts found which would be amply sufficient to show, and were in the opinion of the Magistrate amply sufficient to show, that the first husband had in fact absolutely abandoned his wife. Under those circumstances I can see no possible ground for holding that the karao marriage to Bhagwana was not a valid marriage. That is all there is in this point.

On the next point that the Magistrate exceeded his powers in giving two months' imprisonment in default of payment of the fine the Magistrate himself is agreed.

The result is that I accept the reference only so far that I reduce the period of imprisonment to be suffered in default of the payment of the fine from two months to six weeks. For the rest the reference is rejected.

v.B./R.K.

Order accordingly.

1930 Cr. Cases 1137 (2)
(Allahabad)

SEN, J.

Emperor

v.

P. C. Chaudhri—Accused.

Criminal Reference No. 692 of 1929, Decided on 2nd September 1929, made by Sess. Judge, Allahabad.

Motor Vehicles Act (8 of 1914), S. 16—United Provinces Motor Vehicles Rules, R. 11—R. 11 does not apply to cars registered outside the U. P.

There is nothing in the wording of these rules to show that R. 11 applies to cars registered outside the U. P. It is clear from the definition of "registering authority" in R. 3,

and this expression as used in R. 11 means the authority who had registered the car under the rules in force in the U. P., and hence R. 11 does not apply to cars not registered in the U. P. [P 1138 C 1, 2]

Sen, J.—This is a reference by Mr. Kisch, the learned Sessions Judge of Allahabad, with the recommendation that the order passed by a Magistrate, First Class, of Allahabad, convicting one Mr. P. C. Chaudhri under S. 16, Motor Vehicles Act 1914, be set aside.

The learned Sessions Judge has given excellent reasons in support of his reference. The conviction is clearly illegal and must be set aside.

Mr. P. C. Chaudhri, resident of No. 4 Bankshall Street, Calcutta, came, to Allahabad on a short visit. He brought with him his motor car bearing No. 23047. On 14th April 1929, a constable on traffic duty demanded the production of the registration certificate. The Line Inspector, who acts under the orders of the Superintendent of Police, also made a similar demand. The certificate of registration was not produced. The result was that he was prosecuted for having contravened the provisions of R. 11, United Provinces Motor Vehicles Rules and fined Rs. 5.

Rule 11, United Provinces Motor Vehicles Rules provides as follows:

"Form of certificates and card; their production on demand. Certificates of registration and registration cards shall be in the forms provided in Schs. B and C, and shall be signed by the registering authority or by a person duly authorized by him in this behalf, and the owner of the vehicle in respect of which a certificate of registration has been issued shall be bound to produce the certificate when required so to do by the registering authority."

The "registering authority" referred to has been defined in the rules as meaning the Superintendent of Police, or an Assistant or Deputy Superintendent or Inspector of Police authorized by the Superintendent of Police to perform the duties of the registering authority under these rules. It is to be observed that there is nothing in the rules in force in the Presidency of Bengal corresponding to R. 11, United Provinces Rules. The case lies within a very narrow compass. Do the United Provinces Rules apply to a car registered in Calcutta and which has been brought to the United Provinces for a short duration? The learned Sessions Judge observes as follows:

"There is nothing in the wording of these

rules to show that R. 11 applies to cars registered outside the United Provinces. It is clear from the definition of "registering authority" in R. 3 and this expression, as used in S. 11, means the authority who had registered the car under the rules in force in the United Provinces and, as the applicant's car was not registered in the United Provinces, in my view R. 11 has no application to his case."

I am in complete agreement with this view. I therefore accept the reference upon the grounds set out in the referring order of the learned Sessions Judge, dated 10th August 1929, set aside the conviction and sentence under S. 16, Motor Vehicles Act coupled with R. 11, United Provinces Motor Rules, and direct that the fine, if paid, be refunded.

B.V./R.K.

Reference accepted.

1930 Cr. Cases 1138

(Allahabad)

BOYS, J.

Krishna Gopal Sharma—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 1221 of 1929, Decided on 15th April 1930, from order of Sess. Judge, Jhansi, D/- 9th December 1929.

Penal Code, S. 124-A — Sentence—Accused publishing seditious article—Article merely copied from publications in regard to which there was no prosecution—This fact, as well as the primary intention of accused, was to get members to leave council should be considered in awarding sentence.

The accused published an article in the newspaper which was seditious. But the article was copied from other publications in regard to the appearance in which no prosecution followed. The primary intention of the article by whomsoever it was written was manifestly merely to get members who are in the council to leave it.

Held: that it was fair to the accused also to assume that his primary intention in publishing the article was to win over those who were within the council to readiness to leave it and that this fact as well as the fact that the article was copied from publications in regard to which there was no prosecution, should be taken into consideration on the question of sentence. [P 1139 C 2]

K. N. Laghate—for Appellant.

Sankar Saran—for the Crown.

Judgment.—This is an appeal of Pandit Krishna Gopal Sharma arising out of his conviction under S. 124-A, I. P. C., and a sentence thereunder of one year's simple imprisonment. The article appeared in a paper called the "Krantikari" published at Jhansi and is dated 8th April 1929. The article

is in two portions: the first headed "Swaraj and Death," and the second headed "Sham Fight." It is admitted on behalf of the Crown that the whole article from beginning to end had already previously appeared in two other publications: one in Bombay and one in Calcutta. So far as the information before the Court goes no steps were taken in either Bombay or Calcutta to prosecute in regard to either of those publications. That is however of course no reason for holding that the article is not itself actually of a nature to bring upon persons responsible for it the consequences of S. 124-A, I. P. C.

No question has been argued before me on behalf of the appellant as to his responsibility or otherwise for the article. He does not appear to have at any time endeavoured to evade such responsibility otherwise than by urging that all he had done was to copy an article from other papers. The material answer in the appellant's examination before the Magistrate was to the effect that the article had already appeared in other papers and he copied it in his own as he did not think it was seditious. Manifestly the essential question is whether it was seditious. But on the question of sentence it is also very material to determine, if possible, whether the appellant thought the article to be seditious. On his behalf I have had only two arguments put to me: first that the article has only been "copied" from another paper; and secondly that the appellant did not "intend" to publish anything seditious. Neither of these questions are material except on the question of sentence.

I have however very carefully examined the article myself. So examined it becomes apparent that the second part of it, entitled "Sham Fight," clearly embodies the primary intention of the article, and in that portion of the article I do not find any words that the most captious person could suggest came within the scope of S. 124-A. There is a reference to the "unjust policy" of the bureaucracy, and there is a phrase "courting destruction for the nation." Manifestly these phrases are harmless in the connexion in which they are used. On the other hand the primary intention of this second portion

of the article is very clearly merely to point out that, while a number of persons are all declaring themselves desirous of attaining an object described as "the main issue," some of them hold it best to confine their activities to steps outside the councils, while others think it best to enter the councils and do what they can there. The intention of this portion of the article is clearly to induce those who are working in the councils to come out and thereby more effectively assist in the prosecution of the main issue. Had this been all I have no doubt that this prosecution would never have been instituted. But when we look to see what the "main issue" is, to which reference is made at the end of the article, we find it in the earlier portion of the article, headed "Swaraj and Death," described in words which, I do not think anybody could have any doubt, must bring the person responsible for them within the consequences of S. 124-A as being, putting it briefly, guilty of publishing a seditious article. So far therefore I am of opinion that the conviction is right.

Coming however to the two matters to which I have already made reference as having a bearing on the question of sentence, we find, firstly, that the articles have been copied from other publications in regard to the appearance in which no prosecution followed. This consideration has already been given weight to by the learned trial Judge in giving a sentence of only one year's simple imprisonment. There is however another point to which apparently attention was not directed in the lower Court and that is the point that the primary intention of the article, by whomsoever it was written, was manifestly merely to get members who are in the council to leave it. It is fair to the accused therefore also to assume that his primary intention in publishing the article was to win over those who were within the council to readiness to leave it. The "main issue" is disclosed in the earlier part of the article in words that are seditious, and for that the appellant must be held liable. But the fact remains that, doing my best to appreciate the merits or demerits of the case, it does appear to me that the very great probabilities are that this article would never have been

published but for the primary desire to get members to leave the councils. This consideration has not been given weight to in the Court below, but I think it deserves consideration. Maintaining the conviction under S. 124-A I therefore reduce the sentence from one year's simple imprisonment to six months' simple imprisonment from the date of his surrender.

P.N./R.K. * Sentence reduced.

* 1930 Cr. Cases 1140

(Bombay)

BEAUMONT, C. J. AND MADGAVKAR, J.
Emperor

Koya Partab—Accused.

Criminal Review No. 200 of 1930, Decided on 28th July 1930.

* (a) Criminal P.C. (1898), Ss. 439 (b) and 430—Appeal presented and dismissed either after hearing or summarily—Accused in showing cause why his sentence should not be enhanced cannot go into merits.

Where an appeal has been presented and dismissed either after hearing or summarily, it is not open to the accused in showing cause why the sentence should not be enhanced, to go again into merit: A. I. R. 1926 Bom. 555, *Foll.* [P 1140 C 2]

(b) Criminal P. C. (1898), S. 439 (b)—Accused beating his wife brutally with heavy stick and inflicting injuries—Wife dying—He should be dealt with severely—Penal Code, S. 325.

Accused who had dispute with his wife because she ran away to her father's house, beat her with a stick after her return as a result of which she died two days later. He was convicted under S. 325 for causing grievous hurt to his wife and was sentenced to one year's rigorous imprisonment.

Held: that under the circumstances the sentence of one year's rigorous imprisonment was too short and should be enhanced to three years' rigorous imprisonment. It was a brutal thing for a man to beat a woman with a heavy stick and hurt her on vital parts of her body causing such injuries that she died in two days. [P 1141 C 1]

B. D. Mehta—for Accused.

P. B. Shingne—for the Crown.

Beaumont, C.J.—In this case the accused was convicted on 29th April 1930, under S. 325, Penal Code for causing grievous hurt to his wife, who died of the injuries. He was sentenced to one year's rigorous imprisonment. He appealed, and the appeal was summarily dismissed on 9th June 1930, the appeal being an appeal from jail, under S. 421, Criminal P. C. In dismissing the appeal the Court of appeal directed that notice should be given to the accused to show

cause why the sentence on him should not be enhanced.

Now the first point taken in this appeal is that the accused is entitled to be heard on the merits as to whether he should have been convicted or not, and Mr. Mehta, his pleader, relies on the words of sub-S. (6), S. 439. That section provides that the Court may, in revision, amongst other things, enhance the sentence, and sub-S. (2) provides:

"No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence," and then sub-S. (6) provides:

"Notwithstanding anything contained in this section, any convicted person to whom an opportunity, has been given under sub-S. (2) of showing cause, why his sentence should not be enhanced shall, in showing cause, be entitled also to show cause against his conviction."

In my opinion, the accused in this case is not at liberty to be heard on the merits having regard to S. 430 of the Code, which provides that judgments and orders passed by an appellate Court upon appeal shall be final, except in the case therein mentioned. Under that section, I think, the judgment of the Court of appeal dismissing the appeal on 9th June 1930, is a final order, which this Court is not at liberty to differ from. In sub-S. (6), S. 439 the opening words are "Notwithstanding anything contained in this section," and not, "notwithstanding anything contained in this Code," and I think that these words do not entitle the accused to go behind S. 430, and to show cause against his conviction, after his appeal has been dismissed. Therefore I think, that in a case such as this, where an appeal has been presented and dismissed, either after hearing or summarily, it is not open to the accused in showing cause why his sentence should not be enhanced, to go again into the merits. The point has already been dealt with by this Court in the case of *Emperor v. Jorabhai* (1) and the only distinction between that case and the present one is that that case had been heard on the merits and not summarily dismissed. But in my view that distinction is not one of principle.

Now coming to the merits of the case, the accused was convicted of causing

(1) A. I. R. 1926 Bom. 555=97 I. C. 805=27 Cr. L. J. 1173=50 Bom. 789 (P.C.).

grievous hurt to his wife and the facts are that he had some dispute with his wife, because she ran away to her father's house and on her return he took up a stick and proceeded to beat her. He says himself in his confession that he gave her two blows with a stick, but the post-mortem examination shows that she suffered from severe injuries caused apparently by some heavy blunt instrument, and she died of these injuries two days afterwards. I quite accept the finding of the Sessions Judge that the accused had not any intention of killing his wife. At the same time it must be appreciated that men are not entitled to beat their wives. The prisoner comes of a poor class and if he chastised his wife moderately, but not sufficiently to do her serious damage, probably no more would have been heard of the matter. But it was a very brutal thing for a man to beat a woman with a heavy stick and hurt her in vital parts of her body causing such injuries that she died in two days.

The sentence which the learned trial Judge imposed on the accused was one year's rigorous imprisonment and I think, certainly that it is too short, and the sentence should be enhanced to three years' rigorous imprisonment.

Madgavkar, J.—I agree. As a party to the decision in *Emperor v. Jorabhai* (1), I would add that the reasoning there is as appropriate to criminal appeals dismissed summarily, as to those dismissed after admission, and I am unable therefore to accept the argument for the appellant, which seeks to distinguish the case on that ground.

B.M./R.K. *Sentence enhanced.*

1930 Cr. Cases 1141

(Madras)

PANDALAI, J.

Palani Goundan—Petitioner.

v.

Krishnappa Goundan and others—Respondents.

Criminal Revn. No. 27 of 1930, and Criminal Revn. Petn. No. 26 of 1930, Decided on 28th March, 1930, against judgment of Sess. Judge, Coimbatore Division, in Criminal Appeal No. 14 of 1929.

a) Criminal P. C., (1898), S. 250—Sum-

mary trials—Magistrate acting under S. 250 must record reasons thereunder.

Even in records of summary trials under Chap. 22, where the Magistrate or Bench acts under S. 250 the requisites of that section as to recording of reasons must be carried out.

[P 1141 C 2]

(b) Criminal P. C., (1898), S. 250—Bench after closing evidence in summary trial stating to complainant that case was false and vexatious and as part of same statement calling upon him to show cause against compensation being ordered against him—Statement held to be sufficient compliance with requirements of S. 250.

In a trial under Chap. 22, after the evidence was closed and the impression made by it on the Bench was fresh in their mind, the Bench called upon the complainant to show cause why compensation should not be granted in this wise: "The case brought by you has been proved to be false and vexatious and it is clear that this has been brought simply to harass the accused. Please show cause why compensation should not be ordered?" The complainant answered that the case brought by him was true. The Bench holding that it was no explanation ordered compensation.

Held: that although the passage that the case was brought simply to harass the accused occurred as a portion of the question, is must have been intended as record of their own reason for thinking that the complaint was false and vexatious and hence satisfied the requirements of S. 250. [P 1142 C 1, 2]

K. Periaswami Gounden — for Petitioner.

Order.—This is a petition to revise an order awarding compensation to six accused (at Rs. 10 each) made by the 1st Class Bench of Magistrates of Dhara-puram and confirmed by the learned Sessions Judge of Coimbatore. Two objections are raised: (1) that the record of the trial does not contain, as it should, the reasons why the Bench considered the complaint to be false and vexatious and (2) that this vitiates the order.

On the first point on which there seems to be no direct decision of this Court the contention must be upheld that even in records of summary trials under Chap. 22, Criminal P. C., where the Magistrate or Bench acts under S. 250, the requisites of that section as to recording of reasons must be carried out. This seems to follow from the provisions of S. 262 which lays down that the procedure prescribed for summons cases shall be followed in summons cases and that prescribed for warrant cases shall be followed in warrant cases even when they are tried in a summary way. The only exceptions to this rule are contained in the next two

following sections Ss. 263 and 264. The former applies to cases where no appeal lies and the latter to cases in which an appeal lies; which means, to cases where an appealable sentence is or is not passed upon the accused. These Ss. 263 and 264 do not, if reasonably read provide for proceedings under S. 250 by which alone compensation to the accused is ordered against the complainant. There being thus no express exception from the general rule laid down by S. 262, it follows that even in summary trials the requisites of S. 250 must be satisfied.

The next question is whether in this case they have been satisfied. This point was apparently not raised before the Sessions Judge on behalf of the petitioner. But that learned Judge was of opinion that the order of the Bench does not contain a record of reasons for awarding compensation although he also thought that the omission had not prejudiced the appellant and therefore did not, under S. 537, invalidate the order. Taking the record of the trial as a whole and remembering that the record is itself the record of a summary trial, it is not quite accurate to say that it does not contain a record of reasons for awarding compensation. After the evidence was closed the Bench put the following question to the complainant:

"The case brought by you has been proved to be false and vexatious and it is clear that this has been brought simply to harass the accused. Please show cause why a compensation of Rs. 25 to each of the accused or Rs. 150 in all should not be ordered."

The complainant answered that the case brought by him was true. The Bench therefore go on to state that when called on to explain why compensation should not be ordered for bringing this false and vexatious complaint, P. W. 1 says that his complaint was true and that this is no explanation at all. Then they make the order directing him to pay Rs. 25 each. Reading this in a fair and reasonable way the passage where the Bench said that it is clear that this case has been brought simply to harass the accused, although it occurs as a portion of the question put to the complainant, may be understood and must have been intended as a record of their own reasons for thinking that the complaint was false and vexa-

tious. They had just then taken the evidence and the impression made by it upon their minds was still quite fresh and they concluded, as they said in plain terms, that the case was false and vexatious because it was brought to harass the accused. I am not able to say that the requirements of law have not been satisfied. It is needless to add that, even if there had been any omission, S. 537 would have been sufficient to cure the omission in view of the fact that the petitioner himself did not raise the question before the Sessions Judge. The petition is dismissed.

P.R.S./V.B. *Petition dismissed.*

1930 Cr. Cases 1142

(Sind)

PERCIVAL J. C., AND RUPCHAND,
A. J. C.

Dur Mahomed and another—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 294 of 1929, Decided on 24th February 1930, from judgment of Addl. Sess. Judge, Hyderabad.

(a) Criminal P. C., S. 164—Recording of confession after allowing time to accused for reflecting is proper—It is not necessary to give warning to accused immediately before recording confession.

There is nothing to show that warning should be given to the accused immediately before the confession is recorded or that it should be repeated again just before the prisoner's arrival before the Magistrate. Where the Magistrate allows the accused seven hours to think over the question and to decide whether he would make a confession or not and then records the confession, such recording is proper. [P 1143 C-2]

(b) Penal Code, S. 302—Murder by two persons—One taking minor part and acting under influence of other—It may sometimes be a case for reduction of sentence in case of person taking minor part.

If a murder is committed by two persons, and one of them takes some minor part and is acting under the influence of the other, it may sometimes be a case for reduction of sentence in the case of the man who is acting under the influence of the other, especially where the evidence against him depends primarily on a confession. [P 1144 C-2]

(c) Criminal P. C., S. 162—Mashirnama containing statement of accused relating to place of murder made in presence of police and mashirs should not be referred to in judgment.

The mashirnama contained the following statement alleged to have been made by the accused in presence of the police and the mashirs: "He says that the cot on which the murder took place is to the east of the hurla

at the distance of three paces. He says that the head of the cot is to the north and the tail is to the south. He shows the same place of murder which has formally been shown by the other accused :

Held : that the Judge was wrong in allowing the mashirnama to be exhibited and was in error in referring to it in the judgment.

[P 1145 C 1]

F. C. Widge—for Appellants.

Partabrai D. Punwani—for the Crown.

Percival J. C.—In this case the Additional Sessions Judge, Hyderabad, has convicted accused 1 under S. 201, I. P. C., and sentenced him to five years rigorous imprisonment, and the second accused under S. 302, I. P. C., and sentenced him to death. The case also comes before this Court for confirmation of the death sentence. Accused 1 has not appealed to this Court; so we need not consider the conviction and sentence in his case. We have only to consider the conviction and sentence passed in the case of accused 2.

The facts of the case briefly are that one Thakumal saw a dead body floating in the canal called Mubarakwah. Report was sent to the police at Nawabshah, and one Sijawal actually made the report. The police started inquiries and, on inquiries being made, it was found that Wadero Muhammad Kirio had disappeared a few days before the discovery of the body. On the deceased there were five severe injuries on the head and the other parts, and it was evident that he had been murdered. The relations and neighbours of the deceased were called, and they identified the body as being that of Wadero Muhammad Kirio.

There is no reason to doubt the correctness of their identification, and it is also supported by another small piece of evidence, namely one slipper of the deceased which was found in the canal near the place where the body is said to have been thrown in. It is clear therefore taking the evidence as a whole that the body found was that of Muhammad Kirio, and that he was murdered.

A considerable portion of the evidence in the case consists of the evidence against accused 1, who is the son-in-law the deceased, while the present appellant, Rakhio, was his hari. Accused 1 has been acquitted of the

offence of murder, his case being distinguished from that of accused 2, chiefly because a confession was made by accused 2 whereas no real confession was made before a Magistrate by accused 1. There were certain confessions made to mashirs by accused 1 as well as by accused 2, but the learned Additional Sessions Judge has not admitted those confessions in evidence, and he has relied on the confession of accused 2, before the Resident Magistrate, Nawabshah, supported as it is by circumstantial evidence. In addition to this confession, which will be referred to a little later, there is the fact that accused 2, who is shown to have been at the scene of the offence shortly before the alleged murder of the deceased, absconded and went off to his own village, which is at a considerable distance away in the north of the Nawabshah District, and further his name is said to have been received by the police from accused 1. Accused 2 produced among other things a silk turban which he stated, belonged to the deceased, and which has been identified by the witness Jumo as belonging to the deceased. The Chemical Analyser stated that blood was found on the turban, but that it was insufficient for ascertaining whether it was human blood or not. This is an item of some importance that one would not expect that the turban would have blood on it, though other clothes might naturally have some blood on them.

The main evidence against the accused is his confession. The learned pleader for the accused has taken objection on the ground that the accused was not warned immediately before the confession was recorded by the Magistrate but there is no ruling to the effect that this warning should be given immediately before the confession is recorded, or should be repeated again just before the prisoner's arrival before the Magistrate. It may be noted that the Magistrate went to the length of allowing the accused seven hours to think over the question and to decide whether he would make a confession or not. There are instructions that time should be allowed for reflection, and the Magistrate has certainly given full effect to these instructions.

Another objection taken by the learned pleader for the accused is that

witness, Ex. 40, Tarachand, has stated that the police slapped the accused about the time when enquiry was made first from him. Whether this witness is to be believed or not one cannot tell for certain. But in any case it is to be noticed that the confession before the Magistrate was made about two days after the alleged slapping. The statement made by the accused to the mashirs at the time has been eliminated. It is only the confession before the Magistrate which, as mentioned above is relied on.

Now in regard to the confession, as pointed out by the learned Sessions Judge, it is very detailed and it is confirmed in various particulars. It is confirmed as stated above by the fact that the turban produced by the accused has been identified as that of the deceased, and it is also noticeable that Bacho, a person who might have been also an eyewitness, was sent away, at the time. The confession and Bacho's evidence agree on this point.

There are several other points on which the confession is supported by outside evidence. It is noticeable that in the confession the accused gives a motive for the confession namely that the accused had received a sentence of 22 days rigorous imprisonment for theft of clothes 1 and 1½ months previously owing to the deceased. That also is supported by the other evidence. The accused in the course of his confession states that accused 1 was the leader in the assault and that it was accused 1 who induced him to join in the murder. Now one cannot blindly accept the statement of a person who declares in his confession that he took a smaller part in a murder; but in this particular case the surrounding circumstances to a certain extent make his story probable, because accused 1 was the son-in-law of the deceased and a person of some position, whereas accused 2 was a hari of no particular position. Though this point does not affect the question of conviction it seems to me that it can be taken into consideration in respect of the sentence.

The case is in one way rather peculiar, because the person who, according to the confession, was the leader in the assault, namely accused 1, has been acquitted because the evidence is not

strong against him in certain respects particularly owing to the fact that he has not confessed before a Magistrate. But, looking at the case from this point of view, it is possible that accused 2 really did not take such a prominent part in the murder as accused 1. It is to be noted also that accused 2 retracted his confession. He stated before the Committing Magistrate that he was intoxicated and that is why he made his confession. Before the Additional Sessions Judge he stated at one place that he did not make any statement before the Resident Magistrate, while at another place he said that he had originally been beaten and he was given a meal and made giddy.

Taking the evidence as a whole the offence is fully brought home to the accused for the reasons given by the learned Additional Sessions Judge, namely the confession and the surrounding circumstances. But there are certain circumstances which support the view that the present accused was only a minor offender in respect of the actual murder, and on this ground it may not be considered unreasonable to commute the sentence to one of transportation for life.

The learned Additional Sessions Judge has not stated in his judgment why he passed the death sentence. No doubt it was because the murder was a heinous one, but still if a murder is committed by two persons and one of them takes some minor part and is acting under the influence of the other it may sometimes be a case for reduction of the sentence in the case of the man who was acting under the influence of the other, especially where the evidence against him depends primarily on a confession.

There is one other point to which reference may be made. The learned pleader for the accused has taken objection to the mashirnama, Ex. 14, in which it is stated that the accused showed the same place of the murder, which had been already shown by accused 1. I agree that this mashirnama was not of value to the prosecution, and that it would have been better if the learned Additional Sessions Judge had omitted all reference to it in his judgment. He has referred to it in the summing up of the facts of the case, al-

though he has not referred to it in reasons for conviction. I would accordingly confirm the conviction but alter the sentence to one of transportation for life.

Rupchand, A. J. C.—I agree that the sentence of death in the case of accused 2 should be commuted to that of transportation for life.

The main piece of evidence against the accused is his retracted confession; and it shows that not only did he play a minor part but was induced by accused 1 to join him in the offence. He was as much a servant of the deceased as of accused 1 who was the son-in-law of the deceased. The motive alleged by the prosecution also shows that it was accused 1 who was interested in taking the life of the deceased.

One more point which I wish to refer to is that the learned Additional Sessions Judge has in the first part of his judgment, while narrating the circumstances of the case leading up to the trial, introduced certain matters which are either irrelevant or inadmissible; for instance at line 120 of the judgment he has said as follows:

"The Sub-Inspector was then taken by accused 2 to the hurlo of the deceased. Accused 2 there showed him the scene of offence in presence of mashirs. A mashirnama was prepared about (Ex. 14)."

The mashirnama Ex. 14 inter alia contains the following statement alleged to have been made by the accused in presence of the police and the mashirs:

"He says that the cot on which the murder took place is to the east of the hurlo at the distance of three paces. He says that the head of the cot is to the north and the tail to the south. He shows the same place of murder which has formerly been shown by the accused Dur Mahomed."

The learned Judge below was clearly in error in allowing this part of the mashirnama to be exhibited and was further in error in referring to it, as also to the fact that the accused had shown the scene of offence even in the preliminary part of his judgment although he has not made reference to it in the second part of his judgment where he has given reasons for his findings.

P.N./R.K.

Sentence reduced.

1930 Cr. Cases 1145

(Sind)

WILD, J. C., AND RUPCHAND, A. J. C.
Mahomed Khan and another—Accused
—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 79 of 1930, Decided on 14th July 1930.

(a) Criminal P. C. (1898), S. 164—Magistrate recording statement of witness under S. 164 cannot be examined as first witness with view that aforesaid witness would re-sile from part of statement so recorded to save one of accused—Such statement can be recorded in evidence only for limited purposes and after examining that aforesaid witness.

An Honorary Magistrate who had recorded a statement of a witness under S. 164 was examined as the very first witness and asked to prove the statement, with a view that the aforesaid witness would re-sile from part of the statement so recorded to save one of the accused.

Held: that this should not have been permitted. The statement could only be recorded in evidence for certain limited purposes and only after examining that aforesaid witness.

[P 1146 C 1,2]

(b) Criminal P. C., (1898), S. 297—Accused represented—Court should direct jury to take arguments into consideration—Charge need not be elaborate.

Where the accused are represented, the Court may, having regard to the skill and elaboration with which rival contentions are placed before the jury by counsel on both sides, make the charge not so elaborate, but direct the jury to take the arguments into consideration: 27 *Bom. 644, Ref.*

[P 1146 C 2]

(c) Criminal P. C. (1898), S. 418—Discrepancies in evidence should be brought on record of Sessions Judge and not in High Court.

If there are any discrepancies in the evidence as recorded in a Magistrate's Court and the Sessions Court, it is for the accused to bring them on the record of the Sessions Court so as to afford an opportunity to the prosecution to explain them. The High Court will not look into such evidence. If the accused are unrepresented in the Sessions Court, they have to thank themselves for it. [P 1147 C 1]

(d) Criminal P. C. (1898), S. 297—Accused unrepresented—Judge while charging jury should bring to their notice, likely arguments that would be advanced by pleader, if accused had been represented.

Per Wild, J. C.—Where in a Sessions Court an accused person is unrepresented, it is particularly necessary that the Judge while charging the jury should bring to their notice the arguments which would have been used, if he had been represented by a pleader; else there is a chance that if the case goes to appeal it will be urged that there was a non-direction in the charge of the jury. [P 1147 C 1]

T. V. Thadhani—for Appellants.

C. M. Lobo—for the Crown.

Rupchand, A. J. C.—The present appellants who were accused 1 and 3 in the lower Court and two others Sardar Begum and Ashian who have not appealed were all tried by the learned Additional Judicial Commissioner for an offence under S. 366, I. P. C., and the jury having returned a unanimous verdict of guilty against them were convicted and sentenced under that section to different periods of imprisonment, the maximum being one year.

The facts of the case are simple. It appears that Sardar Begum is a prostitute. She has a daughter named Gulzar who was also brought up as a prostitute, and probably on whose earning Sardar Begum had been living for some years. The complainant Budan is a motor-driver, a young man of 23 years of age. It appears that Gulzar took a fancy to him and went to live with him in his house where he was living with his married wife. Before she did this, she presented an application to the City Magistrate that she was not willing to live as a prostitute and wanted to live a married life. Evidently her intention was to marry Budan but before the marriage took place she was taken away once before by her mother from the house of Budan but she came back. She was again forcibly taken away by all the four accused, and confined in the house of accused 1 from where she was rescued by the police after the present complaint was filed by Budan. She has now married Budan.

The accused were not represented in the Sessions Court and it appears that to a certain extent the procedure adopted by the trial Court with regard to admission of certain pieces of evidence particularly the statement of Gulzar recorded under S. 164, Criminal P. C., was not correct. The summing up of evidence to the jury was likewise defective. The very first witness examined in the case was Mr. Ardeshir. H. Mama, Honorary Magistrate, and was asked to prove the statement of the witness Gulzar recorded by him under S. 164, Criminal P. C. This was evidently done as it was expected that Gulzar would resile from a part of her statement with the object of saving her mother Sardar Begum who was one of the accused. This should not have been permitted. The statement could only

be recorded in evidence for certain limited purposes and only after Gulzar had been examined. When Gulzar was examined as a witness, she was not cross-examined with reference to her previous statement, under S. 164, and was not asked to explain how she made it. Under the circumstances it was hardly fair to Sardar Begum that use should have been made by the learned Additional Judicial Commissioner in his charge to the jury of this statement. Sardar Begum has not appealed. It is therefore not necessary for us to consider this point any further in the present appeal.

There is no mention in the charge whether the relevant sections were explained to the jury. But we are inclined to the view that this is due to a mistake of the stenographer.

Our attention has however been invited to the direction of the learned Additional Judicial Commissioner contained in the following passage :

"There is also one other fact which you must bear in mind, that is, that Gulzar was a prostitute. It might however be argued as to what was the object in taking away Gulzar from the house of the complainant to the house of the accused. It is admitted that the girl and her mother accused 2, are prostitutes. The only inference is that Gulzar was removed for no other purpose but immoral purpose."

It has been argued and not without just cause that a direction given in such positive terms was likely to mislead the jury, that the jury should have been left to draw an inference from the facts for themselves and that if the learned Additional Judicial Commissioner wished to express his own opinion he should have qualified it by warning the jury that it was for them to draw their own inference treating his opinion for what it is worth.

Lastly it has been argued that the summing up is altogether defective as it does not bring out the discrepancies in the evidence and that it therefore infringes the provisions of S. 297, Criminal P. C. It is no doubt true that in certain cases where the accused are represented the Court may, having regard to the elaboration and skill with which rival contentions are placed before the jury by counsel on both sides, make the charge not so elaborate but direct the jury to take the arguments into consideration : see *Emperor v. Mal-*

gowda (1). But the accused were not represented in this case and therefore something more might have been said for the accused.

Under the circumstances we have examined the evidence to see if the offence with which the accused were charged had been proved. The learned counsel has practically admitted that on the record of the case as it stands there can be no other conclusion than that the accused did forcibly remove Gulzar from the house of Budan with one of the objects specified in the section. But the learned counsel has asked us to look at the record of the Magistrate's Court to satisfy ourselves that there are certain discrepancies in the evidence as recorded in the Magistrate's Court and the Sessions Court. I am afraid we cannot do that. If there were any discrepancies, it was for the accused to bring them on the record of the Sessions Court so as to afford an opportunity to the prosecution to explain them. If they were unrepresented in the Sessions Court they have to thank themselves for it.

For these reasons I would confirm the conviction and sentence and dismiss this appeal.

Wild, A. J. C.—I concur and have very little to add. But there is one point which occurs to me and that is that where in a Sessions Court an accused person is unrepresented it is particularly necessary that the Judge while charging the jury should bring to their notice the arguments which would have been used if he had been represented by a pleader. Otherwise there is a chance that if the case goes to appeal, it will be urged that there was a non-direction in the charge to the jury. As an instance of that, in the present case, I might mention that in the first report the complainant Budan states that he cannot give names of the witnesses, yet a witness was examined (Taj Mahomed) who according to the complainant had come to the house as the complainant wished to consult him. An argument could have been founded on the statement made in the first report that the witness Taj Mahomed was not present at the time of abduction.

B. V./R. K.

Appeal dismissed.

1930 Cr. Cases 1147

(Sind)

WILD, J. C., AND RUPCHAND, A. J. C.
Rajabali Hassanali — Accused — Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 65 of 1930,
Decided on 7th July 1930.

(a) Criminal P. C. (5 of 1898), Ss. 195 (3) 476, 476 (b) and 537—Application under S. 476 for prosecution of person rejected—On appeal appellate Court remanding proceedings which led to complaint being filed and conviction of the person—Illegality in order of remand not leading to failure of justice held covered by S. 537—S. 403 or Ss. 366 and 369 are not applicable in such a case—Criminal P. C. (1898), Ss. 403 and 366.

There is nothing in the Code which lays down that once a Magistrate declines under S. 476 to file a complaint, he is functus officio, or that a complaint subsequently filed by him confers no jurisdiction to deal with the person complained against. It is hardly open to argument that a refusal by the Magistrate under S. 476, to file a complaint against an accused person, attracts the applicability of the doctrine of autre fois acquit enunciated by S. 403, or that it amounts to judgment within the meaning of Ss. 366 and 369 which may not therefore be subsequently reviewed. [P 1148 C 1]

Where an application under S. 476 for prosecution of a person is rejected, but on appeal the appellate Court, purporting to act under S. 476 (b), remands the proceedings for further enquiry which results in the complaint being filed against the person, and his conviction, the procedure followed is in strict conformity with the Code, and though the order of remand may be illegal, where the illegality has not led to failure of justice, it is sufficiently covered by the wide provisions of S. 537: 25 *Mad.* 61 (P. C.), *Dist.* [P 1148 C 2]

(b) Criminal P. C. (5 of 1898), S. 439—Every illegality does not call for interference.

It is well settled that every irregularity or illegality does not ipso facto vitiate a trial or call for the exercise of the powers of interference by the appellate or revisional Court, [P 1148 C 2]

T. V. Thadhani—for Applicant.

D. N. O. Sullivan—for the Crown.

Judgment.—The applicant has been convicted and sentenced to two months' rigorous imprisonment for an offence under S. 211, I. P. C. His appeal to this Court on its Sessions Court side has been dismissed. He has now come to us in revision. It appears that he had filed a complaint in the Court of the City Magistrate of Karachi against two persons, Muso and Wahdalshah; against the former for assault and against the latter for incitement. The defence of Wahdalshah was an alibi, and his case

was that on the date of the assault he was on Government duty somewhere at Pano Akil outside Karachi and he produced a railway pass and certain entries to prove his alibi. He was acquitted. He then applied to the learned City Magistrate under S. 476, Criminal P. O., for prosecution of the applicant, but his application was rejected. On appeal to this Court the learned Additional Judicial Commissioner, purporting to act under S. 476-B of the Code, remanded the proceedings to the learned City Magistrate for a further inquiry which resulted in a complaint being filed by the learned City Magistrate against the applicant, and to his conviction.

It is argued on behalf of the applicant that the order of the learned Additional Judicial Commissioner remanding the proceedings to the learned City Magistrate was ultra vires and that therefore the subsequent inquiry held by the learned City Magistrate and the complaint filed by him were equally ultra vires and conferred no jurisdiction on the trial Court to deal with him.

Now there is a good deal to be said in favour of the applicant with regard to the first proposition propounded by the learned counsel, but that does not mean that the alleged consequences necessarily follow. Our attention has not been invited to any provisions of the Code which lay down that once a Magistrate declines under S. 476 of the Code to file a complaint, he is functus officio, or that a complaint subsequently filed by him confers no jurisdiction on the trial Court to deal with the person complained against. It is hardly open to argument that a refusal by the Magistrate under S. 476 of the Code to file a complaint against an accused person attracts the applicability of the doctrine of *autre fois acquit* enunciated by S. 403 of the Code, or that it amounts to a judgment within the meaning Ss. 366 and 369 of the Code, which may not therefore be subsequently reviewed. All that S. 195, Cl. (b) requires is that certain offences which are said to have been committed in or in any relation to any proceedings in any Court should not be taken cognizance of except on the complaint in writing of such Court or of some other Court to which such Court was subordinate. The provisions of

that section have been sufficiently complied with. The trial has proceeded on a complaint of the Court before which the alleged offence was committed. It is therefore difficult to see how the present trial can be said to have been vitiated.

An order passed on a second application for sanction, the first having been dismissed for default, (in 15 Cr. L. J. p. 71) an order revoking a sanction granted ex parte (in 2. Weir p. 194) and an order granting a fresh sanction when the first order was revoked on technical grounds (in 2 Weir p. 195 and (1911) M. W. N. p. 100), have been held to be orders passed with jurisdiction: see notes of Sohini, 1925 Edn., (p. 476).

If the applicant objected to an order of remand as ultra vires it was his duty to have got it rectified; and again, if he wished to challenge the validity of the subsequent proceedings or wished to have the complaint withdrawn, he should likewise have moved in the matter at the proper time.

It is well settled that every irregularity or illegality does not ipso facto vitiate a trial or call for the exercise of the powers of interference by the appellate or revisional Court. The case of *Subramaniam Aiyer v. Emperor* (1) has been distinguished by their Lordships of the Privy Council in *Abdul Rehman v. Emperor* (2) (at p. 109 of 54 I. A.) as being a case where the procedure adopted was one which the Code positively prohibited, and it was possible that it might have worked actual injustice to the accused.

In the present case neither of those conditions exist. The procedure adopted by the Court below is not only not contrary to any positive prohibition contained in the Code, but is in strict conformity with it, and the illegality in the order of the learned Additional Judicial Commissioner has in no way resulted in a failure of justice, and it is sufficiently covered by the very wide provisions of S. 537 of the Code. We accordingly dismiss the application and confirm the conviction and sentence.

P.N./R.K. *Revision dismissed.*

(1) [1902] 25 Mad. 61=28 I. A. 257=8 Sar. 16 (P. O.).

(2) A. I. R. 1927 P. C. 44=54 I. A. 96=100 I.C. 227=28 Cr.L.J. 25 9=5 Rang. 53(P.O.).

1930 Cr. Cases 1149 (1)

(Madras)

* PANDALAI, J.

In re Appanamy Mudali—Petitioner.

Criminal Revn. No. 472 of 1930 and Crim. Revn. Petn. No. 436 of 1930, Decided on 28th July 1930.

Criminal P. C. (1898), S. 117—Joint inquiries under S. 117 are not illegal even where part of inquiry is under Criminal P. C. (1898), S. 110, Cl. (f).

Joint inquiries under S. 117 are not illegal even where part of the inquiry is under Cl. (f), S. 110. The evidence of reputation admitted against the several persons should of course not be against each accused separately but against them all together: A. I. R. 1925 Mad. 189 and 27 Cal. 781, not foll.; A. I. R. 1923 Cal. 55, Rel. on. [P 149 C 1]

P. Viswanatha Ayyar—for Petitioner.

Order.—It is urged that the joint trial of the petitioner with two other persons who did not appeal to the Sessions Judge and have not applied to this Court was illegal. The allegation against them was that all the three of them were together associated in a course of criminal conduct such as to bring them under Cls. (a), (d), (e) and (f), S. 110, Criminal P. C. In such cases S. 117 (5) clearly gave the Magistrate, if he thought it just, the power to deal with all the accused in the same inquiry. But it is said that joint inquiries under S. 117 are not legal where part of the inquiry is under Cl. (f), S. 110, and for this the decision *In re: Kutti Goundan* (1), which itself cites *In Hari Telang v. Queen-Empress* (2), is relied upon. There is a sentence in the latter decision which is incorporated into the former to the effect that there can be no connexion between them (the accused) in regard to their characters so as to make them dangerous persons. But this was not the ground of decision in those cases which were decided on the ground that where several accused are being jointly tried under S. 110, evidence of misdeeds against each of them singly should not be admitted against the others as this will naturally prejudice these orders. And Walsh, J., makes this clear in *Emperor v. Anqu Singh* (3) (at p. 111 of 45 All.). More than this, I think none of the cases cited before me go to show and I find

myself unable to agree to the general proposition that where proceedings are taken under S. 110 (f) several persons should not be dealt with together. The evidence of reputation admitted against them should of course not be against each accused separately but against them all together. In this case, as the judgment of the learned Sessions Judge shows, the evidence was clear that the petitioner along with the other two men were pursuing a course of extortion and terrorizing, for which they were all equally responsible and on which they had jointly earned the evil reputation to which several respectable witnesses spoke. I can see no error or irregularity in the trial. The petition is dismissed. P.R.S./S.N. *Revision dismissed.*

1930 Cr. Cases 1149 (2)

(Madras)

BRASLEY, C. J., AND WALSH, J.

Konda Reddi and others—Accused—Petitioners.

v.

Mangala Babanna—Respondent.

Criminal Revns. Nos. 968 and 969 of 1929, and Criminal Revn. Petns. Nos. 872 and 873 of 1929, Decided on 14th July 1930, from judgment of Sess. Judge, Anantapur, in Criminal Appeal No. 5 of 1929.

Criminal P. C. (1898), S. 428—S. 428 does not enable appellate Court to substitute offence in respect of which there has been no conviction and then call for additional evidence supporting the offence.

Section 428 merely enables an appellate Court if it thinks it necessary to call for additional evidence which will explain or clear up or supplement within limitations the evidence for prosecution in support of a charge which has resulted in conviction and does not enable the appellate Court to substitute an offence in respect of which there has not been a conviction and then say that additional evidence must be called which may support such an offence. [P 1150 C 2, P 1151 C 1]

K. V. Sesha Ayyangar, T. Jagannadha Rao Naidu, K. S. Jayarama Ayyar for Nugent Grant and D. R. Venkatesa Ayyar—for Petitioners.

K. Venkataraghavachariar—for the Crown.

Order.—Four persons, including the appellants in Criminal Revision Case No. 968 of 1929 (accused 2 and 3) and the appellant in Criminal Revision Case No. 969 of 1929 (accused 5) were convicted by the Joint Magistrate of Penukonda for offences under Ss. 347 and 364.

(1) A. I. R. 1925 Mad. 189=86 I. C. 49.

(2) [1900] 27 Cal. 781=4 C.W.N. 591.

(3) A. I. R. 1923 All. 35=45 All. 109.

I. P. C., for wrongful confinement to extort property and extortion.

The facts can be dealt with quite shortly and they are that on 3rd December 1927 a document was registered by the District Registrar at Anantapur the material portions of which ran as follows:—

"Deed of sale caused to be written and given to Nethi Narayanappa of Pamdurti. To discharge debts due to others for the purchase of mango trees, I have received from you in cash this day Rs. 300. The land sold to you for this sum is S. No. 882, extent 0.71 acres, with the various fruit trees standing thereon. I have put you in possession this day. Henceforward you will have all my rights. My heirs and I will have nothing to do with it."

Then there is the mark of Mangala Babanna who admittedly was an illiterate person, and the two witnesses are accused 2 and 3. Upon this document were founded the two charges against the accused, the prosecution case being that Mangala Babanna was by confinement and extortionate methods made to execute that document; that he, as a matter of fact, was not the owner of the property at all; and that it was a spurious document got for the purpose of defrauding others. In support of the prosecution case some evidence was given to show that, whereas in the body of the document Rs. 300 was stated to have been paid by way of consideration none in fact was paid. Though the question of consideration was quite an irrelevant one to the two charges then before the Court, because both the charges could be supported equally well whether there had been consideration passing or not, the Joint Magistrate considered it as of some importance as supporting the case for the prosecution and dealt with it. This resulted, as before stated, in the conviction of four of the accused three of whom are the appellants here. The case then came up before the learned Sessions Judge of Anantapur and he, after going very carefully into the facts in a very lengthy and elaborate judgment, came to the conclusion, to put it quite shortly, that the evidence certainly did not support the conviction of the accused of either offence. He then resorted to a procedure which is called in question here. Having come to the conclusion that no conviction under Ss. 347 and 384, I. P. C., could be supported upon the evidence, he dealt with the evidence given with regard to

the consideration which passed for the document and decided for reasons which he has given in his judgment that a charge could be framed under S. 423, I. P. C., and that in order that such a charge might be framed there should be additional evidence before him; and he accordingly made an order that the Joint Magistrate should take evidence on the question as to whether or not the Rs. 300 consideration or any part of it passed on the date or at about the time of the execution of that document. The result of that enquiry was that he proceeded upon the additional evidence which came before him and found that no consideration for the sale did pass. He thereupon framed charges against the appellants under S. 423, I. P. C., acquitting the other accused who remained before him; and, having framed those charges, he proceeded at once, for the reasons which he has given in the earlier part of his judgment, to convict the appellants and ordered them to pay fines amounting, in the case of the accused 3, to Rs. 500, and in the case of accused 2 and 5 to Rs. 1,000 each, in default of which there was to be a term of imprisonment.

The matter reduces itself to this: Was the procedure adopted by the learned Sessions Judge a proper one or not? It is of course conceded that under S. 428, Criminal P. C., an appellate Court, in dealing with an appeal under the chapter in which the section appears, may, if it thinks it necessary, order additional evidence to be recorded after stating its reasons for so doing and either may take the evidence itself or direct it to be taken by a Magistrate, and it was purporting to act under this section that the additional evidence was ordered to be taken by the learned Sessions Judge. The strong criticism that is made here by Mr. Jayarama Ayyar is that the accused had been convicted under Ss. 347 and 384, I. P. C., and had appealed to the Sessions Court of Anantapur against their conviction for those offences and none other, and that there was no appeal against any conviction under S. 423, I. P. C., because there had not been any conviction or any trial even for an offence under that section. He contends that S. 428, Criminal P. C., merely deals with an appeal against a conviction and does not enable the appellate

Court to substitute an offence in respect of which there has not been a conviction and then say that additional evidence must be called which may support such an offence. We think that that criticism is clearly correct and well founded and that S. 428, Criminal P. C., merely enables an appellate Court, if it thinks it necessary, to call for additional evidence which will explain or clear up or perhaps, supplement within limitations the evidence for the prosecution in support of a charge which has resulted in a conviction and which conviction is the subject of an appeal, and that it does not enable an appellate Court to adopt the procedure adopted in this case by the learned Sessions Judge. He might—although we say nothing about its being proper in this case, it is merely an indication of a possible procedure—have indicated that a charge under S. 423, I. P. C., might be framed and sent the case back again for retrial. But in this case he did not adopt that procedure and we are of the opinion that this petition must be allowed. The convictions will be set aside and the fines paid will be refunded to the appellants.

P.R.S./R.M.

Petition allowed.

1930 Cr. Cases 1151

(Rangoon)

• DOYLE, J.

Maung Ba Maung—Accused — Applicant.

•

Emperor—Opposite Party.

Criminal Revn. Appln. No. 338-B of 1930, Decided on 24th July 1930, from order of Addl. Sess. Judge, Maubin, D/- 11th July 1930.

(a) Criminal P. C., S. 497—Offence under S. 409, Penal Code — Magistrate cannot grant bail.

Under the provisions of S. 497, Criminal P. C., a Magistrate has no power to grant bail in cases falling under S. 409, Penal Code; *A. I. R. 1927 Rang. 205, Foll.*; *A. I. R. 1926 Rang. 51, Held obsolete.* [P 1152 C 1]

(b) Criminal P. C., S. 17—Order of Additional Sessions Judge, granting or cancelling bail without special powers, is ultra vires.

The Code of Criminal Procedure strictly limits the powers of an Additional Sessions Judge to such as are conferred upon him directly by the Local Government or by the Sessions Judge of the division in which he exercises power. Power to grant or cancel bail could be conferred on him under S. 17. Where no such power is conferred, the order of an

Additional Sessions Judge granting or cancelling bail is ultra vires. [P 1152 C 1, 2]

(c) Criminal P. C., Ss. 497 and 498—Offence punishable with death or transportation — High Court will not usually grant bail.

The High Court should not grant bail in cases where a person is charged with offences punishable with death or transportation for life except for exceptional and very special reasons. [P 1152 C 2]

O'de Glanville—for Applicant.

Assistant Government Advocate — for the Crown.

Judgment.—Maung Ba Maung, Secretary of the Maubin Municipality, is accused under S. 409, I. P. C., of committing criminal breach of trust. Having been arrested on 7th July 1930 he was sent up before the Head-quarters Magistrate on 8th July 1930, with a view to obtaining a remand. The Magistrate was of opinion that there was a prima facie case against Ba Maung, but on the authority of *Mahomed Eusoof v. Emperor* (1) considered that he had power to release Ba Maung on bail and proceeded to do so. The District Superintendent of Police, Maubin, thereupon applied to the Additional Sessions Judge, Maubin, to have this order cancelled. The Additional Sessions Judge, Maubin, very rightly pointed out that the case of *Mahomed Eusoof v. Emperor* (1) had been overruled by a Full Bench ruling in the case of *Emperor v. Nga San Htwa* (2) and cancelled the order for bail.

The High Court is now moved in revision on the ground that the order of the Additional Sessions Judge was ultra vires. This application is opposed by the Assistant Government Advocate on the ground that, whatever the powers of the Additional Sessions Judge may be, the original order was ultra vires, and he further urges that this is not a case in which the High Court should use the powers of revision in enlarging an accused on bail.

The provisions of S. 167, Criminal P. C., by themselves would leave it in doubt as to whether a Magistrate before whom an accused could be sent for a remand preliminary to sending him up for trial had any power other than of ordinary detention of the accused before being sent to a Magistrate having jurisdiction for trial purposes. It has been however

(1) A.I.R. 1926 Rang. 51=98 I.C. 65=27 Cr. L.J. 401=3 Rang. 588.

(2) A.I.R. 1927 Rang. 205=104 I.C. 101=28 Cr. L.J. 773=5 Rang. 276 (F.B.).

the practice in this province in the past to regard the term "Magistrate" under S. 167 as synonymous with "Court" under S. 496, Criminal P. C., and bail is habitually granted in cases falling under S. 167, Criminal P. C. It is not necessary for the purpose of this case to discuss the question as to whether bail can be granted under S. 167 by Magistrates, since it is clear that under the provisions of S. 497, Criminal P. C., coupled with the Full Bench ruling above mentioned, a Magistrate has no power to grant bail in cases falling under S. 409, I. P. C.

As to the legality of the action of the Additional Sessions Judge in cancelling the bail order the Assistant Government Advocate argues that the Additional Sessions Judge, Maubin, acted as a Court of Sessions under S. 497 (5), Criminal P. C. By office order of the District and Sessions Judge, Myaungmya-Maubin, dated 30th July 1927, the Additional Sessions Judge was empowered to hear all criminal appeals under S. 409, Criminal P. C., criminal miscellaneous cases under S. 123 (2), Criminal P. C., and to preside over Sessions trials of the Maubin District. The Code of Criminal Procedure strictly limits the powers of an Additional Sessions Judge to such as are conferred upon him directly by the Local Government or by the Sessions Judge of the division in which he exercises power. Thus S. 17, Criminal P. C., enables the Sessions Judge to make provision for the disposal of any urgent application by an Additional Sessions Judge when the Sessions Judge is unavoidably absent or incapable of acting. S. 123 (2) provides that where a Magistrate orders a person to give security for a period exceeding one year and the person does not give such security, he shall be imprisoned pending the orders of the Sessions Judge, and the proceedings shall be laid as soon as conveniently may be, before such Court. It is however made clear by S. 123 (3-B) that the word Court does not include an Additional Sessions Judge, since a Sessions Judge may in his discretion transfer any proceedings to an Additional Sessions Judge. S. 193 says that no Court of Sessions should take cognizance of any offence as a Court of original jurisdiction unless the accused has been committed to it, but S. 193 (2) only per-

mits Additional Sessions Judges to try such cases as the Local Government or the Sessions Judge may make over to them for trial. S. 409 states that an appeal to the Court of Sessions or Sessions Judge shall be heard by the Sessions Judge or by an Additional Sessions Judge provided that an Additional Sessions Judge shall hear only such appeals as the Local Government or as the Sessions Judge may make over. The alternative phrase in S. 409 suggests that the Court of Sessions normally means the Sessions Judge, and that the phrase "the Court of Sessions" only refers to the Additional Sessions Judge in cases in which he has proper seisin. S. 438 restricts the powers of an Additional Sessions Judge to such cases only as have been transferred to him.

It would appear therefore that according to the Code an Additional Sessions Judge can only be regarded as exercising the powers of a Court of Sessions where these powers are specially conferred upon him. Power to grant or cancel bail in cases like the present could have been conferred upon him under S. 17. I am therefore of opinion that the order of the Additional Sessions Judge was ultra vires.

As regards the desirability of enlarging the accused in the present case on bail it has been laid down time and again that the High Court should not grant bail in cases where a person is charged with offences punishable with death or transportation for life except for exceptional and very special reasons. No such reasons have been urged before this Court, while affidavits have been sworn on behalf of the prosecution which would suggest that prima facie it was desirable that the applicant should be kept in custody. The orders of the Headquarters Magistrate allowing bail are set aside.

K.N./R.K.

Order accordingly.

CRIMINAL CASES

1930.]

JOURNAL SECTION

[DECEMBER

Articles

HAND WRITING : Some Common Fallacies

BY F. BREWSTER, F. R. M. S., *Document Specialist, Calcutta.*

There are a surprising number of fallacies prevalent concerning hand-writing, chiefly because of dogmatic statements by persons who have never given the subject any serious study, and who are, therefore, not qualified to speak about it.

Not many persons will be found who will admit their complete ignorance of the subject, as almost everyone has more or less pronounced views of one kind or another, and such is the perversity of human nature, the less qualified the speaker the most vehement is the assertion.

Whatever excuse there may be for ignorance on the part of the layman, there can be none at all for the professional expert who circulates what may be mildly termed inaccuracies. It may be that such inaccuracies are due to ignorance, but more probably they are the outcome of a desire to sustain a fanciful theory, or an alleged test, or system, of some kind.

A very common fallacy is that persons write different hands with different pens, and it is a belief that has the support of alleged authority. A writer becomes habituated to the use of a special pen, or one having a particular point, and most persons find it difficult, or at least awkward, to write with any other kind; but a strange pen does not cause such a writer to write a hand fundamentally different from that which he normally writes. The fact is that a change of pen only causes (though not very often) a superficial transformation that becomes apparent on a brief investigation. A broad or a fine pen will, of course, cause the strokes of the writing to be wide or narrow, but such variation in the width

of the strokes has no effect on the writing itself, which remains fundamentally unaltered. One need only sit down and write with various pens to verify the truth of this.

A stub pen, such as the common "relief" may appear to change the position of the shading or emphasis normally employed by a writer, though in reality shading is not possible with a stub pen. What may be mistaken for shading is a broad stroke at a given point caused by the position in which the pen is held with relation to the line of writing. Superficially a stub pen may appear to cause an alteration in the writing, but actually it does not do so.

On the other hand a stylographic pen makes all the strokes in a writing of the same width, and there is no variation in the width of the up and down strokes. The appearance of the writing of a person using a stylo, who normally favours a broad smooth pen, may appear radically different at a casual glance, but a brief examination will show that the difference in pens causes no radical change at all, because the general style, size, and proportion will remain the same.

While the shibboleth of "different pens with different hands" is exceedingly common, one very rarely hears of anyone claiming to write different hands with a pen and a pencil, yet if it were really true that different instruments caused different writings, it is only reasonable to assume that writing with a pencil would be altogether different from that with a pen. The fact is that there is no radical difference in the normal writing of the same

person with pen or pencil. A pencil, however, has the effect of causing some-writers to write faster than with a pen because of the smoother point of a pen-gliding along the paper.

Many persons seem to think that because they make a slight modification in the forms of some of their letters, this brings about a different hand, but it is one of the underlying principles of handwriting investigation that no one ever writes twice exactly alike. The human hand is not capable of producing stereotyped forms of letters with the result that there must inevitably be certain variations in writing. Even in a signature of any length, it will be found that there are certain variations in size, in length, and in the proportions of the several parts. These variations, however, do not constitute a different handwriting, for really two different habits in writing do not co-exist.

Writing is a complicated acquirement as the result of repeated conscious efforts, until at length it becomes an unconscious or semi-automatic habit. For a writer at once to drop all of the unconscious habits he has acquired by repeated and laborious repetition is equivalent to a person changing off-hand his multifarious personal habits in speech, dress, gait and other various mannerisms. It cannot be done.

A person will sometimes assert that he writes two different hands, in proof of which he will exhibit a specimen each of his normal writing and pen-printing, but the latter is not writing at all, and it is, therefore, fallacious to say that it is a different handwriting from that normally written.

Another fallacy is that which asserts that heredity contributes, something to the form of writing movements, and that sometimes members of the same family possess striking similarities. Such assertions are sometimes supported by the quotation of some authority, which to the uninformed may seem very convincing, but it is never wise to accept blindly any authority, especially if it is rescued from the oblivion of the dead and past bygone. Commentators on the law are, perhaps, the greatest offenders, as they seem to be particularly fond of citing illustrations that often

go back to a dim and hazy past, and it is not uncommon to find them quoting from judicial pronouncements as much as 200 years old.

The conditions under which writing was taught 100 years ago, or more, are vastly different from what they are now. In the old days the teaching of writing was a sort of family institution, wherein the father set the copies for the son, but although in the early stages the son may have dutifully copied the outline set for him, he began of his own accord to develop idiosyncrasies or mannerisms the moment he acquired a certain amount of freedom.

Even assuming for a moment that two members of a family wrote so much alike as to be indistinguishable (which is doubtful) the teaching of writing under modern conditions is materially different both as regards style, and the surroundings in which it is taught.

Modern youth is taught to write in schools and other institutions, and it is consequently inevitable that with the different styles that are constantly being developed and brought out, the absence of parental influence, the personal views of the teacher and the difference in surroundings, that the writing acquired must, of necessity, be different in many ways from that of previous generations.

Now and again it is found that for some special reason, or with some particular object, a son will deliberately cultivate a very closely similar form of signature to that of his father, but such instances are extremely rare. To expect that under modern conditions a son will write a lengthy document so as to be indistinguishable from the writing of his father, is to expect the impossible. In the handwriting of different persons there will be found to occur occasional similarities in a letter or two, but it by no means follows that because of an accidental or isolated agreement or similarity (that at best is perhaps superficial) the writings of two different persons are alike. Just as it is sometimes found that the features of two persons may have something in common, yet many other differences will irresistibly prove that they are not alike. As Ames aptly expresses it :

"'Alike as two peas' is a trite saying; yet when two peas are scrutinized under the lens of a microscope differ-

ences of detail multiply well-nigh to the infinite."

"Like, but oh! how different!"

FORGED DOCUMENTS

A Short Study of Present-day Methods Concerning Proof in Court

BY F. BREWESTER, F. R. M. S., *Document Specialist.*

An experience of many years of dealing with disputed documents leads one to the inevitable conclusion that only the most meagre attention is devoted to the vital subject of preparation by lawyers generally in India.

The general idea seems to be that, all that is necessary is to secure the services of an expert, allow him only the briefest time to inspect the documents, put him in the witness-box, and after one or two preliminary questions, then to ask him to state his reasons. In such circumstances, the evidence of the witness usually amounts to a mere expression of opinion, since it does not permit him the time or the means to bring forth, and illustrate, all the reasons that could be advanced.

Some forgeries are so gross and clumsy that they can be detected at sight, but even with such productions, it is advisable that a full and complete preparation should be made, if the spuriousness of the document is to be proved and the case won. When however the forgery is not obvious at sight, only the fullest and most complete scientific preparation will ensure the fact being proved.

Failure to prove what is actually known to be a forgery is due to many different causes. It is not every day that a lawyer has such a matter to deal with, and consequently he is not fully conversant with the subject, and he is not aware of the necessity of thorough preparation on the technical aspects. Failure may also be due to the incompetency of the person selected to provide the technical proof, or it may be due to the want of skill in placing all the facts clearly before the Court. A frequent cause of failure in proving a forgery is due to the mistaken practice of leaving the critical examination of the document by an expert until the very last moment.

Another difficulty in the proof of a fraudulent document lies in the regret-

ful fact that undoubtedly there are dishonest and incompetent experts (or alleged experts) who will perjure themselves by giving any opinion that is desired of them. Mr. A. S. Osborne, in a recent article in the *Virginia Law Review*, apropos of this says:

"The activities of certain men who try claim cases and defend criminals have developed these corrupt specialists, or so called experts, who stand ready to assist advocates in defending crime and promoting fraud. In many Courts, however these witnesses in forgery cases cannot as in the old days merely give an opinion, but must at least attempt to give the 'grounds of belief,' and as, there are no reasonable 'grounds' for their contentions the weakness of this testimony can be shown by correct testimony, or by an opposing attorney who is technically prepared to cross-examine the witness."

In a recent trial two diametrically opposed opinions in writing on the same document were given by an alleged expert who lays claim to official recognition.

Many lawyers, having the consciousness that they have a true case, seem to think that the best way to offset dishonest expert testimony that has been brought in to 'bolster up a fraudulent plea, is to put their own expert in the witness-box and get him to contradict the evidence of the "fellow on the other side." That view is not only misleading but positively dangerous. Such procedure very often makes it difficult for the Judge to weigh up the conflicting opinion thus given, with the result that he will probably decline to consider the evidence at all.

The conscientious lawyer should endeavour to aid the Judge to the best of his ability, and the simplest and most effective way, is to have the expert who is known to be on the wrong side, thoroughly and effectively cross-examined. To do this, he must be fully coached on the technical side, and also he must know the history of the witness in other trials. The effectiveness of this method has been fully proved in several recent

trials, and its adoption is strongly recommended.

Another difficulty lies in the fact that many Judges and Magistrates shirk the consideration of expert evidence. Adam in his Foreword to Aiyer's "Detection of Forgery" says:

"Even when expert evidence (regarding handwriting) is forthcoming Judges frequently admit their inability to form an opinion. Knowing nothing about scientific detection they have either been unable to follow the expert's demonstration or are unwilling to attempt to do so. The result of this refusal to examine the documents for himself not seldom results in the Judge either unreservedly accepting the expert's opinion or refusing to do so because of what he believes to be the great fallibility of all such experts; . . . to be either genuine or false. I do not mean things fanciful or doubtful but clear and convincing things which might have been discovered by the Judge or Magistrate himself if he had only taken the trouble to examine the documents with care and not given the matter up as being too technical or scientific for his comprehension."

What then is requisite in order to ensure that a right verdict is obtained? To be as brief as possible, the first thing to do is to place the document in dispute before a reliable and competent expert, with the request that he should make such photographs as are necessary and submit a detailed report. Such reports as "In my opinion the document 10 is a forgery (or is genuine)" should not be tolerated.

Then in good time before the trial commences the lawyer should arrange a consultation with the expert, who will explain in detail the points to be enforced and the manner in which the technical evidence should be brought out, and where necessary, support his statements by authority. A consultation of this kind is fruitful of results. If an expert is appearing on the other side, obtain full and complete technical and other assistance on which to cross-examine him.

END

1930 Cr. Cases 1153

• (Calcutta)

PANCKRIDGE, J.

Krishna Gobinda Chatterji — Petitioner.

Mt. Kishoribala Debi — Opposite Party.

Criminal Revn. No. 257 of 1930, Decided on 2nd May 1930.

Civil P. C. (1908), O. 39, R. 2—Injunction cannot be granted for not pursuing remedy in criminal Court under Criminal P. C., S. 488.

A civil Court has no jurisdiction to restrain a party by an injunction from pursuing her remedy, under S. 488, Criminal P. C., in a criminal Court. [P 154 C 1]

Panchanan Ghose and Sitangsu Bhusan Bose — for Petitioner.

Mrityunjoy Chatterji, Debabrata Mukherji and Bhola Nath Roy — for Opposite Party.

Judgment.—This is a rule obtained by the petitioner Krishna Gobinda Chatterji calling upon the District Magistrate of Bankura and also on the opposite party Kishoribala Debi, the petitioner's wife, to show cause why an order under S. 488, Criminal P. C., directing the petitioner to pay a monthly maintenance of Rs. 18 to the opposite party for a certain time and thereafter to pay a monthly maintenance at a reduced rate should not be set aside. An appeal was filed against this order before the Sessions Judge of Bankura and was dismissed by him. It appears that subsequent to the application for an order under S. 488, Criminal P. C., the petitioner instituted a suit in the Munsif's Court seeking restitution of conjugal rights. While the application was still pending he obtained an order from the Munsif restraining the opposite party from proceeding with her application. In spite of the injunction the Magistrate was of opinion that he had jurisdiction to entertain the opposite party's application and made the order to which I have referred. The learned Sessions Judge took the same view.

The ground on which the rule has been granted is that the Sessions Judge erred in holding that the Sub-Divisional Magistrate had jurisdiction to make the order he had made. I have read the judgment of the Sessions Judge which has dealt with the matter at

some length. It is clear to me that in itself it is unsatisfactory as a justification of the order made by the Magistrate. It is conceded that the injunction granted by the Munsif was a temporary injunction, but the learned Judge has founded his decision upon a consideration of Chap. 10, Specific Relief Act, which is only concerned with perpetual injunction, as is indicated by S. 53 of the same Act. The law as regards temporary injunction is to be found not in the Specific Relief Act but in the Civil Procedure Code. The relevant order of that Code is O. 39. It is conceded that R. 1 of that order has no application, but it is said that this injunction was made in the exercise of the jurisdiction which the Munsif had by reason of R. 2. The petitioner I think rightly says that neither the Magistrate and Sessions Judge nor this Court sitting in criminal revision can question the propriety of the injunction provided it was made with jurisdiction. In my opinion however on the face of it the injunction is one which the Munsif had no jurisdiction to grant and must be treated as a nullity. My attention has not been directed to any provision of law by which the injunction can be justified if it does not fall within the purview of R. 2, sub-R. 1. Now the suit in which the temporary injunction is granted must according to that subrule be a suit for restraining the defendant from committing a breach of contract or other injury of any kind. I am extremely doubtful whether on the widest interpretation of the language the suit whereby the plaintiff seeks to enforce his conjugal rights against the defendants can be held to be a suit of the nature contemplated by the subrule.

But on the assumption that it can be considered as a suit of such a nature I do not think that the injunction granted by the Munsif is such an injunction as the subrule contemplates, for the injunction must be one to restrain the defendant from committing breach of contract or injury complained of or any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right. In my opinion that does not cover in the circumstances of the case an injunction restraining the de-

fendant from proceeding with her application under S. 483, Criminal P. C. I do not think that the presumption of such an application is a breach of the matrimonial contract or that it is covered by the other words of the sub-rule to which I have referred in detail. To my mind the Munsif had no jurisdiction to restrain the opposite party by an injunction from pursuing her remedy "in the criminal Court ; and I am of opinion that the Magistrate and the Sessions Judge were right in treating the order made by the Munsif as annulity. The Rule is discharged.
B.V./R.K. *Rule discharged.*

1930 Cr. Cases 1154 (1)

(Calcutta)

PEARSON AND JACK, JJ.

Emperor

v.

Sashi Kanta De—Accused.

Death Ref. No. 4 of 1930, and Criminal Appeal No. 218 of 1930, Decided on 14th May 1930, from order of Addl. Sess. Judge, Mymensingh.

Criminal P. C. S. 297—Dying declaration as foundation for prosecution story — Caution should be given to jury as to its weight and efficacy.

Where the foundation for the prosecution story is dying declaration of the deceased a caution should be given to the jury as regards the weight and efficacy to be given to a dying declaration and their attention should be drawn to the question of how far the other facts and surrounding circumstances proved in evidence must be said to support the truth or otherwise of that declaration. [P 1154 C 2]

A. K. Dhar—For Accused.

Lalit Mohan Sanyal—for the Crown.

Judgment.—This case comes before us under S. 374, Criminal P. C., with regard to the trial of a man named Sashi Kanta De alias Sashi Barai in which the charges against the accused were under S. 302 and 397 I. P. C. The jury have arrived at a unanimous verdict of guilty, and the learned Judge agreeing therewith passed the sentence of death subject to confirmation by this Court.

We have had the charge to the jury placed before us. The case was one in which it is alleged that the accused had murdered and robbed one Ram Golam Thakur as he was on his way home at about 8 o'clock one evening. It appears that the fatal blow was on the back of his head. The evidence of

the prosecution shows that when he was struck he called out with the result that certain persons came upon the scene and the deceased made a statement to them in the nature of a dying declaration mentioning who it was who had done him the injury. He was then removed to the house of Mahi Kanta Majumdar and he made a further statement to him. In these circumstances it is pretty clear that the foundation for the prosecution case is the dying declaration of the deceased. It has been pointed out to us that in the charge there is no caution given to the jury as regards the weight and the efficacy to be given to a dying declaration of this character. Some such caution should undoubtedly have been laid before them, and their attention should have been drawn to the question of how far the other facts and surrounding circumstances proved in evidence might be said to support the truth or otherwise of that declaration. It would not be fitting for us to lay down any more detailed directions having regard to the order that we propose to make. But so far as the case now before us is concerned the verdict of the jury and the sentence must be set aside and the case must go back for retrial by some other learned Judge.

It is particularly regrettable that this course is necessary having regard to the time that had elapsed between the commission of the offence and the conclusion of the trial. Let the record be sent down at once and let the case be disposed of as early as possible.

V.B./R.K.

Case remanded.

1930 Cr. Cases 1154 (2)

(Calcutta)

RANKIN, C. J. AND PATTERSON, J.

Nanooram Goenka—Petitioner.

v.

Fulchand Jajpuria—Opposite Party.

Criminal Revn. Nos. 1018 and 1019 of 1929, Decided on 14th August 1929, from order of Fourth Presy. Magistrate, D/- 2nd August 1929.

Criminal P. C. (1898), S. 208—Cross-examination of prosecution witnesses must be allowed before determining whether case should be committed to Sessions.

It is a clear right of the parties to cross-examine prosecution witnesses before the committing Court makes up its mind as to whether there is a case to be committed. In addition to that there is the right to call evidence for the defence.

[P 1155 C 2]

S. K. Sen, Prabodhchandra Chatterji and Satindranath Mukerji—for Petitioner.

B. C. Chatterji and Anilchandra Ray Chaudhuri—for Opposite Party.

Rankin, C. J.—In this case, it appears to me that the order of commitment must be quashed. The case is one in which certain persons are said to have been entrusted with certain bales of cotton yarn. It is said that, having been entrusted with these goods they have, in fact, committed criminal breach of trust by entering into a conspiracy with certain other people to make away with the goods. We are concerned with two matters. One is a rule obtained by the accused Nanooram and the other is an application for a rule by the accused Piramul and Gobardhan Das. So far as Nanooram is concerned, we have had discussed before us the question, whether, on any of the charges on which the Magistrate has committed the accused, there is *prima facie* evidence to justify the order of commitment; and taking the evidence carefully as recorded, we have come to the conclusion that we are not prepared to say that there is insufficient evidence to justify that commitment.

Then there comes another objection to this commitment order, which applies to the accused in both the cases before us, because it is said that, if the case of Nanooram is somewhat touch and go as to whether there is any evidence to warrant a commitment at all, both his case and the case of the other petitioner cannot be judged at the present stage for the purpose of showing whether the commitment is right or wrong, because the course taken by the Magistrate has deprived all these petitioners of their right, first of all, to cross-examine the prosecution witnesses so as to show that there is no case for commitment and, secondly, to call any evidence that they might desire.

In my judgment, on the second ground the case is completely made out. It appears that this prosecution started first of all as a prosecution in an ordinary warrant case, but that the Magistrate made up his mind, in view of the suggestion that there was a case exclusively triable by the Court of Session, to deal with the case from the beginning as though it were to end in a commitment,

and it is said that, at the time the Magistrate so decided, he explained that no prejudice would accrue to these petitioners, because, instead of calling upon them at once, as in a case that was going to be committed to cross-examine each witness as his evidence was given for the prosecution, he would permit counsel to reserve the cross-examination the idea being that, if it afterwards turned out that the Magistrate was not trying a warrant case in the ordinary course, counsel would then have an opportunity to cross-examine.

What happened in fact is this: The defence did not decline to cross-examine but from the Magistrate's own writing we find that the cross-examination was reserved: It could only be reserved with the Magistrate's permission and it is clear to my mind that the story in the petition before us is correct. The Magistrate himself says, as may well be true, that he has no recollection that he assured the defendant's advocate that the accused would have an opportunity to cross-examine the witnesses. But he says:

"I might have said so; but as the case is going to the High Court Session, I reject the defendants' prayer on that point."

With great respect to the Magistrate, if the Magistrate acted as he is said to have acted, he cannot possibly commit the case to the Sessions without keeping his promise. It is a clear right of the parties to cross-examine prosecution witnesses before the committing Court makes up its mind as to whether there is a case to be committed. In addition to that, there is the right to call evidence for the defence. Those rights given under Chap. 18 of the Code have in effect been taken away from these petitioners. In the same way, if this case were to be dealt with as a warrant case, it is evident that the accused would have the right to cross-examine, whether before or after the charges were framed. I am satisfied that the question whether there is sufficient evidence is a somewhat narrow question, a question in which there is some little difficulty. It is quite impossible for this Court to permit people to be committed to the Sessions, when the Magistrate fails to comply with the law, so as to see that the accused get an opportunity to satisfy him that there is no case

which requires commitment. On that ground, the commitment of the petitioners cannot be supported. The commitment will be set aside and the cases must go back to be tried in accordance with law. The defence must be given an opportunity to cross-examine the prosecution witnesses and to adduce any evidence they desire before there can be any question of a recommitment to the High Court. On the other hand, if, as a result of the evidence, the Magistrate does not any longer think it necessary to commit, he can proceed with the cases as warrant cases.

Patterson, J.—I agree.

B.V./R.K. *Revision allowed.*

1930 Cr. Cases 1156

(Calcutta)

SUHWARDY AND PATTERSON, JJ.

Mokshed Sheikh and another — Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 103 of 1930, Decided on 12th August 1930.

Evidence Act, S. 33— Verbal application is not sufficient ground for admitting evidence under S. 33—Omission to object does not dispense with legal requirements.

It is necessary that under S. 33 the Judge must be satisfied that the evidence is admissible on the materials before him, namely, on the ground that the witness whose deposition is attempted to be put in was not or could not be found or had been won over by the adverse party or otherwise incapable of giving evidence.

A verbal application made by the Public Prosecutor for admission of evidence of a particular witness under S. 33, Evidence Act, is not by itself a sufficient ground for admitting that evidence: 20 W. R. 69 Cr. and 41 Cal. 601. *Ref.*

The fact that no objection was taken to the reception of evidence of a particular witness on the mere verbal application by the Public Prosecutor by the defence, does not dispense with the requirements of S. 33, Evidence Act: 39 Mad. 449 and A.I. R. 1929 Lah. 542, *Rel. on.*

[P 1157 C 1]

*Probodh Chandra Chatterji and Durga Charan Mitter—*for Appellants.

Menindranath Mukherji — for the Crown.

Judgment.—In this appeal it is objected on behalf of the appellants that the learned Judge has misread the evidence in some portions and has wrongly admitted the evidence of a certain witness under S. 33, Evidence Act. This is the only important point taken before

us. It appears that the dacoity with which the accused were charged was committed after midnight of 6th July 1929. The information was lodged at the thana the following morning by a man named Sobhan. He did not name any of the dacoits nor did he say that some of them had been recognized. The first information was recorded by a Sub-Inspector of the name of Abdul Jabbar Chaudhury. The evidence shows that on the night of 7th July 1929 another Sub-Inspector by the name of Birendra Nath Pal took over the investigation from Abdul Jabbar Chaudhury. Abdul Jabbar was not examined in the committing Magistrate's Court because he had died before the case was heard. Birendra Nath Pal was examined by the committing Magistrate. He was not examined before the Sessions Judge but his evidence was admitted by the learned Judge under S. 33, Evidence Act. There is nothing on the record to show in what circumstances or on what ground this evidence was admitted. In the order sheet we find under order dated 14th January 1930 the following notes:

"Then the evidence of Babu Birendra Nath Pal (P. W. 10) in the lower Court put in by the prosecution under S. 33, Evidence Act."

There is no order by the Judge admitting the evidence on the ground that he was satisfied under that section that the witness was not available for examination before him. In the charge the learned Judge has expressed himself thus:

"In the morning at 9 a. m. Sovan (P. W. 6) went to the thana and lodged F. I. R. Ex. 5. The daroga who recorded it is not available and his evidence in the lower Court has had to be put in and used here as evidence."

In this sentence the learned Judge has been guilty of a number of inaccuracies. The first information report is not Ex. 5 in the case but Ex. 2. Ex. 5 is the search report which was prepared and signed by Birendranath Pal. Then the statement that the Daroga who recorded it (meaning Birendra) is not available is not correct because the daroga who recorded it was Abdul Jabbar who is dead. Then the learned Judge proceeds to say: "The daroga went to Rakhal's house on 7th July." If by this daroga he means Birendranath Pal the evidence shows that Birendra went to his house on 8th July. The charge is there-

fore vitiated by a confusion which has been made by the learned Judge in describing the incidents shortly after the dacoity. But the greater defect is with regard to the learned Judge's admission of the evidence under S. 33 Evidence Act. The record does not show that there were such materials before him as to satisfy him that the presence of witness Birendranath Pal could not be secured. It has been held from early times that in order to enable a Court to admit the deposition of a witness under S. 33, Evidence Act, the ground for its admission should be stated fully and clearly to enable the High Court to judge of its propriety.

Queen v. Mowjan (1): It is necessary that under S. 33, Evidence Act, the Judge must be satisfied that evidence is admissible on the materials before him, namely on the ground that the witness whose deposition attempted to be put in was not or could not be found or had been won over by the adverse party or otherwise incapable of giving evidence. In *Emperor v. Kangalmali* (2), the learned Judges refused to admit evidence though certain witnesses had sworn that the witness could not be found and that a warrant was issued on the witness. In their opinion this evidence before the Judge did not lay sufficient foundation for the reception of the evidence. The warrant was not produced and there was no evidence on the record to show that attempt was made to get the witness and therefore there was no evidence to show what was done to find out the man. That was a much stronger case than the present in which there is no material on the record not even an application to show that the witness could not be found. It is possible that a verbal application was made by the Public Prosecutor but that is no sufficient ground as has been held in *In Re Annavi Muthurayan* (3). It appears however that in this case no objection to the reception of the evidence was taken by the defence but that does not dispense with the requirements of S. 33: see *Golam Haider v. Emperor* (4) and the Madras case above re-

ferred to. We are accordingly of opinion that the learned Judge was not right in admitting the evidence of this witness Birendranath Pal and placing it before the jury. The evidence of identification in this case consists of the evidence of a woman named Katyani and the approver. The approver has contradicted the witness Katyani in several points. The learned Judge in his charge has referred to the evidence of the witnesses and says:

"In my opinion there is no genuine corroboration of an independent kind. You have seen that the approver's evidence is in many respects inconsistent with the woman Katyani; that of course may be due to mistake on the part of either. But that only confirms my opinion (which you are not bound to accept) that in this case there is no corroboration of the approver's implication of Mokshed and Doulat. There is no point in saying that if you believe Katyani's evidence it corroborates the approver. That is arguing in a circle.

On this evidence the accused were convicted by the jury, who were divided in the proportion of 3 to 2, under S. 395, I. P.C., and sentenced to rigorous imprisonment for five years each. We are of opinion that the trial has been vitiated by the defect in the learned Judge's charge. The question arises whether in the circumstances of this case there should be an order for retrial. Having gone through the evidence and the learned Judge's comment upon it we think that it is not a case where there should be a fresh trial. Accordingly we allow the appeal and direct that the accused be acquitted and set at liberty.

K.N./R.K.

Appeal allowed.

* 1930 Cr. Cases 1157

(Calcutta)

GRAHAM AND S. K. GHOSE, JJ.

Calcutta Steam Navigation Co., Ltd.—
Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 482 of 1930, Decided on 28th August 1930.

* Criminal P. C. (1898), S. 133—S. 133 deals with trades in themselves injurious to health.

Section 133 deals only with occupations or trades which are in themselves injurious to health and has nothing whatever to do with trades which in themselves are harmless but in course of which a public nuisance might be committed.

There was rivalry between two steamer companies who vied with each other in attracting passengers. It was alleged that their prac-

(1) 20 W. R. 69 Cr.

(2) [1914] 41 Cal. 601=15 Cr. L.J. 718=26 I. C. 161.

(3) [1916] 39 Mad. 449=16 Cr. L. J. 294=28 I. C. 518.

(4) A. I. R. 1929 Lah. 541 = 1929 Cr. C. 85 = 116 I. C. 329=30 Cr. L. J. 623=10 Lah. 837.

tices of taking up passengers from the boats and of taking passengers from places other than the recognized jetties caused backwash and involved danger to the public.

Held: that S. 133 did not apply.

Per S. K. Ghose, J.—Section 133 is not confined to trades which are injurious in themselves. It applies on the contrary to the cases of trades which become injurious by reason of conduct of them. [P 1159 C 1, 2]

Suresh Chandra Taluqdar and Haridas Gupta—for Petitioner.

B. M. Sen—for the Crown.

Graham, J.—This rule was issued calling on the District Magistrate of Midnapore to show cause why certain proceedings drawn up against the petitioners under S. 133, Criminal P. C., should not be quashed, or such other order made as this Court might deem fit and proper upon grounds 2, 3 and 5 in the petition to this Court. The first of these grounds is that the proceedings in question are bound to cause irreparable mischief to the lawful and legitimate trade of the petitioners, and as such proceedings are not contemplated by the criminal law. The next ground is that the Courts below have erred in law in construing S. 133, Criminal P. C., and that upon a proper interpretation of the section they ought to have held that it has no application whatsoever to the facts and circumstances of the case. The third and last ground is that the procedure adopted by the Court below has been illegal and without jurisdiction and has operated to the serious prejudice of the petitioners.

It appears that these proceedings have had their origin in rivalry which had arisen between two steamer companies, namely, the Calcutta Steam Navigation Co. Ltd., and the Ghatal Steam Navigation Co. Ltd. There was evidently keen competition between these companies and their agents have been vying with one another in trying to attract passengers for their respective companies. In the order which has been drawn up by the learned Magistrate three matters have been specified for the purpose of justifying the order under S. 133, Criminal P. C. Firstly, the alleged practice of taking up passengers from boats; secondly, the allegation that the petitioner company is in the habit of taking up passengers from places other than the recognized jetties ordinarily used for the purposes; and thirdly, that as a result of these practices backwash is

caused and that this involves danger to the public. The broad question is whether, having regard to the facts and circumstances of this case, the provision of S. 133, Criminal P. C. have been rightly applied. In my judgment that section has no application whatever to the facts and circumstances of a case such as the present. It is to be observed that Chap. 10, in which this section is included, deals with public nuisances, and it would certainly be a straining of language to hold that the acts which have been described above constitute a public nuisance. The only part of the section which could be deemed to apply is para. 3, which is in the following words:—

“That the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated or such goods or merchandise should be removed or the keeping thereof regulated.”

In my opinion this section deals only with occupations or trades which are in themselves injurious to health and has nothing whatever to do with trades which in themselves are harmless, but in the course of which a public nuisance might be committed. I have no doubt whatever that the section was never intended to apply to the facts and circumstances of a case such as the present.

The result, therefore, is that this rule must be made absolute and the proceedings in question quashed. This order will not interfere with the discretion of the Magistrate or prevent him from taking any other steps under any other section of the law which may be considered to be applicable.

S. K. Ghose, J.—My own view is that by the amendment in para. 3, S. 133, Criminal P. C., that section has been amplified, so that its scope has been widened. It seems to me that it can no longer be said that the section is confined to trades which are injurious in themselves; on the contrary it applies to cases of trades which become injurious by reason of the conduct of them. It will be noticed that the words “conduct” and “regulate” occur for the first time in the amended section. But having regard to the facts and circumstances of the case, I agree with my

learned brother that the rule should be made absolute.

R.M./R.K. . . . *Rule made absolute.*

1930 Cr. Cases 1159
(Calcutta)

PEARSON AND JACK, JJ.

Superintendent and Remembrancer of Legal Affairs, Bengal—Petitioner.

v.

Khagendra Nath Das Gupta—Opposite Party.

Criminal Misc. Revn. No. 81 of 1930,
Decided on 29th May 1930.

(a) Contempt of Court—Power of High Court to commit for contempt of itself is inherent in Court.

The power of the High Court to commit for any contempt of itself is inherent in the Court and arises from the fact that it is a Court of Record. The power is one that is ancillary to the exercise of the various jurisdictions of the High Court, and it may be expedient to exercise it in or in relation to any one of those jurisdictions. [P 1160 C 1]

(b) Crown Side Rules, Chap. 37, R. 2—Rule issued to show cause against committal for contempt—Party need not appear through advocate instructed by attorney.

Where a rule is issued by the Bench of a High Court upon a party to show cause why he should not be committed to prison, or otherwise dealt with for the contempt of itself, it is not necessary that the party, if represented, must appear through an advocate instructed by an attorney: 4 I. C. 237 and 41 Cal. 173, Dist. [P 1163 C 1]

Susil Kumar Sen—for Incorporated Law Society.

Narendra Kumar Basu—for Bar Association.

Pearson, J.—In this matter a rule was issued by us upon the opposite party to show cause why he should not be committed to prison or otherwise dealt with for the contempt of this Court and of the Court of Akshoy Kumar Bose, Deputy Magistrate of Jalpaiguri, in printing and publishing and allowing to be published certain articles on 6th March 1930 entitled "The Sedition Case of Jalpaiguri" and "Bichar" and why he should not pay the costs.

The articles related to the trial of certain accused persons under S. 124-A, I. P. C., which started in November 1929, and went on until February 1930. On 28th February they were found guilty and sentenced, and on 7th March they appealed to this Court. The articles in question were published at Jalpaiguri on 6th March, and the opposite party is resident there.

The Chief Justice has directed that we should exercise the jurisdiction vested in this Court by the Contempt of Courts Act 1926, but when the Rule first came on for hearing, the point was raised by Mr. Sen, appearing as representing the Incorporated Law Society, that the matter was one of such a nature that the party must be represented by an advocate of the Court instructed by an attorney, which was not the case. We directed notice to be given to the Bar Association, and Mr. N. K. Basu has now appeared in their interests.

In so far as the contempt of a subordinate Court is concerned the matter is now governed by the provisions of the Contempt of Courts Act 1926, enacted, as the preamble states, because doubts had arisen as to the powers of a High Court to punish contempts of subordinate Courts. S. 2 (1) of the Act, so far as material, provides that:

"The High Courts of Judicature established by Letters Patent shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempts of Courts subordinate to them as they have and exercise in respect of contempts of themselves."

Mr. Sen has referred in aid of his argument to the decision of the Special Bench in the case of *Re Barristers and Vakils* (1), which however only decided actually that where a Magistrate had committed an accused for trial to the High Court under the provisions of the Criminal Law Amendment Act 1908, barristers would have the exclusive right of audience before the Special Tribunal at the trial of such cases in the High Court. The reasons for the decision are not given. Mr. Sen also referred to the provisions of Cls. 22, 23 and 24, Letters Patent of 1865, as to the criminal jurisdiction of their Court, and to R. 2, Crown Side Rules, laid down in Ch. 37 of the Rules and Orders, as regards the trial of cases at the Crown Side under the extraordinary original criminal jurisdiction. He also referred to Ch. 2, R. 4, of the rules and orders regarding the exclusive right of audience in any matter on the original side.

Mr. Basu on the other hand has argued that the Court has power to dispose of the matter in its criminal appellate jurisdiction, though it may be the Crown side would also have jurisdiction

to deal with it. Even under Ch. 37, R. 2, if the matter is one within the extraordinary criminal jurisdiction, he points out that applications for its exercise are to be heard and disposed of at the appellate side.

The matter is one that is by no means free from difficulty. The power of the High Court to commit for any contempt of itself is inherent in the Court and arises from the fact that it is a Court of Record. The power is one that is ancillary to the exercise of the various jurisdictions of the High Court and it may be expedient to exercise it in or in relation to any one of those jurisdictions. As regards the nature of such proceedings taken in contempt, I do not consider it necessary or desirable to lay down any general rule that such proceedings must necessarily and exclusively fall under any particular one of the different jurisdictions conferred on the Court by its Letters Patent; though it may be that the Court on its Crown side would have the power to deal with such a matter as the present: see per Jenkins, C. J. in *Legal Remembrancer v. Motilal Ghose* (2), at p. 215. On the other hand I am not satisfied that that must be the exclusive way of dealing with such a matter as an application in contempt. Upon the whole I am not prepared to uphold the contention that in this case the party, if represented, must appear through an advocate instructed by an attorney.

Jack, J.—I agree.

V.B./R.K. *Order accordingly.*

[2] (1914) 41 Cal. 173=14 Or. L. J. 321=20 I. C. 81.

1930 Cr. Cases 1160

(Calcutta)

CUMING, J.

Ghuraram Kahar—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 1414 of 1929, Decided on 21st January 1930, from order of Hon. Presy. Mag., Calcutta, D/- 4th October 1929.

Penal Code, S. 341 — Essential element in wrongful restraint is that person restrained must have right to use thing complained of.

Before convicting a person of wrongfully restraining the other from making use of a particular place or thing it is necessary for the Court to determine if that other person has right to use it. [P 1160 C 2]

Sures Chandra Talukdur — for Petitioner.

Judgment. — This rule has been issued on two grounds: first of all, that the conviction and sentence are bad in law inasmuch as the mandatory provisions of S. 342, Criminal P. C., were not followed, and secondly that the facts do not constitute an offence under S. 341, I. P. C., inasmuch as among others the complainant had no right to use the rain water passage as a urinal. The petitioner has been convicted under S. 341, I. P. C., for wrongfully restraining the complainant from going to a certain urinal. The complainant is apparently a tenant of the petitioner and they have fallen out. The complainant's case was that he was not allowed to go to a certain urinal in the house. The learned Magistrate has come to no finding as to whether the complainant had any right whatever to use the aforesaid urinal. This urinal apparently consisted of a couple of bricks put over a rain-water pipe. In order to hold the petitioner guilty under S. 341, I. P. C., it would be necessary to determine that the complainant had a right to use the urinal. That the Magistrate has not done. Therefore there is no alternative but to set aside the conviction and sentence and to send the case back for retrial. The retrial should be held by some Magistrate other than Mr. Rustomji. The Magistrate trying the case should bear in mind the point I have stated above.

The rule is made absolute in these terms.

V.B./R.K.

Rule made absolute.

*** 1930 Cr. Cases 1161**
(Oudh)

WAZIR HASAN, C. J., AND PULLAN, J.
Mohanlal Saksena—A plicant.

Emperor—Opposite Party.

Criminal Revn. Appls. Nos. 87 and 95 of 1930. Decided on 15th August 1930.

* (a) *Salt Act (1882)*, S. 9—Abetment of offence under *Salt Act*—Punishment prescribed under S. 9—Punishment under Penal Code, S. 117, is illegal—Penal Code, S. 117.

The punishment under Penal Code, S. 117, for abetment of an act which is an offence under *Salt Act (1882)* and not an offence under Penal Code, is illegal for the reason that *Salt Act*, S. 9, prescribes specific punishment for the abetment of such an offence. It is illegal to proceed under S. 117, I.P.C., which allows a higher punishment for abetment of an offence for the punishment of which a lighter and separate penalty is provided by the provisions of S. 9, *Salt Act (1882)*. [P 1162 C 2; P 1164 C 1]

(b) *Salt Act (1882)*—Doing anything contravening *Salt Act* or rule thereunder or abetment of such an act is not separate offence under Penal Code (1860), S. 40.

Doing anything in contravention of *Salt Act (1882)* or of any rule made thereunder is not a separate offence under Penal Code nor is it that an abetment of an act in contravention of *Salt Act* or of any rule made thereunder is a separate offence under the Penal Code: 6 O. C. 153, *Ref.*; 6 *Mad.* 249, *Dist.* [P 1163 C 1]

(c) *General Clauses Act*, S. 26—Conviction for abetment of offence exclusively under *Salt Act*—S. 26 is inapplicable.

Where an act for the abetment of which conviction takes place is not a separate offence under Penal Code but is an offence exclusively under *Salt Act (1882)*, S. 26, *General Clauses Act*, is inapplicable. [P 1163 C 2]

(d) *Penal Code (1860)*, S. 5—Where there is special law, making particular act an offence and providing penalties, general law is inapplicable.

Where an act is an offence under specific law and such an offence can also be punished under the specific law, that law and not the general law would apply. [P 1164 C 1]

(e) *Salt Act (1882)*, S. 9—S. 9 prescribes punishments for all kinds of offences under *Salt Act*.

Clause (c), S. 9 embraces all abetments whether aggravated or mitigated in their nature. The section does not provide for any execution in respect of such abetments as provided for by Penal Code, S. 117, and the punishment prescribed by the said section is for all abetments of acts which are declared to be offences by the provisions of *Salt Act*. [P 1164 C 1]

(f) *Criminal P. C. (1898)*, S. 439 (5)—Conviction of members of Bar Association under Penal Code, S. 117—Revision application filed by Bar Association to invoke powers of High Court under S. 439—Cl. 5 was held to be inapplicable.

Two members of the Bar Association were convicted under S. 117, Penal Code read with S. 9, *Salt Act (1882)*, by First Class Magistrate. The Bar Association authorized the President

to file revision application to the High Court invoking its powers under S. 439 on the ground that the conviction was illegal.

Held: that the proceedings by way of revision before the High Court were not intended by party who could have appealed but had not appealed and therefore Cl. 5 was inapplicable. [P 1162 C 1]

St. G. Jackson—for Applicant.

H. K. Ghose—for the Crown.

Judgment.—This is an application presented by the President of the Oudh Bar Association, Lucknow, on behalf of that Association invoking the powers of this Court under S. 439, Criminal P. C., 1898, in the matter of the conviction of Messrs. Mohan Lal Saksena and C. B. Gupta under S. 117, I.P.C., read with S. 9, *Salt Act*, 1882, by a First Class Magistrate of Lucknow under his judgment of 14th April 1930. The two gentlemen mentioned above are members of the Oudh Bar Association. Accordingly in their interest the said Association passed a resolution at a special general meeting, authorizing the President of the Association to move this Court under S. 439, Criminal P. C., on the ground that the conviction was illegal for the reason that there was no evidence on the record to prove that Mr. C. B. Gupta did any overt act amounting to abetment of an offence against *Salt Act*, 1882, and also on the ground that neither Mr. C. B. Gupta nor Mr. Mohan Lal Saksena could legally be convicted and punished under the provisions of S. 117, I.P.C. S. 117 of the Code prescribes penalty of imprisonment of either description for a term which may extend to three years or with fine or with both and in the present case the two gentlemen above-mentioned have been sentenced to 18 months' rigorous imprisonment each.

Besides these two gentlemen, who are members of the Oudh Bar Association as already stated, there were six others who were convicted by the same judgment and sentenced to similar punishment under the same section of the Penal Code. They are Shyam Sundar Nigam, Jai Dayal Avasthi, H. C. Bajpai, Shyam Sundar Qaisar, Imtiaz Ahmad Asharfi and Dr. Lakshmi Sahai.

On the merits of the case as a whole no distinction is possible between the case of one and any of the other convicted persons. It follows that if we feel convinced that this is a fit case in

which we ought to interfere at all in the exercise of our jurisdiction under S. 439, Criminal P. C., 1898, we must interfere in the matter of the conviction of all the eight persons.

On behalf of the Crown the learned Government Advocate has urged two main preliminary objections against the entertainment of this application. The first objection is that inasmuch as the convicted persons have not appealed from the order of conviction passed by the Magistrate, though in law they had a right to appeal, the present application is not maintainable having regard to the provisions of Cl. (5), S. 439, Criminal P. C. The second objection is that the Oudh Bar Association, being no party to the case in which the order of conviction was made by the Magistrate, has no locus standi to file the present application.

We are of opinion that both these objections should be overruled. As regards the first objection Cl. (5), S. 439 bars entertainment of proceedings by way of revision at the instance of the party who could have appealed but has not appealed. The proceedings now before us have not been initiated by a party who could have appealed but has not appealed. Cl. (5) therefore has no application to this case. It cannot be doubted that S. 439, Criminal P. C., 1898, invests the High Court with jurisdiction of revisional nature in cases in which it may deem fit in the exercise of its own discretion to call for the record of a case or which has been reported for orders or which otherwise comes to its knowledge. The section further authorizes the High Court to exercise all or any of the powers conferred on a Court of appeal by Ss. 423, 426, 427 and 428, Criminal P. C., and this is the jurisdiction which the present application seeks to invoke. In the present case we are of opinion that the Oudh Bar Association have acted rightly in the discharge of their duty as such an association to watch and protect the privileges and liberty of its members which they are entitled to enjoy under the laws of the country. We think therefore that the present application has been laid before us by the President of the Association not in any frivolous spirit of officious interference with the administration of justice but with a high sense of responsibility.

The President himself argued the application before us not on the ground that he has a right to do so but that as the President of the Bar Association it was his duty to bring to the knowledge of this Court that an illegality has been committed by a subordinate Court in the exercise of its jurisdiction under the Penal Code and under the Salt Act, 1882. What we have said above answers the second objection also.

The first ground on which the application was argued before us is, as we have already said, that there is no evidence on the record to establish the offence of abetment within the meaning of the Penal Code of the commission of an offence under the Salt Act, 1882, against C. B. Gupta. This ground must be rejected at once. There is evidence on the record and the learned Magistrate has accepted it as true. We see no reason to disagree with the finding of the learned Magistrate in the matter of the trustworthiness of the evidence.

The second ground of the application is more serious and covers not only the cases of Mohan Lal, Saxena and C. B. Gupta but also of all those convicted persons whose names we have already mentioned. The learned Magistrate has convicted them under S. 117, I. P. C., read with S. 9 (a) and (b), Salt Act 1882, and has sentenced each of the eight persons to rigorous imprisonment for 18 months. The argument presented before us is that punishment under S. 117, I. P. C., for abetment of an act which is an offence under the Salt Act, 1882, and not an offence under the Penal Code, is illegal for the reason that S. 9, Salt Act, 1882 prescribes specific punishment for the abetment of such an offence. We are of opinion that the argument is right and must be accepted. So much of S. 9, Salt Act, 1882, as bears on the question under consideration may be reproduced here :

"Whoever commits any of the following offences namely :

"(a) does anything in contravention of this Act or of any rule made hereunder ;

(b) evades payment of any duty or charge payable under this Act or any such rule or

(c) attempts to commit or abets within the meaning of the Penal Code the commission of any of the offences mentioned in Cls. (a) and (b) of this section shall for every such offence be punished with fine which may extend to five hundred rupees or with imprison-

ment for a term which may extend to six months, or with both.

It was not disputed by the learned Government Advocate that doing anything in contravention of the Salt Act, or of any rule made thereunder was not a separate offence under the Penal Code nor is it contended that abetment of an act in contravention of the Salt Act or of any rule made thereunder is a separate offence under the same Code. But sentence under S. 117, I. P. C., could be passed even in respect of abetment of an offence which is committed not only under the Penal Code but also under any law of the country. In the present instance that law is to be found in the Salt Act, 1882, and if the matter had stood there we think there could be no question that these eight persons were rightly punished under S. 117, I. P. C., but the matter does not rest there for S. 9, Salt Act, 1882, not only makes an act done in contravention of the Act or abetment of the same act an offence, but it also prescribes the penalty for such an offence. If we accept the argument of the learned Government Advocate the result will be that a specific offence prescribed as such by a special Act only would be capable of being punished under both the provisions of the Penal Code and the provisions of the Salt Act, 1882, or under either of them. We are unable to construe the law in such a manner as would produce such a result. The learned Government Advocate placed before us the decision in *Raghubar Dayal v. Emperor* (1) by a Bench of the late Court of the Judicial Commissioner of Oudh. That decision however does not seem to be in point. In that case a person was tried on a charge under S. 81, Registration Act, 1877, and was acquitted on the ground that it was not proved that he knew that it was likely that he would cause injury to any one by his act. He was subsequently tried and convicted on a charge under S. 197, I. P. C. The learned Judges held that the plea of bar arising out of the previous acquittal was a valid plea and that the accused could not subsequently be tried and convicted on a charge under S. 197, I. P. C. They further held that under S. 26, General Clauses Act, where an act or omission

which constitutes an offence under two or more enactments the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for the same offence, and that it did not prevent the application of the S. 403, sub-S. 1, Criminal P. C.

The second case which the learned Government Advocate placed before us is *Queen v. Ramachandrappa* (2). In that case it was held that the provisions of S. 174, I. P. C., are not in conflict with the special provisions of Ss. 15 and 16, Regn. I of 1816, (Madras) and that the accused could be charged and tried under the provisions of S. 174, I. P. C. This decision only amounts to this that where an act is an offence under the provisions of two enactments which are not in conflict with each other, prosecution may be resorted to under either of the enactments. It will be seen that the ratio decidendi of that case was that the act in respect of which the accused in that case was prosecuted was an offence both under the Penal Code and the Special Regulation of 1816, while in the present case, as we have already stated, it is agreed on both sides that the act for the abetment of which these persons were convicted, is not a separate offence under the Penal Code, but is an offence exclusively under the Salt Act, 1882. It is to the former class of cases to which the provisions of S. 26, General Clauses Act, apply, but the present case is of the latter class.

Before the passing of the Salt Act, 1882, acts which are made offences by the provisions of that Act were not offences under any other law of the land and we have already said that they were not and are not in themselves offences under the Salt Act, 1882, and the principle of interpretation of statutes in such circumstance is *generalia specialibus non derogant*. If therefore an act which is an offence under any other Act but no penalty is prescribed thereby could be punished under the provisions of S. 117, I. P. C., this particular offence could not be so punished because the special enactment also prescribes a specific penalty for such an offence; in other words where

(1) [1909] 6 O. C. 153.

(2) [1883] 6 Mad. 249.

an act is an offence under a specific law and such an offence can also be punished under that specific law that law and not the general law would apply, and this is the principle laid down in S. 5, I. P. C.

It was argued by the learned Government Advocate, and seems to have been argued on behalf of the prosecution in the Court of the learned Magistrate, that S. 117, I. P. C., deals with such offences of abetments as are aggravated in their nature and therefore the special penalty provided by S. 9, Salt Act 1882, is not the penalty for an abetment of such a nature. This argument clearly ignores the language of S. 9, Salt Act, 1882. Cl. (c) of that section defines abetment by referring to its definition in the Penal Code and embraces all abetments whether aggravated or mitigated in their nature. The section does not provide for any exception in respect of such abetments as are provided for by S. 117, I. P. C., and the punishment prescribed by the said S. 9 is clearly a punishment which is prescribed for all abetments of acts which are declared to be offences by the provisions of the Salt Act, 1882. It follows that it is illegal to proceed under S. 117, I. P. C., which allows a higher punishment for abetment of an offence for the punishment of which a lighter and separate penalty is provided by the provisions of S. 9, Salt Act, 1882. It seems to us that the argument of the learned Government Advocate if carried to its extreme logical conclusions would reduce the law in this respect to an absurdity. According to that argument a person may be punished for abetment when it is of an aggravated character under S. 117, I. P. C., and he may also be punished under S. 9, Salt Act, 1882, for the same abetment because the aggravated form of it undoubtedly includes the mitigated form. To avoid such absurd results we must construe the two enactments in the light of the maxim quoted above, that is, where there is a special law making a particular act an offence and providing penalties for such an offence the general law must be held to be inapplicable. We therefore hold that the conviction of these eight persons and the sentences passed on each under S. 117, I. P. C., were illegal. We

set aside those convictions and sentences.

But as on merits we are in agreement with the learned Magistrate that an offence under S. 9, Salt Act 1882, has been committed by those persons they are liable to be punished as provided for by that section. We accordingly set aside the conviction and sentences passed by the learned Magistrate under S. 117, I. P. C., and convict each of the eight above-named persons under S. 9 (c), Salt Act, 1882, and sentence each of them to rigorous imprisonment for a term of six months which is the maximum punishment permitted by that section.

G.P./R.K.

Order accordingly.

1930 Cr. Case 1164

(Oudh)

PULLAN, J.

Sarfazar Singh and another—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 82 of 1930, Decided on 4th September 1930, from order of Sess. Judge, Gonda, D/- 20th May 1930.

(a) Criminal P. C., S. 4 (b)—Application to Court to take action under Ss. 107 or 145 without allegation of offence is not complaint.

Where the person aggrieved asked the Court in his petition to take action under the preventive Ss. 107 or 145, Criminal P. C., and there was no allegation in his petition or in his statement as recorded by the Magistrate that an offence had been committed and that the Magistrate should take action in respect of such offence against any person under the Criminal P. C.

Held: that the petition of the aggrieved person did not amount to a complaint.

[P 1165 C 2]

(b) Criminal P. C., S. 190 (c)—Magistrate acting under S. 190 (c) can take cognizance of offences under Ss. 352 and 447, Penal Code, even without complaint.

There is nothing in the Code of Criminal Procedure to restrain the Sub-Divisional Magistrate from taking action in respect of an offence which he thinks has been committed but which has not been brought to his notice in the form of a complaint. S. 190 (c) gives very wide powers to the Magistrate. What is intended thereby is that the Magistrate should be able to bring his experience to bear upon any statement of facts made to him by an aggrieved person who might not know what his legal remedy was in the given circumstances.

Where the person aggrieved made a petition to the Sub-Divisional Magistrate to take action against A and B under Ss. 107 or 145, Criminal P. C., and did not allege in his petition that

any offence had been committed by A and B and the Magistrate passed the following order: "This is a case under Ss. 447 and 352, I. P. C., and is transferred to the Court of the Tahsildar," and the Tahsildar tried A and B and ultimately convicted them under Ss. 352 and 447, I. P. C.

Held: that the Magistrate was acting within his jurisdiction when he read the statement as being a complaint of facts which constituted an offence, and even if the definition of "complaint" would rule out the application of Cl. (a), S. 190, the Magistrate was certainly able to take cognizance of the offence under Cl. (c).

[P 1166 C 1]

J. N. Misra—for Applicants.

Ali Muhammad—for the Crown.

Pullan, J.—These three applicants in revision may be considered together. On 10th September 1929 two persons, Ramphal and Budhai came before a Sub-Divisional Magistrate of Tarabganj with separate petitions in which they alleged that Sarfaraz Singh and others were threatening them and likely to interfere with the cutting of their crops and asked the Court to take preventive measures presumably under Ss. 107 or 145, Criminal P. C. The Sub-Divisional Magistrate passed temporary orders which appear to have been under S. 145, Criminal P. C. Eight days later, on 26th September, Ramphal made a second application in the form of a complaint that Sarfaraz Singh and another had cut his crop, and on this complaint proceedings were instituted under S. 379, I. P. C. While these proceedings were pending the Sub-Divisional Magistrate on 23rd October passed an order on the two petitions which had been made on 18th September in the following terms:

"This is a case under Ss. 447, 352, I. P. C. and is transferred to the Court of the Tahsildar."

On 30th November 1929, the Bench Magistrates convicted Sarfaraz Singh and his son Jaipatar Singh of an offence under S. 379, I. P. C., and ordered them each to pay a fine of Rs. 25. On 18th December 1929 the Tahsildar Magistrate convicted Sarfaraz Singh and five others of offences under Ss. 352 and 447, I. P. C. and sentenced them each to pay a fine of Rs. 50. Appeals were filed against both these convictions before the District Magistrate and both appeals were dismissed. In his judgment in the theft case the learned District Magistrate pointed out that although Sarfaraz Singh had been successful in appeal in a civil suit as to the zamindari rights of this

land, and had got possession in August 1929, "this gave him no right to confiscate the tenant's rights or seize the crop." As it was admitted that the crop had been cut there seems to be no doubt that a criminal offence was committed and no case has been made out for interfering in revision with the order of the District Magistrate.

In his judgment in the two appeals arising from conviction of Sarfaraz Singh and others of offences under Ss. 352 and 447, I. P. C., the learned District Magistrate refers to the legal points which were argued before him. One of these points has been taken before me and it is as follows: In these cases no complaint was made that any offence under the Penal Code had been committed. The persons aggrieved only asked the Court to take action under the preventive sections of the Code of Criminal Procedure. The trial therefore is alleged to have been without jurisdiction. "Complaint" is defined in the Code of Criminal Procedure, S. 4, Cl. (b) as:

"an allegation made orally or in writing to a Magistrate with a view to his taking action under this Code, that some person has committed an offence."

Now in these petitions there was no allegation that an offence had been committed with a view that the Magistrate should take action in respect of such an offence against any person under the Code of Criminal Procedure. Consequently there was no complaint, and I am not prepared to agree with the learned District Magistrate that the original petition taken in conjunction with the statement recorded by the Magistrate amounted to a complaint. I find that in their statements also these persons merely requested the Court to take action so that the opposite party should not be able to seize the crops. But although I do not agree with the District Magistrate's view that this was a complaint I do not find that there is anything in the Code of Criminal Procedure to restrain the Sub-Divisional Magistrate from taking action in respect of an offence which he thinks has been committed, but which has not been brought to his notice in the form of a complaint. S. 190, Criminal P. C., enacts that a Sub-Divisional Magistrate may take cognizance of any offence (a)

upon receiving a complaint of facts which constitute such offence; and (c) upon information received from a person or upon his own knowledge or suspicion that such offence has been committed. This section gives to the Sub-Divisional Magistrate very wide powers. No doubt it was intended that a Magistrate should be able to bring his experience to bear upon any statement of facts made to him by an aggrieved person who might not know what his legal remedy was in the given circumstances. In the present case these cultivators made statements which clearly indicated that criminal offences under the Penal Code had been committed by this Sarfaraz Singh and others, and although they themselves did not ask that these persons should be prosecuted possibly because they did not know that the acts of which they complained amounted to offences under the Penal Code, the Magistrate was acting within his jurisdiction when he read the statement as being a complaint of facts which constituted an offence, and even if the definition of "complaint" would rule out the application of Cl. (a), S. 190, the Magistrate was certainly able to take cognizance of the offence under Cl. (c) of the same section.

I am therefore unable to find that in any of these cases there has been any failure on the part of the Magistrate to exercise his jurisdiction, still less can I find that there has been any miscarriage of justice. The Courts below have found that these offences have been committed and no reason has been shown to me for reconsidering those findings in revision. I dismiss all three applications.

K.N./R.K. *Applications dismissed.*

• 1930 Cr. Cases 1166

(Oudh)

RAZA AND PULLAN, JJ.

Emperor—Appellant.

v.

Chhattarpal Singh and another — Accused—Respondents.

Criminal Appeal No. 368 of 1930, Decided on 10th September 1930, from order of Addl. Sess. Judge, Unao, Dy. 25th July 1930.

(a) Evidence Act, S. 30—Self-exculpatory statement — Confession — Admissibility against co-accused.

Where the accused in her confession stated

that she gave to her husband a certain drug in milk from the effects of which he died, but added that she was given the drug by the co-accused, who wished to marry her daughter, and that the drug was intended to bring her husband under her control and to induce him to consent to the marriage:

Held: that the statement is a self-exculpatory statement which is without value in evidence against the co-accused. [P 1187 C 1]

(b) Penal Code, S. 302—Woman of middle age administering arsenic must accept full responsibility of her action.

Where a woman of middle age administers to her husband arsenic disguised in sugar and placed in his food and thereby causes his death, she must accept the full responsibility of her action.

S who was on bad terms with her husband administered arsenic poison to him in milk by way of medicine. The husband died, and S was convicted by the Court of Session under S. 304-A, Penal Code. An appeal was made on behalf of Government.

Held: that S was guilty of culpable homicide amounting to murder and should have been convicted under S. 302, Penal Code: 40 All. 360, *Foll.* [P 1168 C 1]

H. K. Ghose—for the Crown.

S. N. Sinha and Azizuddin and Azizuddin—for Respondents.

Judgment.—Two persons Chhattarpal Singh and Mt. Sukhpala have been convicted by the learned Additional Sessions Judge of Unao of an offence under S. 304-A, I. P. C., and sentenced under that section to the maximum sentence permitted by law. In the case of Chhattarpal the offence has been held to be one of abetment. Against this decision an appeal has been preferred, on behalf of the Local Government on the ground that these persons should have been convicted of an offence under S. 302, I. P. C., of which they were acquitted by the learned Sessions Judge, and that S. 304-A does not apply to a case of this nature. Chhattarpal Singh alone has appealed against his conviction.

The main facts of the case are clear enough. Mt. Sukhpala was the wife of one Jalpa Singh. Jalpa Singh was poisoned with arsenic and died on 8th April 1930, and his death was reported by the chaukidar of the village on the following day. In the report it was stated that Jalpa Singh had himself said that his wife had administered poison to him in milk. Nobody else except the wife was accused in the first report, but a suggestion was made that she had a liaison with one Hanuman Singh. It is not clear that this was in-

tended to imply that it was on account of that liaison that she poisoned her husband. There is on the record sufficient evidence both that Sukhpala gave a drug in milk to her husband and that he accused her of poisoning him apart from her own confession. Her confession was recorded on 10th April before a Magistrate, and in this confession she admits that she gave the drug to her husband in the milk, but she says that she was given the drug by one Chhattarpal Singh who wished to marry her daughter Ram Kali, and that the drug was intended to bring her husband Jalpa Singh under her control, and to induce him to consent to the marriage. Accordingly Chhattarpal Singh also was arrested and placed on his trial. He is a young, unmarried Thakur. He has all through denied that he had any intention of marrying Ram Kali and none of the Thakur witnesses in this case make any statement to that effect. Apart from the confession of Mt. Sukhpala there is the statement of one witness only which can be said to implicate Chhattarpal Singh. This is a woman named Shahzadi who says that she herself is a marriage-broker and that she had attempted to arrange a marriage between this Ram Kali and Chhattarpal Singh. She also says—and this is the main point in her evidence—that Chhattarpal Singh in her presence gave a puria to Sukhpala and that this puria was alleged to contain basi karah, that is to say, a drug designed to bring some person under the power of the person administering it. She also says that there had been a conversation between Chhattarpal Singh and Sukhpala about administering such a drug on a previous occasion.

The first question which we have to decide is whether the evidence is sufficient to convict Chhattarpal Singh of any offence. In our opinion it is not. The statement made by Sukhpala when she was accused by every one of the murder was purely self-exculpatory and any statement which she made implicating another person is without value in evidence. Leaving her confession aside the statement of Shahzadi alone merely shows that Chhattarpal Singh gave a puria to Sukhpala. It does not show what the contents of the puria were, and it does not show that the

contents of that very puria were administered to the deceased and caused his death. The evidence is in our opinion too slight to justify the conviction of Chhattarpal Singh for abetting any offence which Sukhpala may have committed.

We have now to consider what offence was committed by Sukhpala. She herself is ready to accept the decision of the Sessions Judge that she has committed an offence under S. 304-A, I. P. C. S. 304-A is causing death by doing any rash or negligent act not amounting to culpable homicide. We are aware that there have been cases in which women, who have administered poisonous drugs under the genuine impression that they were love philters and would not cause the death of the persons to whom they were administered, have been found by certain Courts to have committed an offence under S. 304-A. No doubt the decisions in those cases were justified by their special circumstances. But we are of opinion that where a woman of middle age administers to her husband arsenic disguised in sugar and placed in his food and thereby causes his death, she must accept the full responsibility of her action. Such a woman is Sukhpala, the accused in this case. This is the view laid down by a Bench of the Allahabad High Court in the case of *Emperor v. Gauri Shankar* (1), and as far as we are aware there is no later decision of any High Court in India which expresses a different view. That case was like this a case of arsenic poisoning and arsenic was described by the learned Judges as "a substance with the effect of which the agriculturist population in Northern India is well acquainted".

and we accept the view of the learned Judges that a person who administers a well-known poison like arsenic to another

"must be taken to know that his act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and if death ensue he is guilty of murder notwithstanding that his intention may not have been to cause death."

We do not believe that Sukhpala was unaware of the properties of arsenic or of the fact that in her confession she sets up this defence is no reason why the Court should believe that defence if

(1) [1918] 40 All. 860=19 Or. L. J. 382=44 I. A. 686.

the face of the evidence. Apart from the story of Chhattarpal Singh and his projected marriage there is abundance of evidence that Mt. Sukhpala was on bad terms with her husband, and in particular that he resented her visits to the house of her married daughter, and he had on at least one occasion dragged her out of that house in ignominy in the presence of witnesses. It was in this house that Hanuman Singh lived and it appears that the village people were under the impression that she had some improper intimacy with Hanuman Singh. Whether this be so or not is of little importance; it is certain that the woman was on bad terms with her husband on this account, and it is not necessary to find any further motive for the crime such as that which she herself gives by implicating her co-accused Chhattarpal Singh.

We find therefore that Chhattarpal Singh should not have been convicted at all, and we allow his appeal and set aside his conviction and sentence. Consequently we must disallow the Government appeal in his case and we declare him to be acquitted. As to Sukhpala we consider that she was wrongly acquitted of the offence of murder and therefore wrongly convicted of an offence under S. 304-A. We therefore allow the Government appeal in her case, set aside her conviction under S. 304-A and, finding her guilty of an offence under S. 302, I. P. C., we sentence her to transportation for life. In our opinion this is not a case in which the death penalty should be inflicted on a woman of her age.

K.N./R.K.

Sentence enhanced.

1930 Cr. Cases 1168

(Rangoon)

BAGULEY, J.

S. C. Guha—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 238-B of 1930, Decided on 2nd July 1930, from order of Second Addl. Magistrate, Moulmein, D/- 24th March 1930, in Criminal Regular Trial No. 124 of 1929.

(a) Principal and Agent—Agent undertaking to be insurer of goods made over to his charge for separate consideration—He does not cease to be agent.

It is quite possible that an agent might make himself responsible for loss or damage to

goods belonging to his principal. There is nothing in law which would prevent an agent undertaking to be an insurer of goods consigned to his care provided that there is consideration for that insurance and this consideration would have to be something outside the terms of the employment at the ordinary rate: 7 L. B. R. 278, *Ref.* [P 1169 C 2]

(b) Penal Code (1860), S. 409—Goods entrusted to firm and not to its manager personally—He is not criminally liable for breach of trust in respect of goods.

A person who is the manager of the firm cannot be held criminally liable for breach of trust where there is no personal entrustment of goods to him but to the firm in respect of which the offence was alleged to have been committed. [P 1170 C 2]

Judgment.—This is an application in revision. The applicant S. C. Guha has been convicted under S. 409, I. P. C., of criminal breach of trust of goods valued at Rs. 8,081-12-0 as an agent and employee of the Dunlop Rubber Co., (India) Ltd. His appeal to the Sessions Judge was dismissed and he now comes to this Court in revision.

The allegation of the complainant is that Guha was a "stockist" of Dunlop tyres; that as a "stockist" he was entrusted with goods on what is known as "consignment terms." The contract which is the basis of the case is contained in a letter filed as Ex. A. At the end there are four spaces against which are printed the caption "Name in full," "Address," "Dated at," and "Signature." "Name in full" is written against National Cycle and Motor Company, and "Signature" is against S. C. Guha. The document is in the form of a letter addressed to the Dunlop Rubber Company (India) Limited, and begins:

"Dear Sirs.

In consideration of your placing my name/our name upon your list of traders who will have the benefit of holding consignment stocks of Dunlop pneumatic tyres, covers and tubes and for Dunlop sold tyres, during the session ending 30th September 1929, I/We hereby agree as follows:

1. You are, subject to the terms hereof, to supply me/us, unless prevented by causes beyond your control, with such stock of Dunlop goods as may be agreed upon between us from time to time to be managed by me/us on your behalf in the way of my/our trade, and as far as possible during the continuance of this agreement to replace the same as and when sold.

2. I/We shall from time to time acknowledge receipt in writing in the form prescribed by you of all stocks of Dunlop goods immediately same are delivered to me/us, and such stock shall remain your absolute property until same is sold and paid for by me/us at your list price.

less agreed discounts and I am/We are to be deemed to be a trustee/trustees of the said stock for you and on your behalf until you are paid in cash for same.

3. All sales from the said stock shall be on your account, and, all cash received in payment for the said stock shall, until payment is made by me/us in trust for you. When any such article has been sold I am/We are to advise you of the sale forthwith in the form prescribed by you.

4. I am/We are to send you on the 15th day each month or such date as you may advise later a detailed return in the form prescribed by you setting out the stock position from the date of the previous return of all Dunlop goods I/We held in stock on your behalf and provided I/We settle your accounts before the 5th day of the month following sale you are to allow me/us a settlement discount of 5 per cent.

5. I/We undertake to keep and maintain all goods supplied to me/us under this agreement in a safe, sound and saleable condition and do hereby undertake to indemnify you against all loss to such goods from fire, theft, pilferage or from any cause whatsoever and will afford your traveller, or other representative every facility at any time during business hours to inspect and check the said stock, and if at any time any article be missing, destroyed or damaged, I/We will forthwith pay you the then current list price, less agreed discount of such article.

The remainder of the document is not material at the present time.

The main defences relied upon are firstly that the offer contained in the document, if accepted, would not constitute the executant an agent of Dunlops, and in the second place that the applicant is not the executant of the document personally. It was argued on behalf of the applicant that the offer contained in this letter, if accepted by Dunlops, would merely make the executant a purchaser of the goods, the main point relied upon being that the stockist undertakes to keep all goods made over to him under the agreement in sound and saleable condition and undertakes to indemnify Dunlops against all loss to such goods from fire, pilferage etc., and on the principles laid down in *Po Yuet v. Emperor* (1) it was argued that, as the loss, if the goods were damaged, would fall upon the stockist, the goods must be regarded as his. I wish in no sense to be regarded as dissenting from the principles laid down in this ruling, but it appears to me to be quite possible that an agent might make himself responsible for loss or damage to goods belonging to his principal. There is nothing in law

(1) [1918] 7 L. B. R. 278=15 Cr. L. J. 452=24 I. O. 392 (F. B.).

which would prevent an agent undertaking to be an insurer of goods consigned to his care provided that there is consideration for that insurance and this consideration would have to be something outside the terms of the employment at the ordinary rate. Ex. A seems to suggest that a stockist under this agreement has something beyond the ordinary commission that the usual dealer on commission might be expected to receive. The opening words of the letter refer to a stockist being placed on the special list of traders, and there is the obvious benefit that a stockist appointed under this agreement holds in that he does not have to pay for the goods less the usual trade discount on receipt of the goods. It is in evidence that in addition to this relationship of stockist for tyres the parties were also dealing with one another in what is referred to as the "straight sales basis" in which the goods were consigned to the dealer presumably either subject to the usual trade discount or for cash. Goods sold under the stockist agreement required no outlay on behalf of the stockist until the goods were actually sold by him, and then he was allowed to retain the cash for a certain length of time before remitting it to Dunlops. In addition to this there is a specific discount referred to as "settlement discount" subject to the goods being paid for on due date, and it was also pointed out in argument that by virtue of his stockist agreement the stockist would obtain by supplying goods from his stock to other dealers at trade rate a percentage on all Dunlop tyres sold within the Moulmein area, for all other dealers would get their goods from him to sell there.

For these reasons I would hold that there is nothing impossible in a stockist on these terms being agent of Dunlops. The stockists directly in terms undertake to be an agent of Dunlops. In Cl. (2) he states that he is to be deemed to be a trustee of the stock on behalf of Dunlops, until he pays in cash for the goods. In Cl. (3) he undertakes that all sales from stock shall be on Dunlop's account and all cash received in payment of the stock shall, until paid to Dunlops, be held in trust for them, and when a man explicitly declares himself to be a trustee or agent

in this manner, I do not consider the fact that for a specific consideration he insures the goods made over to his charge would prevent him from being an agent. The next point for consideration therefore is whether the application under this agreement became the agent of Dunlops.

The letter is in a printed form in which the words "I" and "we" both appear and neither the "I" nor the "we" has been scratched out. But at the bottom of the letter the name in full is the National Cycle Motor Company. There is evidence which does not seem to have been seriously disputed that the National Cycle & Motor Company is a family firm, of which Guha is the Managing Agent, but in which other members of the family sometimes assist. There is nothing on the record which leads one to suppose that Dunlops regarded themselves as dealing with Guha as a man. One bundle of exhibits, the G series, apparently invoices, are all made out in the name of Messrs. The National Cycle & Motor Company. The prosecution have also filed a number of letters; Ex. H is addressed to Messrs. The National Cycle & Motor Company and it begins "Dear Sirs," and is signed "Yours faithfully, for and on behalf of the Dunlop Rubber Co. (India) Ltd." Ex. I is the same. Ex. J is slightly different being in the form of what would be known in Government circles as a D. O. letter and is addressed to S. C. Guha, Esq., C/o The National Cycle & Motor Company, and begins "Dear Mr. Guha," and is signed "Yours sincerely." Ex. K is the same. Ex. L is headed "Mr. S. C. Guha, the National Cycle & Motor Company" and begins "Dear Mr. Guha." It is signed "Yours faithfully, F. F. M. Ferguson, District Manager," and is also of the D. O. type, and the reply thereto, Ex. M, is addressed to Mr. F. F. M. Ferguson and signed "Yours faithfully, S. C. Guha," Ex. N is of the same type. In Ex. P we find the official type once more and is addressed to Messrs. The National Cycle & Motor Company, and begins "Dear Sirs" and is signed "Yours faithfully, for and on behalf of the Dunlop Rubber Co. (India) Ltd., F. F. M. Ferguson, District Manager." Again Ex. Q which is a deed of assignment of certain agreements to Dunlops is des-

cribed at the beginning as being made between the National Cycle & Motor Company of Lower Main Road, Moulmein, represented by S. C. Guha, their managing representative of the same address, and the Dunlop Rubber Co. (India) Ltd.

These series of extracts and exhibits show quite clearly that Dunlops regarded the National Cycle & Motor Company as being a firm of which S. C. Guha was the Manager, and it seems clear that the company regarded themselves as dealing with the firm. This being the case I fail to understand how Guha personally could have been regarded as a stockist under Ex. A. In my opinion the stockist was the firm and therefore it was the National Cycle & Motor Company who were the agents of Dunlops, under this agreement, and not Guha personally. There can, I think, be no possible doubt that, if Dunlops were reduced to filing a civil suit on the basis of Ex. A, they would have to make the National Cycle & Motor Company the defendants and not Guha personally, except possibly as a member of the firm for the price of the goods. It seems to me to follow that the goods were entrusted to the firm and not to Guha, and, if there was no personal entrustment to Guha, he cannot be regarded as criminally liable for breach of trust. Guha's position under Ex. A is such that he could not be held personally liable in a civil Court for goods delivered under it, and a man cannot be held criminally liable for goods for which he is not even civilly liable.

I have been referred to a number of cases in the course of argument, but in consequence of the view that I take of the letter Ex. A, it is unnecessary to deal with the question of whether there was actual shortage in the payments which were made for the goods, as I consider Guha personally was neither the agent nor the servant of Dunlops and this being the case the charge of criminal breach of trust under S. 409, I. P. C., is bound to fail. I therefore set aside the conviction and sentence and acquit the applicant.

P.N./R.K. *Conviction set aside.*

1930 Cr. Cases 1171

(Privy Council)

(From British Columbia)

25th November 1929

THE LORD CHANCELLOR, LORDS MER-
RIVALE, ATKIN, THANKERTON AND
RUSSELL OF KILLOWEN

• Chung Chuck—Appellant.

Rex—Respondent.

Privy Council Appeals Nos. 73 and 74
of 1929.Privy Council Act. — Special leave to
appeal in criminal case cannot be granted.
—Criminal Trial.Special leave for appeal cannot be granted
under Privy Council Act (1884) in a criminal
case: *Nadan v. King*, (1926) A. C. 482, *Foll.*
[P 1475 C 2]H. Wood and C. F. R. Pincott — for
Appellant.H. B. Robertson and T. Matthew — for
Respondent.H. P. Macmillan, F. P. Vercoe and H.
Hall—for Intervener.

The Lord Chancellor.—These are consolidated appeals from a judgment of the Court of Appeal of British Columbia, and they arise out of the prosecutions instituted against the appellants for offences against the Produce Marketing Act (Statutes of British Columbia, 1926-27, Chap. 54), as amended by the Produce Marketing Act Amendment Act (Statutes of British Columbia, 1928, Chap. 39), and certain regulations and orders made thereunder.

The appeals are brought in pursuance of leave granted to the appellants by the Court of Appeal of British Columbia. Though the proceedings in the Courts below were somewhat different in form, both appeals raise the same point for decision here. The appellant in the first appeal, Chung Chuck, who resided and grew potatoes within the area in question in 1928, was charged on 8th August 1928, with unlawfully marketing potatoes on 29th June 1928, within British Columbia without the written permission of the Mainland Potato Committee, and was convicted and fined \$10, and in default of payment, one month's imprisonment. The appellant applied by way of habeas corpus and writ of certiorari for his discharge from custody, alleging that the said Produce Marketing Act was ultra vires of the legislature of the Province of British Columbia, for certain reasons which for the moment need not be set

forth. On 27th August 1918, Murphy, J., dismissed the appellant's application, holding that the statute in question did not infringe upon the powers of the Dominion Parliament under heads (2) and (27), S. 91, British North America Act, nor upon S. 498, Criminal Code, Revised Statutes of Canada 1927, Chap. 36, and further holding that if the statute did infringe upon S. 498 this section was ultra vires of the Dominion Parliament. It is unnecessary to discuss in detail the circumstances giving rise to the second appeal. The appeals—which have been consolidated—raise the same point.

The appellant, Chung Chuck, appealed to the Court of Appeal, and on 8th January 1929, the appeal was unanimously dismissed. In *Wong Kit's* case, the appellant's acquittal by the Police Magistrate having been upheld by the Supreme Court, the Crown was the appellant in the Court of Appeal, and that appeal was allowed.

As already stated, the Court of Appeal granted leave to the appellant in both cases to appeal to His Majesty in Council. The Attorney-General of the Province of British Columbia put in a petition in which he denied the competency of the Court of Appeal to give leave. He says in para. 12 of his petition:

"That your petitioner respectfully submits that the conviction of the appellant by the said stipendiary Magistrate on the said 8th day of August 1928, was a conviction in a criminal case in respect of a breach of a statute passed by the legislature of the Province of British Columbia."

Then he cites the case of *Nadan v. King* (1) and says:

"It was held by the Lords of the Judicial Committee of the Privy Council that such a conviction was within S. 1025, Canadian Criminal Code, Revised Statutes of Canada, 1906, Chap. 146."

Then he says in para. 14:

"That the said S. 1025, Canadian Criminal Code provides inter alia as follows: 'No appeal shall be brought in any criminal case from any judgment or order of any Court in Canada to any Court of Appeal or authority by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard.'"

Then he submits that by reason of the matters set forth in the paragraphs referred to the Court of Appeal of British Columbia had no jurisdiction to make the order under which they gave leave to appeal. That particular con-

(1) [1926] A.C. 482.

tention is supported by the Attorney-General of the Dominion of Canada, and a preliminary objection is taken that these appeals are not competent because the Court of Appeal of British Columbia had no power to give leave to appeal. In those circumstances it is incumbent upon the appellants to show, two things, and they took two points. First of all they say:

"This matter was not a criminal matter at all, and therefore we have a right to appeal, it being a civil matter, or at any rate, not a criminal matter."

and secondly:

"Even if it is a criminal matter still, under the Order in Council of 23rd January 1911, the Court of Appeal of British Columbia had power to give us leave to appeal and we are entitled to prosecute the appeal."

With regard to the first point, was this a criminal matter? The relevant section of the Act in question, which is "an Act respecting the marketing of fruit and other produce,"

is S. 20, which provides:

"Every shipper guilty of an offence against this Act shall on summary conviction, be liable, if an individual, to a penalty not exceeding \$1,000 or to imprisonment for a term not exceeding one year, and if a corporation to a fine not exceeding \$10,000; and every other person guilty of an offence against this Act shall be liable on summary conviction to a fine not exceeding \$1,000."

Are an offence under S. 20 and the proceedings consequent upon the offence criminal matters? It appears to their Lordships that they are criminal matters. The section speaks about an offence punishable on summary conviction, exposing an individual who has been found guilty of an offence not only to a fine but to imprisonment, and in this respect it does not differ from the facts in *Nadan v. King* (1) where Viscount Cave, then Lord Chancellor, in giving judgment in a similar matter, said this at p. 489 of the report:

"It was argued on behalf of the appellant that neither of these appeals was brought in a 'criminal case' within the meaning of the above section; but in their Lordships' opinion this argument cannot prevail. In each of the cases the appellant was charged with an offence against the public law and a sentence of imprisonment could be and was imposed."

The particular law in question in that case was not a law of this particular province; it was a law of the Province of Alberta, but the reasoning is the same, and it appears to their Lordships that the first point made by Mr. Wood, counsel for the appellants, namely that this was not a criminal matter, but was

a civil matter, in which they therefore had a right to appeal, fails.

The next point to be considered is whether Mr. Wood has shown that it is competent for the Court of Appeal of British Columbia to have given leave to appeal. He quite rightly points out that in the petition of the learned Attorney-General for the Province of British Columbia supported, as it was, by the learned Attorney-General for the Dominion of Canada, S. 1025 of the Canadian Criminal Code is relied upon, and *Nadan's* case (1) is cited, but the view which their Lordships take of the present circumstances renders it unnecessary for them to go into those points or into any question as to a conflict between the Dominion and the Provincial Legislatures in respect of that section. As already stated it is for Mr. Wood to satisfy the Board that it is competent for him to appeal, that is to say, that it was competent for the Court of Appeal of British Columbia to give the leave to appeal in question. The way in which he seeks to show that is by citing the Order in Council to which reference has been made. That Order in Council was passed in pursuance of the Privy Council Act of 1844 which provides that

"it shall be competent to Her Majesty by any order or orders that may from time to time for that purpose be made, with the advice of Her Privy Council, to provide for the admission of any appeal or appeals to Her Majesty in Council from any..."

Attention is called to these words: "judgments, sentences, decrees or orders of any Court of justice within any British colony or possession abroad, although such Court shall not be a Court of error or Court of appeal within such colony or possession."

Their Lordships pause for a moment to observe that the word "decision" is not one of the words used in that section. The words are:

"judgments, sentences, decrees or orders of any Court of justice."

By an Order in Council referring to British Columbia, passed on 12th July 1887, not the present Order in Council, but the one which preceded it, it is provided:

"Whereas it is expedient that provision should be made by this Order to enable parties to appeal from the decisions of the said Supreme Court of British Columbia to Her Majesty in Council, it is hereby ordered: (1) Any person or persons may appeal to Her Majesty, her heirs and successors in her or their Privy Council from any final judgment, decree, order or sentence of the said Supreme Court of

British Columbia in such manner, within such time and under and subject to such rules, regulations and limitations as are hereinafter mentioned;

that is to say:

"In case any such judgment, decree, order or sentence"

Again, their Lordships pause here for a moment to point out that the word, "decision" is not used in the operative part, although it is used in the recital.

"shall be given or pronounced for or in respect of any sum or matter at issue above the amount or value of £300 sterling, or in case such judgment, decree, order or sentence shall involve, directly or indirectly, any claim, demand or question to or respecting property or any civil right amounting to or of the value of £300 sterling, the person or persons feeling aggrieved by any such judgment, decree, order, or sentence may within fourteen days next after the same shall have been pronounced, made or given apply to the said Court by motion or petition for leave to appeal therefrom to Her Majesty."

That being the position of affairs on and after 12th July 1887, a subsequent Order in Council was passed, which is the Order in Council to be interpreted in the present case, on 23rd January 1911. As to that Mr. Wood's contention is as follows: He says, after the passing of the last recited Order in Council, an Act was passed in British Columbia constituting the Court of Appeal, that is, the Act of 1907 of the Statutes of the Province of British Columbia, Chap. 10, which provides in S. 6:

"The Court of Appeal hereby constituted shall be a superior Court of record. . . . And without restricting the generality of the foregoing an appeal shall lie to the Court of Appeal,"

then,

"(4) from every decision of the Supreme Court or a Judge thereof . . . in any of the following matters or in any proceeding in connexion with them or any of them ;"

then (e) is :

"Case stated under the "Summary Convictions Act."

Then by S. 8 it is provided:

"For all the purposes of and incidental to the hearing and determination of any matter within its jurisdiction and the amendment, execution and enforcement of any judgment or order, and for the purpose of every other authority expressly or impliedly given to the Court of Appeal by this Act, the Court of Appeal shall have the power, authority and jurisdiction vested in the Supreme Court."

The way in which Mr. Wood uses that Act is this. He says the word "decision" there evidently refers to a case stated under the Summary Convictions Act, and therefore the meaning of the word "decision"—putting his argu-

ment generally—will embrace or will include a criminal cause or matter.

Their Lordships now come to the section of the new Order in Council itself. It says, subject to the provisions of these rules an appeal shall lie in certain cases which are set out in (a) and (b) of S. 2, and it is necessary to read both of those: (a) is:

"As of right from any final judgment of the Court where the matter in dispute on the appeal amounts to or is of the value of £500 sterling or upwards, or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the value of £500 sterling or upwards."

It is not contended that a criminal matter is provided for in S. 2 (a), but Mr. Wood's point is it is provided for in S. 2 (b), which says:

"Subject to the provisions of these rules an appeal shall lie at the discretion of the Court," which Mr. Wood says has happened in this case; he says that the discretion of the Court of Appeal of British Columbia has been exercised in his favour "from any other judgment of the Court, whether final or interlocutory, if in the opinion of the Court the question involved in the appeal is one which by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision."

"That," says Mr. Wood,

"is my charter; the Court of Appeal of British Columbia was entitled under S. 2 (b) to give me leave to appeal; they did give me leave to appeal, and therefore the preliminary objection ought to fail."

Their Lordships have been assisted by learned counsel on all sides, Mr. Wood, Mr. Macmillan and Mr. Robertson, by being referred to a number of cases, but in the view that they take of the cases it is hardly necessary for them to go into them at any length, and they do not propose to do so. The first case cited was *The Canadian Pacific Wine Company v. Tuley* (2), which decided that the British Columbia Prohibition Act of 1916 and the Summary Convictions Act of 1915 were both valid and within the competence of the Legislature of British Columbia. The next case cited was *The King v. Nat Bell Liquors* (3), where their Lordships think Mr. Macmillan was right in saying that the Board decided towards the close of the judgment delivered by Lord Sumner that there was a part of the criminal

(2) [1921] 2 A. C. 417.

(3) [1932] 2 A. C. 128.

law which was within the competence of the Provincial Legislature. Finally there was the case of *Nadan v. King* (1), where it was held that S. 1025 of the Criminal Code of Canada did not exclude the prerogative of the Crown to give leave to appeal.

None of those cases really touched the point which their Lordships have to decide, which is a very short one, that is to say, does S. 2 (b) of the Order in Council of 23rd January 1911, give the authority to the Court of Appeal which Mr. Wood claims that it does give?

First of all it is necessary to look at the recital to the Order in Council to see whether any hint can be derived from that. It appears rather as if Mr. Wood would have to contend that the Order in Council of 1911 goes further than the Order in Council of 1887, but in the recital it is said :

"And whereas it is expedient, with a view to equalising as far as may be the conditions under which His Majesty's subjects in the British Dominions beyond the seas shall have a right of appeal to His Majesty in Council and to promoting uniformity in the practice and procedure in all such appeals, that the rules regarding appeals from the said Supreme Court contained in the said Order in Council should be revoked and provision should be made for appeals from the said Court of Appeal to His Majesty in Council."

That appears from the recital to be an Order in Council dealing with practice and procedure and to unify the practice and procedure, as it says, in the British Dominions beyond the seas, and, if that is right, it would be a rather strong thing to give an interpretation to that Order in Council under which the new Order in Council, purporting to unify the practice, should in addition to that confer fresh rights.

But Mr. Wood's argument proceeds in this way. He says there are two words in the definition of "judgment" which are in his favour. It will be recollected, the words are

"subject to the provisions of these rules an appeal shall lie as of right from any final judgment of the Court,"

or "at the discretion of the Court from any other judgment," and "judgment" means decree, order, sentence or decision. Their Lordships think when Mr. Wood made his first submission with regard to the word "sentence" he rather relied upon the fact that the word "sentence" was a word which was appropriate to

some procedure in criminal law, but when he replied to Mr. Macmillan he did not put his case quite as high as that, nor, indeed, could he have done so. Although the word "sentence" no doubt in the minds of some people is peculiarly appropriate to criminal cases and is chiefly heard in criminal trials, there is a great difference between verdict and a sentence, and it would be very strange if leave to appeal was to be given only against a sentence and not against a conviction. As has been pointed out in the course of the argument, "sentence" is a well-known word in common law, and their Lordships do not think the word "sentence" carried Mr. Wood the distance he would like to be carried, so as to give the right to give leave to appeal in a criminal case. With regard to the word "decision," Mr. Wood says that is the word used in the Act which constitutes the Court of Appeal of British Columbia and includes reference to matters under the Summary Convictions Act, but it does not seem to their Lordships, having regard to the whole of the legislation, that any serious argument can be built upon that foundation. It has already been pointed out how the word "decision" is used. Sometimes it is used in the recital as it was used in the recital to the first of the two Orders in Council; it is not in the original Act of Parliament, it is not in the operative words of the first Order in Council, and, although it might be said that the word "decision," if it stood alone, might possibly embrace matters both of civil and criminal law, the word "decision" is not used alone here. One cannot take one word out of the Order in Council and say it may include criminal law; one must look at the whole of the Order in Council itself. It being perfectly clear that S. 2 (a) refers to civil matters, when we come to S. 2 (b) the words are :

"Subject to the provisions of these rules an appeal shall lie at the discretion of the Court," from any other judgment, and it looks as if the word "other" refers and relates back to the same sort of judgments as those which are referred to in S. 2 (a), that is to say, a judgment

"where the matter in dispute amounts to or is of the value of £500 sterling or upwards,"—that is clearly not a criminal matter—

"or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right."

The words can be satisfied in this way. It may well be contended in normal cases there is to be no appeal and no leave to appeal where the matter in dispute is under £500, but there may be some cases in the nature of a test action where, although the value of the question involved is a few shillings or a few pounds only, it may involve many thousands of pounds over the whole of the province. S. 2 (b) would involve a case like that. Finally, if one looks through the Order in Council itself one sees there a great number of provisions for the purpose of dealing with cases where leave to appeal is given which are entirely appropriate in civil matters; and not only not appropriate in criminal matters but criminal matters do not appear to be provided for if they are included within the word "decision." Take, for example, S. 6, Order in Council. It is pointed out by Mr. Macmillan that it provides for a stay of execution which is entirely appropriate in a civil case, if leave is given to appeal, but it is not appropriate, nor indeed is there any provision made as to what is to happen to a man who has been sent to prison and special leave is given to him to appeal to His Majesty in Council.

To sum up: (1) Although the word "decision" standing merely by itself might be sufficient to cover a decision either in a civil or in a criminal case, the word does not stand by itself, but is in an Order in Council containing a number of other provisions working out the procedure; (2) the Order in Council itself recites that it is passed for the promotion of uniformity in practice and procedure of all such appeals, and one would not expect to find it conferring new rights of appeal when it only purports to deal with practice and procedure in appeals; (3) the way in which S. 2 is drafted first of all in (a), where it merely relates to civil cases, and in (b), where it says that there is an appeal at the discretion of the Court from any other judgment, again points to the fact that 2 (b) is simply referring to the same class of case as 2 (a), namely to civil cases and not to criminal cases.

In those circumstances their Lordships have arrived at the conclusion that Mr. Wood has not made out either of his points. He has not made out point (1), that this is not a criminal matter. Their Lordships think it is a criminal matter. He has not made out point (2), that the Order in Council of 23rd January 1911 gave a right to the Court of Appeal to give leave to appeal in criminal matters. In the result the preliminary objection succeeds, not, indeed for the reasons already given, upon the point which is in the petition of the learned Attorney-General of British Columbia, supported by the learned Attorney-General of Canada, but upon the point that Mr. Wood has not satisfied their Lordships that it is a civil matter or that there was a right in the Court of Appeal of British Columbia to give leave to appeal in a criminal case. That being so it is unnecessary to proceed with the hearing of the appeal, the preliminary objection being a good one which must prevail.

At the last moment Mr. Wood detailed to their Lordships the great importance of this case, and he told them, and they entirely accept his statement, that there is a number of matters in British Columbia which are depending upon the decision in this case, and he asks whether their Lordships could not here and now advise His Majesty to grant him special leave to appeal. In their Lordships' opinion that would be a very inconvenient course, and they do not think it would be right to accede to it. It must be remembered that their Lordships have decided that this is a criminal matter. They do not wish in any way to decide a question which has only been mentioned at the last moment and upon which they have not heard the respondent. Their Lordships would however point out, without in any way prejudging or discountenancing any further steps which the parties may desire to take, that the final words in the report of the case of *Nadan v. King* (1) will make it very difficult to induce this Board to advise the granting of special leave to appeal in a criminal case.

In the result, in their Lordships' opinion, the preliminary objection succeeds, and they will accordingly humbly advise His Majesty that both appeals

ought to be dismissed; but, the respondents and the intervener not asking for them, without costs.

V.B./R.K. *Appeals dismissed.*

Solicitors for Appellant — *Black & Redden.*

Solicitors for Respondent — *Gord, Hyell & Co.*

1930 Cr. Cases 1176

(Madras)

Full Bench

BEASLEY, C. J., SUNDARAM CHETTY
AND WALSH, JJ.

In the matter of R. V., Advocate, High Court, Madras.

Case under S. 12 (3), of Indian Bar Councils Act, Decided on 28th July 1930.

Legal Practitioners Act (1879), S. 13—Legal practitioner receiving money on behalf of client and retaining it in his hands without authority from client—He subsequently treating it as loan and giving security which he felt himself at liberty to withdraw at his own will—This amounted to professional misconduct.

A legal practitioner received money from the Court on behalf of his client and retained it in his own hands without any authority from the client so to retain it. Subsequently he chose to treat it as loan and gave security which he felt himself at liberty to withdraw at his own will and pleasure.

Held: that this was a grave offence which amounted to professional misconduct, for no practitioner was entitled to hold his client's money in his hands and to use it himself for his own private purposes without the consent of his client. [P 1177 C 1]

K. Krishnaswamy Iyengar — for the Advocate concerned.

The Advocate-General—for the Crown.

Beasley, C. J.—This matter comes up before us on a report by the Tribunal of the Bar Council. A charge was framed by the Tribunal against the advocate of having received a sum of Rs. 150 on behalf of the complainant who was the plaintiff decree-holder in a suit in the Small Cause Court, Madras, and appropriated that money to his own use without any authority from him. The facts of the case are that on 5th November 1927 the advocate received a cheque for Rs. 150 from the defendant judgment-debtor in the suit already mentioned in pursuance of the decree in that case and that on 7th November he cashed that cheque; and the case against him is that he put the proceeds of that cheque into his own pocket and utilized those proceeds for his own pur-

poses. The petitioner made demands upon him for payment of the money by Ex. K, dated 25th November 1927, Ex. A, dated 3rd December 1927 and Ex. C, dated 26th January 1928. On 1st February 1928, by adjustment, the advocate paid Rs. 105-9-9 towards the amount of Rs. 150. Previous to this he had given a security letter to the complainant by means of which he pledged his horse and carriage with him. His case is that the complainant accepted the horse and carriage as security for the Rs. 150 then outstanding. His defence is that the complainant was out of Madras at the time when he received the cheque. There is certainly evidence, the complainant's diary, that with the exception of about a day and a half he was out of Madras and did not return until 19th November, and that on the day he returned or some date afterwards he tendered the Rs. 150 to the complainant asking him at the same time to lend him that amount for a fortnight and that the complainant agreed. This defence the Tribunal has totally disbelieved, and in fact it is definitely and flatly contradicted by two exhibits in the case. Putting it at its very earliest, the date of the alleged loan was 19th November, and therefore the fortnight's time would expire on 3rd or 4th December yet it is very strange to find that on 3rd December there is a letter written by the complainant to the advocate (Ex. A) demanding payment of the amount by 8 p. m. and stating that if the amount was not paid by that time, he would be compelled to seek legal help to realize the amount from the advocate and take such other steps as might seem necessary. That certainly is quite inconsistent with the advocate's case that there was an arrangement to lend the money for a fortnight. But there is a stronger piece of evidence than that, and that is to be found in Ex. K, dated 26th November 1927. That is a letter from the complainant to the advocate and reads as follows:

"Will you please pay the amount to Mr. V. B. Krishnaswami Mudali viz. Rs. 150 due to me in S. C. S. No. 10700 of 1927 of Small Cause Court paid by B. Satyanarayana to the credit of the above suit."

That again is quite inconsistent with the advocate's statement that the money was by arrangement to be treated as a loan to him for a fortnight.

We are in complete agreement with the Tribunal in coming to the view that this story of the alleged loan is a complete concoction. With regard to the security letter Ex. 11, dated 20th January 1928, written by the complainant to the advocate stating "I hope you will not remain quiet with the idea that you have assigned me the horse and carriage as security." It seems to us to indicate that the security letter had been pressed upon the complainant by the advocate who was in financial difficulties at the same time and unable to pay, and it certainly is by no means clear that the complainant ever accepted that security at all. The fact remains that from the date of receipt of the money to the date when the security letter was given the advocate retained in his own hands the money which belonged to his client without any sort of authority from his client at all to so retain it. That of course is, as the Tribunal has found, misconduct and we are bound to say that it is clearly professional misconduct. No practitioner is entitled to hold his client's money in his hands and use it himself for his own private purposes without the consent of his client, and the Tribunal has found that he has been guilty of that offence. We might at the same time add that when a person who is not a practitioner receives money in his hands for some other person and converts it to his own use he commits the offence of criminal breach of trust, and that offence is none the less committed because a person happens to be a legal practitioner. Such acts as these are very serious ones indeed and certainly cannot be dealt with lightly by any Court. This advocate has already been dealt with in this Court on another occasion in 1928 when he was sentenced to be suspended for six months for an offence similar to this committed in 1927; so that this is the second case of professional misconduct and dishonesty. We have had urged upon us by Mr. K. Krishnaswamy Iyengar the fact that the security letter was executed by the advocate and that some time the complainant was in possession of the horse and carriage, but we are now told that after the arrangement, by means of which Rs. 105 odd was paid to the complainant, the advocate took back the horse and carriage and

this was of course whilst the balance of the amount was still unpaid and it still remains unpaid. That does not seem to us to be an extenuating circumstance at all. The facts of the case are that the advocate kept this amount in his own hands, used it for his own purposes, chose to treat it as a loan and then gave security for it which he felt himself at liberty to withdraw at his own will and pleasure. This is a very grave case and we have very carefully considered what our order should be as regards the sentence to be passed upon him. Speaking for myself, I had at one time the view that this being the second offence of this nature, the advocate should be prevented from practising again. However, after mature consideration we are going to pass an order which, in view of the circumstances, we consider to be a light sentence. The order of the Court is that Mr. V. Advocate, be suspended from practice for 18 months from this date.

P.R.S./S.N.

Order accordingly.

* 1930 Cr. Cases 1177

(Rangoon)

DOYLE, J.

Ali Hossein and others—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. Nos. 174-B to 178-B of 1930, Decided on 11th June 1930, from order of Fourth Addl. Magistrate, Myaungmya, D/- 9th November 1929, in Criminal Reg. Trial Nos. 295 to 302 of 1929.

(a) Criminal P. C., Ss. 412 and 439—High Court in revision may examine record to see if plea of guilty was based on proper conception of facts.

High Court in revision is not bound by S. 412 but may examine the record for the purpose of seeing whether the accused have had a fair trial and whether their plea of guilty was based on a proper conception of the facts.

[P 1178 C 2]

* (b) Criminal P. C., S. 342—Accused ignorant and undefended by advocates—Magistrate ought to assist them in putting up obvious defensive pleas.

It is the duty of the Magistrate, when dealing with ignorant individuals accused of technical offences, to go very thoroughly into the evidence, and where they are not defended by advocates to give them some assistance in putting up obvious defensive pleas. [P 1178 C 1]

* (c) Criminal Trial—Where there is proviso to law which if pleaded would establish sound defence accused may plead that he

was not aware of proviso—Case under S. 19 (1), Arms Act—Quantity of lead found with accused and neighbourhood suggesting that lead was used for fishing purposes—Magistrate should question accused if they were vendors of lead for fishing purposes, especially if they are not defended by advocates—Arms Act, S. 19 (1) and Sch. (2) (7) (a).

Ignorance of law cannot be pleaded as a defence where the law has been transgressed, but where there is a proviso to the law which if pleaded would establish a sound defence, an accused may under certain circumstances plead that he was not aware of the proviso.

In a case under S. 19 (1), Arms Act, quantity of lead found with the accused and the neighbourhood were such as to suggest that the lead was used for fishing purposes, the Magistrate merely asked each of the accused, whether he admitted having the lead, for sale without license although they were not represented by counsel and on their pleading guilty convicted them.

Held: that the Magistrate should have in his examination of the accused put some questions with a view to elucidating from them whether they were prima facie vendors of lead for industrial, that is fishing, purposes within the meaning of Arms Act, Sch. 2 (7) (a).

[P 1178 C 2]

S. Ganguli—for Applicants.

Judgment.—Ali Hossein, Khorban Ali, Ruston Ali, Ali Hossein, and Mahomed Suleiman have in four separate cases been fined under S. 19 (a), Arms Act, for selling military stores without a license. They are all ironmongers in Myaungmya, which is the headquarters of a large fishery industry, and the supposed military stores found in their possession was lead in quantities varying from 14 to 54 viss. In the case of Ali Hossein the lead was described as sheet lead and balls; in *Khorban Ali's* case the lead consisted of lead labels used for attaching nets, of which he is a vendor; while in the case of two of the three remaining ironmongers the lead was described as sheet and scrap. All except Mahomed Suleiman pleaded guilty, the last mentioned contending that the lead was not exposed for sale. Those who pleaded guilty were fined Rs. 10 each while Mahomed Suleiman was fined Rs. 15.

In the Court of the Fourth Additional Magistrate, Maungmya, they were not represented by counsel and there was no cross-examination of witnesses. The learned Magistrate contented himself with asking each whether he admitted having the lead for sale without a license. Each applied in revision to the Sessions Judge stating that he was a vendor of nets, and that the lead was

used for manufacturing nets. The learned Judge held as regards the four who pleaded guilty that no remedy lay as the finding of fact either in appeal or revision, and that if the lead was kept for industrial purposes they must prove it. He refused to take action. The five have now preferred applications in revision to this Court.

The High Court in revision is not bound by S. 412, Criminal P. C., but may examine the record for the purpose of seeing whether the applicants have had a fair trial and whether their plea of guilty was based on a proper conception of the facts. Ignorance of law cannot be pleaded as a defence, where the law has been transgressed, but where there is a proviso to the law which if pleaded would establish a sound defence an accused may under certain circumstances plead that he was not aware of that proviso.

Schedule 2 (7) (a) provides that lead required in good faith for industrial and manufacturing purposes (other than the manufacture of bullets or birdshot) is excepted from all the prohibitions and directions of the Burma Arms Manual. In the case of at least one of the applicants the prosecuting Sub-Inspector of Police admitted that he sold nets and that the lead found in his possession was in the form of beads for nets. In this case the presumption therefore was that he was selling the lead in good faith for industrial purposes and it is difficult to see what grounds there were for prosecuting him.

In the second case the lead was described as being in sheets and balls, but it was not suggested that it was in the form of ammunition. It is reasonable to suppose that the "balls" correspond to the "beads" mentioned in the other case.

There is ground for supposing that had the applicants known that they were entitled to plead that the lead was used for industrial purposes they would have done so. The learned Magistrate should in his examination of the accused have put some question to them with a view to elucidating whether they were prima facie vendors of lead for industrial, that is, fishing purposes, a circumstance which the quantities found and the neighbourhood would prima facie appear to suggest.

It is the duty of the Magistrate when dealing with ignorant individuals accused of technical offences to go very thoroughly into the evidence, and where they are not defended by advocates to give them some assistance in putting up obvious defensive pleas. The convictions and sentences are set aside and the fines if paid will be refunded. The cases will be classified as "mistaken."

The diary entry in each of the Fourth Additional Magistrate's Court cases under the 6th February 1930 is incorrect.

R.N./R.K. *Convictions set aside.*

1930 Cr. Cases 1179.

(Rangoon)

PAGE, C. J., AND DOYLE, J.

U Ba Thein and another—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeals Nos. 338 and 437 of 1930, Decided on 2nd June 1930, from judgment of Otter, J., in Sessions Trial No. 4 of 1930

(a) Criminal Trial — Practice — Existing practice of taking shorthand note of charge of Rangoon High Court Sessions only in cases of murder strongly deprecated.

The existing practice of taking a shorthand note of the charge of the learned Judge presiding at the Criminal Sessions of the Rangoon High Court only in cases of murder is strongly deprecated. In cases where an appeal lies, or where an application is made to the Government Advocate for a fiat, it is essential that there should henceforward be an official record of the charge that the learned Judge delivered to the jury: *A. I. R. 1924 Cal. 257, Ref.*

[P 1180 C 1]

(b) Criminal P. C. (1898), S. 342—Court cannot under S. 342 administer inquisitorial interrogatory to accused or subject him to cross-examination — When once Court is satisfied that accused appreciates salient features of evidence against him, its work is over.

Bearing in mind that the accused is not bound to set up any defence or make any statement, that what he elects to say is not evidence that any explanation that he may proffer, need not be true, and that he does not render himself liable to punishment by refusing to answer any question that the Court may put to him or by giving a false answer to the question, it becomes obvious that the Court is not entitled under S. 342 to administer an inquisitorial interrogatory to the accused or to subject him to cross examination or to ask any questions of him with a view to elicit the truth of the matter, or by a series of supplementary questions to test the accuracy or reliability of the answers that he has been willing to give. An examination on these or similar lines is not within the ambit of S. 342

and all such questions are wholly inadmissible. When once the Court is satisfied that the accused appreciates the salient features of the evidence against him, its function under S. 342 is exhausted and no further examination is permissible: *A. I. R. 1928 Cal. 470, Ref.* [P 1181 C 1, 2]

(c) Criminal P. C. (1898), Ss. 342 and 537—Accused examined, but not in conformity with provisions of S. 342—S. 537 applies.

Where the accused have been examined, but the examination is not in conformity with the provisions of S. 342, S. 537 applies to such a case and unless a failure of justice thereby has been occasioned, a conviction and sentence ought not for that reason to be disturbed: *A. I. R. 1927 P. C. 44 and A. I. R. 1930 Cal. 212, Ref.* [P 1182 C 1]

McDonnell—for Appellants.

Page, C. J.—On 24th March 1930, at the Criminal Sessions of the High Court the appellants, Maung Po Chit and U Ba Thein, were tried before Otter, J., and a jury for an alleged offence under S. 420, I. P. C. They were found guilty, Po Chit by a majority of eight jurors to one, and Ba Thein unanimously, of having cheated one H. E. Brown by dishonestly or fraudulently inducing him to deliver property and valuable securities to the amount of Rs. 17,000. Po Chit was sentenced to be imprisoned till the rising of the Court, and also to pay a fine of Rs. 1,000, or in default to suffer one year's rigorous imprisonment and U Ba Thein was sentenced to one year's rigorous imprisonment, and also to pay a fine of Rs. 1,000 or in default to suffer a further term of rigorous imprisonment for one year. Under S. 449, Criminal P. C., Po Chit and Ba Thein presented separate appeals to the High Court both on matters of fact and matters of law. At the hearing of the appeal the Crown was not represented, and no one appeared on behalf of Po Chit, but Mr. McDonnell urged the appeal on behalf of Ba Thein.

Three contentions were raised in support of the appeal. Firstly, it was urged that the conviction was against the weight of the evidence, and that on the merits the accused were entitled to be acquitted. As there must be a retrial in this case I propose to say as little as possible about the facts. To dispose of this contention it is enough that we hold that, if the jury believed the witnesses for the Crown, there was ample evidence to justify the conviction of each accused of the offence with which he was charged. The first con-

tention on behalf of the appellants therefore fails. Secondly, it was urged that the learned trial Judge misdirected the jury, because he did not explain in his charge the meaning of the terms "dishonestly" and "fraudulently" as used in connexion with the offence of cheating.

Now, the learned trial Judge possesses a wide and varied experience of the conduct of criminal trials, and it is highly improbable that Otter, J., would fail to direct the jury on so essential an ingredient in the offence of cheating. Unfortunately, however, there is no record of the charge which the learned Judge delivered to the jury, and the terms in which Otter, J., charged the jury must remain a matter of conjecture. This impasse is the result of the practice which hitherto has obtained of taking a shorthand note of the charge of the learned Judge presiding at the Criminal Sessions of the High Court only in cases of murder. How this practice has been allowed to grow up it is difficult to understand. In cases where an appeal lies, as in the present case, or where an application is made to the Government Advocate for a fiat, which may happen in any case it is essential that there should be an official record of the charge that the learned Judge delivered to the jury: see *Emperor v. Barendra Kumar Ghose* (1), and the only record of what occurred at the trial upon which reliance can be placed is that for which the presiding Judge takes responsibility. In *Barendra Kumar Ghose's* case (1) I pointed out that shorthand writers are not infallible, and emphasized

"the importance of rigidly maintaining the rule that a statement by a learned Judge as to what took place during the course of a trial before him is final and decisive. It is not to be criticized or circumvented; much less is it to be exposed to animadversion."

The present practice at the Criminal Sessions of the High Court will now cease, and in future the charge of the learned Judge is to be taken down in shorthand, and a transcript of the shorthand notes is to be made and tendered to the learned Judge, in order that he may make such corrections therein as may be necessary. The trial Judge will then sign the transcript,

and the transcript as amended and signed by the learned Judge will form the record of the charge that was delivered to the jury. No copy of the shorthand note of the charge, whether it has been transcribed or not, is to be issued to anyone except by the order of the trial Judge or of the Chief Justice. In the absence of any record of the terms in which the learned judge in the present case charged the jury it is impossible for this Court to determine whether there has been any misdirection or not. As it would, I think, be both unreasonable and unfair that the appeal of an accused person should prove of no avail merely because the practice of the Court has rendered it impracticable for him to present his appeal, in my opinion the proper course for this Court to take is to set aside the conviction and sentence in respect of each of the accused and to order that the accused be retried at the next available Criminal Sessions of the High Court.

Thirdly, it was contended that the examination of each of the accused in the Sessions Court was not in compliance with the provisions of S. 342, Criminal P. C. In my opinion this contention must be accepted, and I feel bound to say, with all due deference to the learned trial Judge, that in my opinion the examination of the accused by the Court at the trial was not such an examination as is permitted under S. 342.

It is unnecessary that I should discuss in detail the question to which objection has been taken by the learned advocate for Ba Thein. But as I have observed in other cases that there is a tendency in this country to conduct examinations under S. 342 in a manner that is unwarranted by the terms of that section, it is well that I should explain what I understand to be the scope and effect of S. 342.

In this country an accused person, save in exceptional circumstances, is not at present allowed to give evidence on his own behalf, and, however anxious the accused may be to take his stand in the witness-box and be examined and cross-examined on oath as to the truth of his story, he is deemed incompetent to do so. It is an anachronism against which I have frequently protested, and I hope that before many years have passed it will be swept away. But the

(1) A. I. R. 1924 Cal. 257=81 I. C. 353=25
Cr. J. J. 817 (F.B.).

mouth of an accused person at his trial is not entirely closed, for, although he is not entitled to give evidence, after the witnesses for the Crown have been heard, he is at liberty, if he so elects, to make a statement to the jury. His statement is not evidence, but the jury may take it into consideration, and give to it such weight as they think it deserves, as Rankin, J., observed in *Pramatha Nath Mukerjee v. Emperor* (2) :

"In this country it often happens that a prisoner is tried in a language which for one reason or another he understands but indifferently well, and for that reason as well as for other equally grave reasons the intention of the statute is that at a certain stage in the case the Court itself shall put aside all counsel, all pleaders and witnesses, all representatives, and shall call upon each individual accused with the authority of the Court's own voice to take advantage of the opportunity which then arises to state in his own way anything which he may be desirous of stating."

In these circumstances the legislature enacted S. 342 to ensure that the accused should not remain in the dark with respect to the allegations that have been made against him, and to enable the Court to put such questions to him as will help him to understand the case for the Crown.

Section 342 (1) runs as follows :

"For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence."

The section means what it says, and it is for one purpose only that the Court is entitled to examine the accused under S. 342, namely to enable the accused :

"to explain any circumstances appearing in the evidence against him."

When the scope and effect of S. 342 is understood the nature of the examination that is permissible thereunder can readily be appreciated. Bearing in mind that the accused is not bound to set up any defence, or make any statement, that what he elects to say is not evidence; that any explanation that he may proffer need not be true; and that he does not render himself liable to punishment by refusing to answer any question that the Court may put to him or by giving a false answer to the ques-

tion, it becomes obvious that the Court is not entitled under this section to administer an inquisitorial interrogatory to the accused, or to subject him to cross-examination, or to ask any questions of him with a view to elicit the truth of the matter, or by a series of supplementary questions to test the accuracy or reliability of the answers that he has been willing to give. An examination on these or similar lines is not within the ambit of S. 342, and all such questions are wholly inadmissible. I decline to lay down what the form of the examination should be, provided that the object of it is to enable the accused to explain the evidence against him, and the effect of it is that the accused appears to the Court to understand the main points in the evidence of the witnesses for the Crown. In this matter the trial Judge must exercise his discretion according to the circumstances of the particular case that is before him. But when once the Court is satisfied that the accused appreciates the salient features of the evidence against him its function under S. 342 is exhausted, and no further examination is permissible.

Now, what is the effect of an examination that is not in conformity with the provisions of S. 342? It has been decided in some cases that non-compliance with S. 352 *ipso facto* vitiates the trial; on the other hand there are authorities in which it has been held that unless there has been a failure of justice the defect in procedure is curable under S. 537, Criminal P. C. I do not pause to canvass the earlier decisions on this section because, in my opinion, all the previous authorities must be read in the light of the recent judgment of the Judicial Committee in the case of *Abdul Rahman v. Emperor* (3). In the case of the *Emperor v. Erman Ali* (4), which was decided by a Full Bench of the Calcutta High Court, I laid down the test which, in my opinion, ought to be applied in order to determine whether or not a breach of the provisions of the Criminal Procedure Code has vitiated

(3) A. I. R. 1927 P. C. 44=100 I. C. 227=54 I. A. 96=28 Cr. L. J. 59=5 Rang. 53.

(4) A. I. R. 1930 Cal. 22=180 Cr. C. 212=123 I. C. 664=31 Cr. L. J. 586 (F. B.).

(2) A. I. R. 1928 Cal. 470=71 I. C. 792=24 Cr. L. J. 248=50 Cal. 518.

the trial, and I venture to repeat it in the present case:

"The test to be applied, in cases where the prescribed rules of procedure have not been followed, to ascertain whether there has been a mistrial is always essentially the same, namely, whether there has been a miscarriage of justice; for if the appeal Court is satisfied in point of fact that the accused has materially been prejudiced by the breach of procedure clearly a failure of justice has occurred; while if by reason of the breach of procedure there has in effect been substituted another mode of trial, for that prescribed by the Legislature as affording the best means of obtaining a fair trial it is presumed that a fair trial has not been accorded the accused, and that in that case also there has been a failure of justice. In either case therefore the proceedings pro tanto will be set aside upon the ground that by reason of the breach of the rules of the procedure a miscarriage of justice has been occasioned. On the other hand, if the appeal Court is not satisfied that the breach of procedure falls within one or other of those categories, in my opinion it ought not to hold that the proceedings have become vitiated merely because there has been a transgression of the prescribed rules by which such proceedings are to be regulated. It is ever to be borne in mind that rules and regulations are intended to be the handmaid and not the mistress of the law, and that in criminal proceedings it is of the utmost importance that a decision just and reasonable on the merits should not be disturbed because in the course of the proceedings some flaw can be detected that is not fundamental, and which is not proved to have worked injustice to the accused although it may constitute a breach of the rules of criminal procedure; *Emperor v. Erman Ali* (4)."

In this appeal it is unnecessary to decide whether the failure in toto to examine the accused would ipso facto vitiate the trial, as being a breach of procedure going to the root of the trial, and I postpone the determination of that question until the proper occasion arises. In the present case however the accused have been examined, but the examination was not in conformity with the provisions of S. 342. Is the result of this defect in procedure that the trial is vitiated? In my opinion to such a case S. 537 applies, and unless a failure of justice thereby has been occasioned the conviction and sentence ought not for that reason to be disturbed.

It is however undesirable in my opinion that this Court should decide whether in the circumstances of the present case non-compliance with the provisions of S. 342 has occasioned a failure of justice, because in order to determine that question it would be

incumbent upon the Court to embark upon a consideration of the facts and merits of the case, a course from which we desire so far as possible to refrain in view of our decision that the case must be retired; and it is also unnecessary that we should do so inasmuch as, in my opinion, the case must be remanded for retrial upon the other ground which I have stated. For these reasons we order that the appeals be allowed, the conviction and sentence upon each of the accused set aside, and the case retried at the next available Criminal Sessions of the High Court.

Doyle, J.—I concur.

D.V./R.K.

Appeals allowed.

1930 Cr. Cases 1182

(Bombay)

BEAUMONT, C. J. AND MADGAVKAR, J.
Nurmahomed Kadaribhai—Accused—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. Applns. Nos. 173 and 174 of 1930, Decided on 16th July 1930, from order of First Class Special Magistrate, Surat.

(a) Criminal P. C., S. 530—Magistrate doubting if facts justified charge of dacoity—Defence inviting Magistrate to try case—Magistrate accepting invitation—Framing charge under Ss. 147, 440 and 380, Penal Code, and convicting under those sections—No charge framed under S. 395, Penal Code—Defence cannot object that Magistrate had no jurisdiction.

Where the Magistrate doubted whether the facts justified a charge of dacoity or not and where he was invited by the defence to deal with the case himself and accepting the invitation framed a charge under Ss. 147, 440 and 380, Penal Code, and convicted the accused under those sections and did not frame a charge under S. 395, Penal Code, it is not open to the defence to object on the ground that the Magistrate had no jurisdiction. [P 1193 C 1]

(b) Criminal P. C., S. 537—Infringement of S. 162, Criminal P. C., is an irregularity cured by S. 537, if there is no failure of justice—Criminal P. C., S. 162.

The infringement of the provisions of S. 162, Criminal P. C., is an irregularity which can be cured under S. 537 if it has not occasioned a failure of justice.

In considering whether a particular infringement of the provisions of the Criminal Procedure Code is one which does or does not come within the purview of S. 537, what one has to consider is whether any vital rule of procedure has been broken and whether the irregularity goes to the root of the proceedings—85 Cal. 61, Appl. 25 Mad. 61 (P.C.), Dist.; A.I.R. 1923 All. 81, Ref. [P 1184 C 1, 2]

*Velinker, Azad and S. K. Nabiullah—*for Applicant.

*P. B. Shingne—*for the Crown.

Beaumont, C. J.—These are applications in revision from the decision of the Sessions Judge, Surat, upholding the conviction of the accused before the Special Magistrate.

Now, the accused, I am only referring to the accused, who have, appealed to this Court, were charged originally under Ss. 147, 148, 149, 426, 451 and 395, I. P. C., and they were convicted under Ss. 147, 440, and 380, I. P. C., i. e., they were not convicted under S. 395, which deals with dacoity.

The first point taken on behalf of the accused by Mr. Velinker is that the facts brought the case within S. 395 and showed that the offence of dacoity had been committed, and that under the schedule to the Code of Criminal Procedure, a case of dacoity was not within the jurisdiction of the Magistrate. The Magistrate seems to have had some doubt whether the facts justified a charge of dacoity or not and he was invited by the defence to deal with the case himself. Accepting that invitation, he framed a charge under Ss. 147, 440 and 380, and framed no charge under S. 395, and, as I have already said, he convicted the accused under the former three sections. The accused now say that the Magistrate had no jurisdiction to try the case, but the accused having invited the Magistrate to deal with the case and he having accepted that invitation, in my opinion, there is nothing in the point at all. The learned Magistrate did not, by the consent of the parties, assume jurisdiction to try a case which was outside his jurisdiction. That point would have arisen if he had framed a charge for dacoity and convicted the accused on that charge, but he did not do that. He framed a charge under the other sections, the sections under which he was invited to frame a charge by the defence and it is not now open to the defence to object on the ground that he had no jurisdiction.

The next point is one of more substance and has been strenuously argued by Mr. Velinker. The point is that the Magistrate only convicted those accused whose names had been mentioned before the police on a previous occasion, and

at p. 22-A of his judgment, the learned Judge tabulates the accused who had been named before the police and identified by them. Now Mr. Velinker says that in doing that the Magistrate was making an illegitimate use of police statements and was infringing the provisions of S. 162, Criminal P. C. It appears clear from the record that it was the defence themselves who made use of the statements before the police for the purpose of cross examining various witnesses. It may be that that was not justified and that the Magistrate ought to have prevented the defence from so doing, and I think that if the defence had used the statements at all the Magistrate ought to have required them to put them in evidence and place them on the record, and he did not do that. I am disposed to think from the whole of his judgment that he probably did use the police statements in a way which was not justified by S. 162, but then the question arises whether that user, assuming it to have been improper, is cured by S. 537, Criminal P. C. That section provides:

"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered under Chap. 27 or on appeal or revision on account:

(a) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code unless such error, omission, irregularity, or misdirection has in fact occasioned a failure of justice."

I am quite clear that the irregularity, if it be an irregularity in this case, has not occasioned a failure of justice. But, Mr. Velinker says that an infringement of the provisions of S. 162 is not an irregularity, which can be cured under S. 537. He says that it amounts to an illegality such as cannot be cured and for that he refers to the judgment of Lord Halsbury in the Privy Council case of *N. A. Subramania Iyer v. Emperor* (1). But that was a case very different from the present on the facts because the accused there was tried on an indictment charging him with no less than forty-one acts, extending over a period of two years, and undoubtedly the whole trial was illegal. The test, as to what acts are irregularities within

(1) [1901] 25 Mad. 61=28 I. A. 257=8 Sar. 160 (P.C.).

S. 537 has been considered as a matter of principle in two cases, one of them in *Ashutosh Sikdar v. Behari Lal Kirtania* (2), where Mookerjee, J., says thus (p. 72) :

"As pointed out in *Macnamara on Nullities and Irregularities*, no hard and fast line can be drawn between a nullity and an irregularity: but this much is clear that an irregularity is a deviation from a rule of law which does not take away the foundation or authority for the proceeding, or apply to its whole operation, whereas a nullity is a proceeding that is taken without any foundation for it, or is so essentially defective as to be of no avail or effect whatever, or is void and incapable of being validated. It may be conceded that the application of this doctrine to an individual case, may sometimes be attended with difficulty. One test however is well established, and is often useful; as was observed by Coleridge, J., in *Holmes v. Russell* (3), "it is difficult sometimes to distinguish between an irregularity and a nullity"; but the safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection; if he can waive it, it amounts to an irregularity; if he cannot, it is a nullity."

If you apply that test here, the defendants could, I think, have waived the prohibition against using the statements to the police. The other case in which the general principle is discussed is *Emperor v. Bechu Chaube* (4). Stuart, J., remarks (p. 126) :

"The tests to be applied in considering whether a particular infringement of the provisions of the Criminal Procedure Code is one which does or does not come within the purview of S. 537 appear to me to be these: Does the error go to the whole root of the trial? Does it in effect vitiate the proceedings? Has the Court assumed an authority which it does not possess? Has it broken the vital rules of procedure? If the error is of such a nature, the proceedings are vitiated in their very inception and S. 537 has no application. But the mere fact that a certain provision of the Code is imperative does not in itself indicate that a breach of that provision vitiates the whole proceeding. In fact it might very well be argued that in order to create an error there must be some breach of an imperative rule, for, if the matter were discretionary, it would appear that no opportunity for error could arise. What I have to consider is the simple point. Were the proceedings vitiated? In my opinion they were not vitiated."

Now, that passage lays down a rule, which, I think is of general application, and what one has to consider is whether any vital rule of procedure has been broken, and whether the irregularity goes to the root of the proceedings.

(2) [1907] 35 Cal. 61=6 C. L. J. 320=11 C.W. N. 1011 (F.B.).

(3) [1841] 9 Dowl. 487.

(4) A. I. R. 1928 All. 81=71 I. C. 115=24 Cr. L. J. 67=45 All. 124.

In my view the infringement of S. 162 committed as it was here in the first instance by the defence themselves, and not by the prosecution, is a class of irregularity which can be cured under S. 537. In my judgment therefore this application fails and is dismissed.

Madgavkar, J.—I agree. On the first point, this is not a case of an undoubted dacoity in which the Magistrate has deliberately framed a charge of robbery in order to confer jurisdiction upon himself; on the contrary, he has accepted the view put forward for the defence that the facts did not constitute robbery and that the intention of the accused was at the most that of theft without the violence or extortion to aggravate it into robbery. It does not, therefore lie in the mouth of the defence to turn round and complain of a result which was a consequence of their contention. On the second point, it was certain accused who were allowed excessive latitude beyond the strict provisions of S. 162 and under the guise of omissions were permitted to all intents and purposes to transfer the entire purport of the police statements on to the record. All the accused whose names had not been mentioned to the police availed themselves of this privilege and elicited the fact that their clients' names had not been mentioned. From this it was a plain inference that the names of the other accused had been mentioned. Had the judgment proceeded on that basis, the point could not have been taken. The learned Magistrate however in tabulating the results evidently has proceeded further; but such a use of S. 162 has not, for the reasons stated above, in fact, occasioned a failure of justice. It is at the most an irregularity without a failure of justice, and therefore as held in *Emperor v. Jehangir Cama* (5), curable under S. 537, Criminal P. C. I agree that the application should be dismissed.

Beaumont, C. J.—I do not think that there is any ground for varying the sentence as there is no appeal on the merits. The unexpired portion of the sentence on the accused should be carried out.

K.N./R.K. *Appeal dismissed.*

(5) A. I. R. 1927 Bom. 501=106 I. C. 100=28 Cr. L. J. 1012.

1930 Cr. Cases 1185

(Lahore)

AGHA HAIDAR, J.

Umra and another—Accused—Appellants.

v.

Emperor—Opposite Party.

Criminal Appeal No. 464 of 1930, Decided on 16th August 1930, from order of First Class Magistrate, Karnal, D/- 31st March 1930.

(a) Practice—Punjab High Court—Counsel for petitioner or appellant in criminal case not allowed to make copies even for arguing his appeal, without application for certified copies. Copying documents in extenso during inspection of record not allowed, but only short notes permitted. Such practice deprecated, especially when client is in jail—Amendment in rules on lines of rules of Allahabad High Court suggested, viz. allowing counsel to inspect record free of charge and to take sufficient notes for his case.

According to the rules which are in force in the Punjab High Court a counsel appearing for petitioner, or an appellant in a criminal case, even while his client is in jail, is not allowed to make copies even for the limited purpose of arguing his appeal, unless he applies for certified copies, the cost of which is almost prohibitive. Also copying of the document in extenso during the inspection of record is not allowed, but only taking of short notes of the documents is permitted. This sort of thing is deprecated by his Lordship. Amendments in the rules on lines of the rules of the Allahabad High Court are suggested, viz. the counsel should be allowed to inspect his record free of charge and to take sufficient notes for his case. [P 1185 C 2, P 1186 C 1]

(b) Penal Code (1860), S. 366—For conviction under S. 366, deceit must be unmistakably inferred from reliable evidence.

There must be some reliable and convincing evidence, from which it can be unmistakably inferred that a person has been guilty of deceitful conduct before he can be convicted under S. 366 for abducting a woman with the intention, knowledge or purpose mentioned therein. [P 1187 C 1]

Jalal Din—for Appellants.

D. R. Sawhney—for the Crown.

Judgment.—Umra, aged 50, and Umar Din, aged 40, have been convicted of offences under Ss. 366 and 376, I. P. C., and sentenced to four years' rigorous imprisonment each under the two charges. The judgment of the trying Magistrate, which is very unsatisfactory throughout, is silent on the point whether the sentences are to run consecutively or concurrently.

1930 Cr. C. 149 & 150

A First Class Magistrate ought to know the provisions of S. 35, Criminal P. C., and must record in the judgment very clearly the order in which the sentences are to run.

The hearing of this appeal presented considerable difficulty. Mr. Jalal Din, who was supposed to represent the accused persons, had practically no proper brief from which he could argue the appeal. He had just a few stray notes which he began to read before me. I asked him to read the full depositions of the witnesses so that the case may be fully presented before the Court. He said that his client, who was in jail, was a poor man and was not in a position to supply him with the necessary funds for obtaining certified copies of the evidence and that therefore he had to do the best for him by reading out stray notes of the evidence which his counsel had prepared in the Court below. On account of this handicap Mr. Jalal Din could not argue the case properly and as the Crown counsel is not supposed to argue cases for and on behalf of the accused persons, I was obliged to study the whole record myself in order to dispose of the case in a proper manner.

I understand that, according to the rules which are in force in this Court, a counsel appearing for a petitioner or an appellant in a criminal case, even while his client is in jail, cannot make copies of the evidence for the limited purpose of arguing his appeal unless he applies for certified copies, the cost of which is, I understand, almost prohibitive. I was informed by counsel that if he were to inspect the record the official in charge of the inspection room would not allow him to copy out any document or deposition in extenso and that he would only be permitted to make short notes of the evidence. It is not the first time that an appeal has been presented before me on behalf of a convict appellant in the manner in which Mr. Jalal Din has sought to conduct this case. The lot of a convict is a hard one. He is cut off from the outside world and in the majority of cases he is a poor man who is completely isolated from his kith and kin. On account of the high cost entailed in obtaining certified copies, it is not to be expected that his friends and rela-

tions after engaging a counsel and paying him his honorarium would have sufficient funds to spare wherewith to apply for certified copies. I know from my fairly long experience of the Allahabad High Court that in criminal cases and particularly when the accused is in jail, his counsel's clerk can inspect the record free of charge, and what is more important he can copy out the whole of it, if so required by the counsel. The record is placed at his disposal day after day until he has copied out either the whole or such portion of it as the counsel considers sufficient for the purpose of arguing the appeal or revision properly. Besides, the costs of obtaining certified copies of the depositions of witnesses in the lower Courts is to the best of my recollection, 12 annas for a deposition.

In the interests of justice and humanity I hope a similar practice would be introduced in this Court as well so that the cases of persons who are in jail may be conducted efficiently by their counsel and the Judges may not have to wade through voluminous records for themselves in order to dispose of the case satisfactorily. This would also effect the saving of much of the public time, as counsel after a study of the record can exercise their judgments and confine themselves only to such portions of it as may be necessary for the purpose of presenting their cases before the Court. This is however by the way.

Somewhere at the end of December 1929, Mt. Mukhtiar, a Jat woman, aged 25, left her mother-in-law's house. It appears from the evidence of Aiman, D.W. 1, Hoshiara, D.W. 2, Hansa, D.W. 3, that Mt. Mukhtiar had on two or three previous occasions also left her husband's home. According to the prosecution the accused Umra abducted Mt. Mukhtiar by inducing her to believe that he would take her to the home of her parents, in the village Tikri, District Meerut. Mt. Mukhtiar was living at the time of her alleged abduction in the village Lalon in the District of Muzaffarnagar. The two districts are adjacent to each other and the distance between the two villages being 15 or 16 kosas. According to the prosecution Mt. Mukhtiar was taken to various places by train and was in fact taken

as far afield as Delhi and Panipat. From Panipat she was brought to Taraori railway station and was made to walk to Mauza Sonkra, where she was confined in the house of one Fateh Din by the accused; and finding an opportunity one day she slipped out and narrated her story to Raja Ram, P. W. 2. It is said that during the course of her peregrinations she had been raped by the two accused.

Admittedly no force had been used by any one of the accused at the time when the woman left the village Lalon. The life of Mt. Mukhtiar in her husband's house does not appear to have been a happy one. As already stated she had left her marital home on two or three occasions and immediately before her departure from her husband's house there had been quarrels and bickerings between her and her mother-in-law. She did not get, according to the evidence, proper food and clothes. The sole question for decision, so far as the offence under S. 366, I. P. C., is concerned, is whether any fraud was practised by the accused upon Mt. Mukhtiar in order to induce her to leave her husband's house, or she was a willing party to her wanderings with the accused until the time when she reached the village Sonkra and approached Raja Ram, P. W. 2. The woman, as already stated, is not a mere child or even young girl, but according to herself is a fully grown up Jat woman aged 25 years. Her lot in her husband's home not being a happy one, it appears that she got disgusted with it and in a fit of temper she decided to try fresh fields and pastures new. According to her own evidence in her wanderings she passed through populous towns and crowded railway stations of Delhi and Panipat. She says that on various occasions she saw police constables going about. Now Mt. Mukhtiar knew that her father's home was in the neighbouring district of Meerut. We know the distance between Tikri and Lalon, and certainly she ought to have known that, in order to reach Tikri, she had no business to travel as far as Delhi and Panipat. It is on the record that after her marriage she had several times travelled between the village Lalon and the village Tikri, and she must have known that she never had to pass through Delhi or Panipat.

Now, if any fraud had been practised by the accused, as is alleged on behalf of the prosecution, and they had falsely represented to her that they would take her to her father's house she must have been disillusioned very soon indeed, and on being disillusioned, the easiest thing for her would have been to raise an outcry at one of these populous resorts of men, like Delhi or Panipat, and attract the attention of crowds. At any rate she could have called any policeman on duty at the railway station of Delhi, Shahdara and Panipat and complained to him that the accused were leading her astray and taking her to some unknown destination. She did nothing of the kind. The learned Magistrate has acted erroneously in assuming the existence of deceit and relying upon mere conjectures and surmises. His judgment is wholly tainted in this respect and cannot be sustained. He has assumed deceit and fraud which must always be proved by clear and cogent evidence like any other fact. It is true that very often, to prove deceit, direct evidence is not available, but there must be some reliable and convincing evidence from which it can be unmistakably inferred that a person has been guilty of deceitful conduct before he can be convicted under S. 366 for abducting a woman with the intention, knowledge or purpose mentioned therein. I may also point out that Mt. Mukhtiar is not a truthful person, and anything which she says must be received with a good deal of caution. The statement which she made on oath before the Court is at variance with the statement which she made in the first information report in respect of her quarrel with her mother-in-law, and when confronted with that statement she naively remarked that it was Umra, who made it. Umra had nothing whatsoever to do with the statement in the first information report, and this statement of Mt. Mukhtiar is a pure falsehood.

It appears that after wandering about with the accused and visiting various places like Panipat and Delhi, this wayward young woman either got tired of the company of the two accused or felt displeased with them over something and approaching Raja Ram asked him to convey her to the village Sambhalika where she had friends. As regards the

charge of rape we have only the evidence of the woman Mt. Mukhtiar. In my judgment, and having regard to the fact that she never demonstrated her unwillingness by any protest to any person, the charge of rape is not established. There were no signs of violence on the person of the woman. Even if there was any sexual intercourse between Mt. Mukhtiar and one or both of the accused, it was with her consent. There is nothing on the record to support the charge of rape excepting the solitary testimony of the woman, and having regard to the circumstance that she neither raised an outcry nor offered any resistance, I am not prepared to maintain the conviction. I do not think the convictions of the appellants, either under S. 366 or S. 376, I.P. C., can be maintained. I therefore allow the appeal and set aside their convictions and sentences and order that they be released forthwith.

. B.V./R.K.

Appeal allowed.

1930 Cr. Cases 1187

(Madras)

PANDALAI, J.

Union Board, Ayyampet—Complainant—Petitioner.

v.

Ramachandra Aiyar—Accused—Respondent.

Criminal Revn. No. 996 of 1929, and Criminal Revn. Petn. No. 899 of 1929, Decided on 27th March 1930, from judgment of First Class Sub-Div. Mag., Mayavaram, D/- 26th July 1929, in Criminal Appeal No. 24 of 1929.

Madras Local Boards Act (1920), S. 159—Occupier of premises failing to remove encroachment though notice given—He found guilty but acquitted in appeal because he was tried on same facts in previous case—Previous case brought by District Board—He being acquitted in that case because encroachment was within Union Board's and not District Board's jurisdiction—Present case was not upon same facts and so acquittal was wrong—Criminal P. C. S. 403.

An occupier of premises within the jurisdiction of Union Board failed to remove encroachment of which notice was given to him. He was found guilty but on appeal he was acquitted on the ground that in a previous trial he was tried upon the same facts. The previous case was brought by the District Board in which the accused was acquitted because the encroachment was within jurisdiction of the Union Board and not of the District Board.

Held: that the present case was not upon the same facts as the previous one and so the acquittal was wrong. [P 1188 C 1

K. P. Ramakrishna Ayyar—for Petitioner.

V. Viswanatha Sastry and Parkat Govinda Menon for Public Prosecutor—
for Respondent.

Order.—This is a revision petition against an acquittal and the petitioner is the President of the Union Board, Ayyampet. The charge was against the occupier of premises within the jurisdiction of the Union Board that he failed to remove an encroachment of which notice was given to him under S. 159, Madras Local Boards Act. There appears to be no doubt that the alleged encroachment was an encroachment. The Stationary Sub-Magistrate of Papanasam found the accused guilty and sentenced him to pay a fine of Rs. 10. But in appeal the Sub-Divisional Magistrate of Mayavaram set aside that conviction and acquitted the accused on the ground that he had been tried for the same offence upon the same facts in a previous trial, namely, in C. C. No. 174 of 1927. What happened in C. C. No. 174 of 1927 was that the District Board of Tanjore brought a case against this accused for failing to remove the same encroachment after notice to remove it was given by the District Board. In answer to that charge the accused pleaded that the road was within the jurisdiction of the Ayyampet Union Board and that therefore the District Board was not the authority to cause removal. This was accepted and the accused was acquitted. After that acquittal the Union Board sent a fresh notice under S. 159 (1) to the accused to remove the encroachment, and it was for failure to do so that this case was brought. The present case was not upon the same facts as C. C. No. 174 of 1927 and the acquittal was therefore wrong. I have now to decide whether it is worth while ordering a retrial of this accused for this offence. I do not think it is necessary in the interests of the Union Board or of public justice that there should be a retrial of this particular accused for this particular offence. He is only a tenant of the premises. The owner of the premises has, if appears, addressed the Union Board accepting responsibility for the encroachment, and it will be quite enough for the Union Board, if they are so advised, to take steps if necessary

against the owner. With these remarks the petition is dismissed.

P.R.S./S.N. *Revision dismissed.*

* 1930 Cr. Cases -1188

(Madras)

WALLACE AND ANANTAKRISHNA
Ayyar, JJ.

Kolanda Nayakan—Accused—Appellant.

Emperor—Opposite Party.

Criminal Appeal No. 134 of 1930, Decided on 8th April 1930, from judgment of Sess. Judge, Coimbatore, in Sessions Trial No. 4 of 1930.

(a) Penal Code (1860), S. 302—Murder.

A person who inflicts on the deceased fatal wounds with a knife intends nothing short of inflicting death and so the offence in the absence of extenuating circumstances, is murder. [P 1189 C 1]

* (b) Penal Code (1860), S. 302—Where murder by juvenile is not wholly deliberate and cold-blooded, and there is certain amount of legitimate provocation, capital sentence may not be appropriate.

In cases where the murder has been deliberately planned and is essentially of a cold-blooded and contemptible nature, the death sentence is appropriate whatever be the age of the accused, provided his case does not come under S. 22, Madras Children Act 4 of 1920. But where the murder by a juvenile cannot be said to be wholly deliberate and cold-blooded, and where there may be a certain amount of legitimate provocation rankling, which in an immature mind might assume an exaggerated importance, the capital sentence might in certain cases not be the appropriate one. [P 1189 C 1, 2]

V. L. Ethiraj and N. Somasundaram
—for Appellant.

Public Prosecutor—for the Crown.

Judgment.—The accused has been convicted by the learned Sessions Judge of Coimbatore of the offence of murder and sentenced to death. The charge against him was that at about 11 o'clock on 20th October last he stabbed one Abdur Muthu in the streets of Tiruppur and inflicted upon him seven incised wounds three of which were fatal. The man after running for some distance collapsed and died practically on the spot. The eyewitnesses to the attack are P. Ws. 2, 3, 4, 5 and 12. That it was the accused who so attacked the deceased has not been seriously disputed by the learned counsel for the accused, although he would suggest that the series of blows occurred in quicker succession than the eyewitnesses would

say, and perhaps it may be allowed that on the medical evidence it is a little difficult to imagine how the deceased was able to run about 180 yards after receiving the blows which the medical certificate describes and it may be that the attack was something more rapid and not quite so deliberate as the eye-witnesses would make out. The offence prima facie is clearly murder. There can be no doubt that the person who inflicted with a knife such fatal wounds on the deceased certainly intended nothing short of inflicting death. We cannot find any extenuating circumstances which would bring the offence to anything less than murder. There is no question of self defence raised nor is there any such case appearing in the prosecution evidence. It had been suggested that the accused had a certain amount of provocation, but the only provocation that has been spoken of by prosecution witnesses occurred a couple of hours earlier than the offence and cannot therefore easily be described as grave and sudden. The only defence put forward by the accused is that the case is a false one and has been got up by his enemies. But there is really no motive elicited why the eyewitnesses should lend themselves to a false case against the accused. There can be no doubt that the learned Sessions Judge is correct in convicting the accused of the offence of murder and the only question which remains is whether the capital sentence in the circumstances was an appropriate one.

The accused is stated to be aged about 15. Both the committing Court and the Sessions Judge say that he looks more; that he looks about 18; so far as the records show it may be taken that he is about 15 years of age, but his age has not been definitely determined. A plea has been put forward that in the case of a youth the capital sentence is inappropriate. To the proposition put thus broadly we cannot assent. Beyond the provisions of Ss. 82 and 83, the Penal Code does not say anything about there being any age limit for the capital sentence; and in cases where the murder has been deliberately planned and is essentially of a cold-blooded and contemptible nature we think that usually whatever the age of the accused might be, provided his case does not come under S. 22, Madras

Children Act 4 of 1920, the death sentence would be the appropriate one.

This Court has, for example, in cases where the accused had been convicted of decoying away children and cutting their throats, or drowning them, or putting them away, in order to possess themselves of a few rupees worth of jewels, held that, in spite of the murderers being youths (about 18 years old) the capital sentence would be the only appropriate sentence. But where the murder cannot be said to be wholly deliberate and cold-blooded, and where there may be a certain amount of legitimate provocation rankling, which in an immature mind might assume an exaggerated importance, we think that the capital sentence might in certain cases not be the appropriate one. In the present case, apart from the question whether accused is entitled to the benefit of the provisions of S. 22, Madras Children Act, we have evidence that, within about a couple of hours before the occurrence the accused and the deceased had been quarrelling, and that the deceased, who is described by the prosecution witnesses themselves as a bully and the terror of the village, had assaulted this boy and had given him several blows; about two hours later the accused retaliated by stabbing the deceased in the manner described. There is therefore in the present case this amount of recent provocation which justifies us as in describing the murder as not deliberately cold-blooded and inherently vicious. In these circumstances we think that the adequate sentence will be the lesser sentence of transportation for life. We therefore reduce the capital sentence to one of transportation for life.

P.R.S./S.N.

Sentence reduced.

* 1930 Cr. Cases 1189

(Madras)

PANDALAI, J.

Rudraraju Ramaraju — Accused —
Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 57 of 1930 and Criminal Revn. Petn. No. 54 of 1930, Decided on 18th July 1930, from judgment of Joint and First Class Magistrate, Narasapur, in Criminal Appeal No. 59 of 1929.

*** Penal Code (1860), S. 425—Owner of land throwing earth upon land used for passage by others—Use becoming impossible—it does not amount to mischief.**

If the owner of land over which another or a body of others have a right either of passage or other use throws earth upon that land so that the use becomes either disadvantageous or impossible that does not amount to mischief within S. 425; 8 Bom. 295, *Relon.* [P 1190 C 2]

V. Govindarajachari—for Petitioner.

N. S. Mani for *Ag. Public Prosecutor*—for the Crown.

Order.—The petitioner has been convicted of the offence of mischief and sentenced to pay a fine of Rs. 30. The mischief complained of was that he dumped a hundred cartloads of earth upon a portion of survey No. 113 in the zamindari village of Kalagumpudi which is included in the Peddamidipalli estate. The prosecution was launched by the Revenue Inspector upon the footing that the survey number on which the earth was dumped was Government land, that the said land was used as a thoroughfare and that the dumping of earth upon it had diminished its utility as a thoroughfare. But by the evidence given by the accused it was clearly shown that the land was not Government land and it is not now disputed that it is part of a zamindari of which the proprietor is D.W. 1. But the Courts below have held that even so the land is what is called a 'puntha' (a thoroughfare for men and cattle), and that the unauthorized dumping of earth upon it amounts to mischief and therefore the petitioner is guilty. There can be no doubt and it is not denied that the petitioner dumped some earth upon some portion of this survey number. The portion so covered now by earth is said to be 26 cents in extent, but that it is only some portion of the survey number is also clear because the 'puntha' is described by the Revenue Inspector as 80 links broad in some places and in others 100 links broad. There is no plan in the case and nothing from which I am able to say what portion of the entire area has been covered by the earth newly thrown upon it, nor in what way the act of the accused has interfered with the use of the land, if it was so used, as a thoroughfare by men and cattle of the village of Kalagumpudi. The proprietor denies that the land is a 'puntha' at all. But there are some revenue accounts in which the land is entered as a puntha

and the prosecution evidence at its best shows that the survey number is classified in the revenue accounts as a puntha.

The question is, assuming that it is a thoroughfare over which the villagers had a right of user either for passing or for stopping and assuming that the accused's throwing earth upon some portion of it has in some way interfered with the use of that portion in the way in which it had been accustomed to be used, whether those facts which are the utmost that can be said to have been proved by the prosecution amount to the offence of mischief of which the petitioner has been convicted. So far as any consent may make any difference, the proprietor, D.W. 1, says that he has no objection at all to the earth being where it was thrown and therefore the question for decision is the same as if the proprietor had either by himself or others had with his consent thrown the earth where it is. I find it impossible to say that, if the owner of land over which another or a body of others have a right either of passage or other use throws earth upon that land so that the use becomes either disadvantageous or impossible, that amounts to mischief within S. 425, I. P. C. The only direct decision upon the point referred to in the argument is an unreported decision entitled *Keru* (1888) of the Bombay High Court which is referred to in all the commentaries upon the Penal Code, namely, those of Ratanlal, Gour and Nandalal. It was to the effect that, where the accused with intent to cause wrongful loss to the complainant who had a right of way along a flight of steps, caused the destruction of those steps, that act did not amount to mischief for the reason that property under S. 425 means tangible property capable of being forcibly destroyed but does not include an easement. Somewhat to the same effect is the better known decision of the same High Court in *Queen-Empress v. Govinda Punja* (1), where it was held that where the owner of an animal buries the carcass after its death, he is not guilty of mischief or any other offence although he does so with the express object of preventing the Mahars of his village from taking its skin according to the custom of the country.

(1) [1884] 8 Bom. 295.

What has happened in this case is that a villager has thrown earth upon a plot of land over which others are said to have a right of use as a thoroughfare. The only value which is diminished or utility which is destroyed is that of the right of thoroughfare because there is nothing to show that the land itself has lost either its value or its utility or is in any way affected injuriously.

I must hold therefore that the act of the accused taken in the best light for the prosecution did not amount to mischief and therefore the conviction was wrong. Whether it amounted to some other offence it is not now necessary to say because the dispute really appears to be between the owner of the land, the zamindar and certain officers of Government who at one time thought that it belonged to Government. The fine, if paid, will be refunded.

P.R.S./S.N. *Conviction set aside.*

*** 1930 Cr. Cases 1191**

(Madras)

PANDALAI, J.

(Thoomulur) Anantapadmanabhiah —
Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 516 of 1930 and Crim. Revn. Petn. No. 479 of 1930, Decided on 22nd September 1930, from order of Sub-Divl. Magistrate, Nellore, D/- 26th July 1930, in Misc. Case No. 39 of 1930.

* (a) Criminal P. C. (1898), S. 112—Scope.

A Magistrate acting under S. 112 is a Court : 30 Cal. 953, *Foll.* [P 1192 C 2]

* (b) Criminal P. C. (1898), Ss. 107, 112 and 548—Person asked to show cause under S. 107 is not entitled to copy of written information by police on which the order is based, as it does not form part of record.

The record in proceedings under S. 107 is the magisterial record and begins usually with the order under S. 112 except where a Magistrate not empowered under S. 107 wishes to have proceedings taken under it and issues a warrant under CP. (3), S. 107. The information which leads to action under S. 107 may be of the most varied kind. It may be oral, sworn or not sworn, and need not be in writing. It may be from any source official or unofficial, formal or informal. It may be derived from the Magistrate's own knowledge. He is not bound to disclose the same in respect of the information received. [P 1192 C 2]

A person against whom a Magistrate has drawn up an order under S. 112 asking him to show cause why he should not be bound over to keep peace under S. 107 is not therefore entitled to obtain a copy of the written information given by the police on which the order is based, as it does not form part of the record

within the meaning of S. 548 : 43 Mad. 450; A. I. R. 1925 Mad. 189 and 20 Mad. 189, *Ref.* [P 1193 C 1]

C. Rama Rao Saheb for G. Sivarama-krishna Sastri—for Petitioner.

N. S. Mani for Public Prosecutor
—for the Crown.

Order.—The question raised in this case is whether a person against whom a Magistrate has drawn up an order under S. 112, Criminal P. C., asking him to show cause why he should not be bound over to keep the peace under S. 107 is entitled to obtain a copy of the written information given by the police on which the order is based. The Magistrate refused to grant the copy holding that it is not a charge sheet, as the petitioner described it in his application. That it is not a report under S. 173, Criminal P. C., copy of which under Cl. 4 of that section be furnished on application and payment to the accused, is clear enough, because the section is in terms confined to reports made on investigation under Chap. 14 of the Code. But this does not dispose of the matter. S. 548 (leaving out the immaterial words) provides that if any person affected by an order passed by a criminal Court desires to have a copy of . . . "other part of the record" he shall on applying for such a copy be furnished therewith. The petitioner was clearly affected by the order under S. 112 requiring him to show cause. If the information by the police on which the Magistrate founded his order can be brought within the words "part of the record" he is entitled to a copy. No direct decision on the point has been brought to my notice. But there are observations of more or less indirect application. In *Ranga Reddi v. Emperor* (1), where the point for decision was whether and to what extent the order under S. 112 should set out particulars of the information and whether evidence of repute was admissible on a charge under S. 110, Cl. (f), Seshagiri Iyer, J., after pointing out that it is of the utmost importance that the information communicated to the accused under S. 112 should be clear and specific, says at p. 451:

"The accused is to be put on his trial on information received behind his back. In the case of a complaint the accused may be entitled to a copy, if he applied for it, but in the case of an information of this kind, which is

(1) [1920] 43 Mad. 450=21 Cr. L. J. 384=55 I. C. 722.

necessity is a confidential one, the accused is entitled to be told the nature and extent of the information on which the Magistrate intends to take the action against him."

This passage is cited by Madhavan Nair, J., in *Kutti Goundan, In re* (2) at 692 (of 47 M. L. J.) in another similar case where the question for decision was whether the order under S. 112 contained sufficient particulars to enable the accused to prepare for his defence and to summon witnesses on his side before the actual enquiry commences. In both cases the learned Judges assumed that the accused is not entitled to copy of the information to the Magistrate and it may also be pointed out that the insistence on particulars in the order under S. 112 would to a great extent be superfluous if the accused were entitled to obtain copies of the information on which that order is based. At the same time it cannot be denied that in neither case was S. 548 under consideration, nor were the learned Judges considering whether the report of the police on which the order under S. 112 is based is part of the record in which that order is made.

On the other side there are observations of at least three learned Judges in a contrary sense in the well-known Full Bench decision in *Queen Empress v. Arumugham* (3). That case was decided in 1896 before the amendment of S. 173 enabled accused persons to get copies of charge sheets under Chap. 14. The question related to copies of police reports under Ss. 157, 168 and 173 of the then Code. Of the four learned Judges who constituted the Court three held that reports under Ss. 157 and 168 were not public documents and consequently the accused were not entitled to copies of them. The Court was equally divided as to reports under S. 173, two Judges holding that they were and the other two that they were not public documents of which the accused could get copies. The two referring Judges at p. 192 say with reference to the argument founded on S. 548 that if an order has been made or a police occurrence report or charge sheet affecting the person accused such as an order for his arrest or for his remand to custody, he is ipso facto entitled to a copy

of that document under the express terms of S. 548, Criminal P. C. At p. 206 Benson, J., refers to the argument based on S. 548. He was of opinion that the argument would succeed if the Magistrate making the order is at the time a criminal Court. He rejected the argument as he thought that a Magistrate is not a Court when enquiring into offences which he is not empowered to try. This distinction between Magistrates and Courts is no longer valid after the decision of the Privy Council in *Clarke v. Brajendra Kishore Roy Chowdhry* (4), at p. 966 and there can be no doubt that a Magistrate acting under S. 112 is a Court. It would therefore seem that but for this distinction which did not exist, Benson, J., would have upheld the view of the referring Judges as to S. 548. There is however no denying the fact that these were observations, not decisions, and that they were made with respect to police reports made under Chap. 14 and not to police reports or information to a Magistrate with a view to his taking action under Chap. 8.

In this state of authority, I have to decide the point before me on a consideration of the words of S. 548 and such considerations as may be based on the nature of proceedings under S. 107, Criminal P. C. In brief, what is meant by "the record" and when does "the record" begin in proceedings under S. 107? On the best consideration I can give to the matter, I think the record intended is the magisterial record and such record in proceedings under S. 107 begins usually with the order under S. 112, except where a Magistrate not empowered under S. 107 wishes to have proceedings taken under it and issues a warrant under Cl. (3) of that section. The information which leads to action under S. 107 may be of the most varied kind. It may be oral, sworn or not sworn, and need not be in writing. It may be from any source, official or unofficial, formal or informal. It may be derived from the Magistrate's own knowledge. He is not bound to disclose the source or the nature of the information received: *In the matter of the Petition of Mithu Khan* (5). I am

* (2) A. I. R. 1925 Mad. 189=86 I. O. 49=26
* Cr. L. J. 673.

(3) [1897] 20 Mad. 189=7 M. L. J. 167 (F. B.).

(4) [1912] 39 Cal. 958=13 Cr. L. J. 693=15
I. O. 501=39 I. A. 163 (P. O.).

(5) [1904] 27 All. 172=(1904) A. W. N. 206=
1 A. L. J. 685.

therefore of opinion that the information or report of the police in this case was not part of the record within the meaning of S. 548, Criminal P. C., and that the petitioner is not entitled to a copy of it. The petition must be dismissed.

P.B.S./R.M. *Petition dismissed.*

1930 Cr. Cases 1193

(Madras)

PANDALAI, J.

Janardhanam—Accused—Petitioner.

Emperor—Opposite Party.

Criminal Revn. No. 436 of 1930 and Criminal Revn. Petn. No. 403 of 1930. Decided on 18th July 1930, from judgment of Presy. Magistrate, George Town, in Criminal Case No. 12675 of 1930.

Criminal P. C. (1898), S. 256—Magistrate putting to accused, on same day he was charged, question whether he would further cross-examine prosecution witnesses after recording reasons—There is no illegality.

There is no illegality if a Magistrate puts to the accused on the same day as he was charged the question whether he wants to further cross-examine the prosecution witnesses, provided he records his reasons in writing for doing so. Whether the reasons given are sufficient or not entirely depends upon the circumstances of each case.

A Magistrate put the accused the question on the same day as he was charged and recorded as reason "the accused is undefended."

Held: that what the Magistrate meant by saying the accused was undefended was that he never engaged a pleader and did not appear to want to engage one, and this was sufficient reason for the Magistrate to put the question on the same day: *A. I. R. 1927 Mad. 78, Expl.* [P 1194 C 1]

K. Venkataraghavachariar—for Petitioner.

Order.—This is an application to revise the conviction of the petitioner by the Third Presidency Magistrate for an offence under S. 408, I. P. C., for which he was sentenced to three months' rigorous imprisonment. The ground alleged is that the trial before the Magistrate is vitiated by the illegality that after the charge was framed and the accused had pleaded "not guilty," the question whether he wished to further cross-examine the prosecution witnesses was put to him on the same day and that because the petitioner was undefended this was an illegality which could not be cured.

The facts are that after the prosecution witnesses were examined on 5th

June 1930 the accused was charged and he pleaded "not guilty." The Magistrate's record then contains the following:

"He (the accused) wants to further cross-examine the prosecution witnesses. The accused is undefended. I therefore have not adjourned the case to another date to put this question."

The case was accordingly adjourned to a subsequent date on which date the prosecution witnesses were admittedly further cross-examined by the petitioner himself, he not having engaged any lawyer. He called no evidence, and on the evidence before the Court he was convicted and sentenced to three months' rigorous imprisonment.

The learned advocate for the petitioner relies upon a decision of Jackson, J., in *Raju Athari, In re* (1) for his argument that on the above facts the trial was illegal because the question was put to the petitioner whether he wished to further cross-examine the prosecution witnesses on the same day the charge was framed. The decision cited is not an authority for this case. In that case the original papers of which I have called for and examined, a Bench of Honorary Magistrates after framing a charge under Ss. 323 and 114 questioned the accused whether he wished to further cross-examine the prosecution witnesses, and he said "No." He had no vakil. The Bench recorded no reasons for putting the question the same day. Upon these facts the learned Judge held that the trial was vitiated by illegality and that it was one which could not be cured. In that case the Court recorded no reasons whatever for asking an undefended accused whether he wished to further cross-examine the prosecution witnesses on the same day that he was charged, whereas S. 256 explicitly lays down that where the Magistrate wishes to put that question the same day, he must record in writing the reasons for it. The omission to record reasons was thus clearly an illegality. In this case there is no such illegality because the Third Presidency Magistrate was clearly aware of what his duties were under S. 256, and he says that the accused was undefended and that he therefore did not adjourn the case to another date to put the ques-

(1) *A. I. R. 1927 Mad. 78=99 I. C. 44=28 Cr. L. J. 12=50 Mad. 740.*

tion. But Mr. Venkataraghavachariar says that it is no reason at all. Whether that be a good reason or not, to which I will refer presently, there is no illegality in this case of failure to record reasons, and the decision of Jackson, J., is therefore not applicable. Whether the reason recorded is or is not sufficient, the decision cited does not say, nor could it possibly say, that in no circumstances can the question be put to an undefended accused on the same day as he is charged. On the contrary all that the decision says, and here it is merely carrying out the clear words of the section, is that where the question is put on the same day the Court must record the reason for so doing, and this is so whether the accused has a vakil or has no vakil. All that I understand Jackson, J., to say is that where the accused has a vakil there may usually be less likelihood of his being prejudiced if the question is put on the same day. But he has clearly recognized that even where the accused has no vakil all that is required is that the Magistrate must have a reason for putting the question the same day and also record it. Whether the reason given by the Magistrate in this case was itself sufficient or not, that was a matter entirely dependent upon the circumstances.

The Magistrate says that the accused was undefended and therefore it was that he put the question the same day. The meaning of that I consider to be that the man had never engaged a vakil and did not appear to want to do so and it would purely be a waste of time for him, that is the accused, to ask him to come again to answer a question which he was prepared to answer at once without consulting any vakil because he had no intention of engaging one. That this was the case is shown by the fact that the accused did not answer that he did not want to further cross-examine; on the contrary he said that he did want to further cross-examine, and by the fact that, when on the subsequent date the prosecution witnesses appeared again, they were re-cross-examined by the petitioner himself. In these circumstances, I think the Magistrate was perfectly justified in thinking that the petitioner not having a vakil, and not wanting to have one, was a perfectly good reason why the

question might, without any prejudice to him, be put the same day. I therefore think that there has been no illegality in the case, and therefore it does not arise to decide whether, if there had been one, it would have been curable. Mr. Venkataraghavachariar urges that in the circumstances of the case the sentence imposed is too severe. The petitioner is a young man. The sum involved is small. He has already been in jail for six weeks. The sentence is reduced to the period already undergone.

P.R.S./S.N.

Sentence reduced.

* 1930 Cr. Cases 1194

(Madras)

PANDALAI, J.

(*Seemakurti*) Kanakayya—Petitioner.

Emperor—Opposite Party.

Criminal Revn. No. 122 of 1930 and Criminal Revn. Petn. No. 114 of 1930, Decided on 12th August 1930.

* Criminal P. C. (1898), Ss. 222 (2) and 561-A—S. 222 allows large number of separate charges to be tried for purpose of convenience—But separate charges can be framed in respect of separate amounts misappropriated on specific dates.

Section 222 (2) is an enabling provision which permits what otherwise would be a large number of separate charges to be joined together for the purpose of convenience. Nowhere is it prescribed that separate charges in respect of separate amounts misappropriated shall not be resorted to and that if an accused has misappropriated several sums within a year they all should be added together and made into one gross sum and tried as one charge. [P 1196 C 1]

A who was B's clerk and sold rice for him was charged with having received Rs. 60 on 10th August 1928 and two other sums on 24th September 1928 and having misappropriated the same without properly bringing them to account and was convicted. A similar complaint was subsequently filed in respect of an amount collected on 14th August 1928. It was contended that A having been previously convicted for criminal breach of trust in respect of sums collected on 10th and 24th September 1928 could not again be tried in respect of an amount collected on an intermediate date 14th August 1928.

Held: that the trial was not illegal. The former case against A was not for a gross sum misappropriated within two dates but was, for misappropriation of specific sums of money received on specific dates and S. 222 (2) did not come into operation. The charge pending against A could therefore be heard. [P 1196 C 2]

Held also: that the trial could not be stopped under S. 561-A unless it was shown that there was an abuse of process of the Court: 32 I. C. 158, *Dist. A. I. R. 1929 Cal. 457* and 5 I. C. 970, *Ref.* [P 1196 C 1, 2]

P. V. Rajamannar for P. Venkata-ramana Rao—for Petitioner.

N. S. Māni for Ag. Public Prosecutor—for the Crown.

Order.—The only point argued in this petition is that the petitioner against whom charges under Ss. 408 and 477-A have been framed in C. C. 82 of 1929 now pending against him cannot be tried or convicted for those offences because the petitioner was in a previous case filed by the same complainant namely C. C. 84 of 1928 tried and convicted for criminal breach of trust in respect of sums collected within the same period as that covered by the alleged offences in this case.

The facts are as follows: The petitioner was a clerk under the complainant who is a trader in paddy and rice. The duty of the accused was to sell rice, collect the price from his customer and pay the amounts collected to the complainant and keep correct accounts of all receipts. In C. C. 84 of 1928 the petitioner was charged with having received sums of money on two days namely Rs. 60 on 10th August 1928 and two sums of Rs. 16-12-0 and Rs. 54-4-9 on 24th September 1928 and misappropriated the same without properly bringing them into account. For this he was tried and convicted in that case. The present complaint which was subsequently filed and which is pending was in respect of three amounts namely Rs. 20 collected on 14th August 1928, Rs. 21 collected on 5th March 1928 and Rs. 5 collected on 22nd March 1928. Although the charge was framed originally in respect of the three above amounts, it appears that the charge in respect of amount collected on 5th March 1928 and 22nd March 1928 have been struck out, so that the only charge now pending against the petitioner is that in respect of money collected on 14th August 1928. The petitioner's argument is that he having been previously convicted for criminal breach of trust in respect of amounts collected on 10th August and 24th September 1928 cannot now be tried again for criminal breach of trust in respect of an amount collected on an intermediate date, namely 14th August 1928. This argument is sought to be based on S. 403, read with S. 222 (2), Criminal P. C. Reliance was also placed upon a

decision of this Court reported in *In re Appadurai Ayyar* (1) and a decision of the Calcutta High Court in *Sidh Nath Awasthi v. Emperor* (2). The public Prosecutor on the contrary relies upon the case in *Nagendra Nath Bose v. Emperor* (3) following the decision in *Emperor v. Kashinath Bagaji* (4). If the decision of this Court in *In re Appadurai Ayyar* (1) is applicable I am bound by it. But it seems to me that it is not applicable to the facts of this case. From the report it seems that in that case there was a previous trial of the same accused for misappropriation of a gross sum between two dates. The accused was thereafter charged for misappropriation of another gross amount not included in the first amount but misappropriated on dates within the same period. In those circumstances the Court held that the intention of the legislature in enacting S. 222, Criminal P. C., is that where there is to be a trial for misappropriation of a gross sum there should be only one trial for all such offences committed within the period covered by the defalcation. The charge in the previous case in such circumstances should be taken to include all the items misappropriated by the accused during that period and therefore the accused cannot be put on trial in a subsequent case for other amounts alleged to have been misappropriated during the same period. That decision has no bearing on this case because the former case against this petitioner was not for misappropriation of a gross sum misappropriated within two dates but was for misappropriation of specific sums of money received on specific dates. Where that is the case S. 222 (2), Criminal P. C., does not come into play at all. All that the section in my opinion says is that instead of charging the accused under separate counts for defalcation of each particular amount separately received and misappropriated which is the general rule laid down in S. 234; an exception is made necessitated by convenience that all the defalcations within a year may be joined together and the total amount of defalcation and

(1) [1916] 17 Cr. L. J. 30=32 I. C. 153.

(2) A. I. R. 1929 Cal. 457=1929 Cr. C. 91=124 I. C. 824=81 Cr. L. J. 747=57 Cal. 17.

(3) A. I. R. 1928 Cal. 654=76 I. C. 300=25 Cr. L. J. 156=50 Cal. 632.

(4) [1910] 11 Cr. L. J. 337=5 I. C. 970.

the dates within which the defalcations took place need alone be mentioned in the charge, and a charge so framed is to be deemed to be a charge for one offence within the meaning of S. 234. This does not mean that if that is more convenient separate counts should not be charged for separate amounts misappropriated on different dates. In other words, S. 222 (2) is an enabling provision which permits what otherwise would be a large number of separate charges to be joined together for the purpose of convenience. Nowhere is it prescribed that separate charges in respect of separate amounts misappropriated shall not be resorted to and that if an accused has misappropriated several sums within a year they all should be added together and made into one gross sum and tried as one charge. All that the decision in *In re Appadurai Ayyar* (1) means is that where a trial of misappropriation of a gross sum within an interval of time has already taken place the prosecution cannot be heard to say that certain items of misappropriation were left out from the gross sums first charged or to bring fresh cases on those omitted amounts. As the learned Judges say in such a case the charge in the previous case should be taken to include all the items misappropriated by him in the course of the same transaction during that period. As that decision has no application to this case I need not further consider it. The decision in *Sidh Nath Awasthi v. Emperor* (2) is really against the petitioner's contention. There the prosecution knowing well what was the gross sum in respect of which an accused had committed criminal breach of trust elected to proceed on three separate items and got the accused convicted. Then they picked up three other items and got the accused tried a second time and convicted. The Court said that though S. 403, Criminal P. C., may not strictly apply in terms to a case like this, still there is abundant authority for the view that a second trial in circumstances such as this ought not to have been allowed to be held by which I understand that the High Court would in an appropriate case stop the trial if it was shown to be oppressive or an abuse of the process of the Court. But

so far as the legality of the conviction was concerned the Court held that there was nothing illegal in it and contented itself with reducing the sentence. This decision does not support the argument of the petitioner that the trial is illegal. It only says that in an appropriate case this Court has power to stop the trial as oppressive and an abuse of the process of the Court. The decision in *Emperor v. Kashinath Baga'i* (4) is a direct authority against the petitioner. There the accused was tried for the offence of criminal breach of trust as a public servant in respect of Rs. 12 odd and was acquitted. He was again tried for the same offence in respect of another sum, Rs. 19, misappropriated during the same period as that to which the Rs. 12 related and was convicted. The Sessions Judge acquitted the accused on the ground that his previous acquittal was a bar to the second trial. The High Court of Bombay reversed the order of acquittal holding that the previous acquittal did not operate as a bar to the accused's conviction at the second trial. This was followed by two learned Judges of the Calcutta High Court in the decision reported in *Nagendra Nath v. Emperor* (3). On the authorities there is no ground for the petitioner's contention that having regard to the form of the charge in the former case the charge now pending against him cannot be heard.

Nothing has been urged at the hearing to show that there is a fit case in which the trial should be stopped to prevent the abuse of the process of the Court under S. 561-A. The complaint stated that the complainant did not, when he brought the former case, know that the accused had misappropriated the sum now charged. I have not been shown that this is untrue. I therefore see no reason to interfere and dismiss this petition.

P.R.S./R.M.

Petition dismissed.

1930 Cr Cases 1196

(Madras)

PANDALAI, J.

Suppiah—Accused—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 345 of 1930, and Criminal Revn. No. 560 of 1930, Decided on 20th August 1930.

Penal Code (1860), S. 366—Woman kidnapped having illicit intercourse with accused even before kidnapping—Seduction was committed.

Under S. 366 seduction does not mean surrender or loss of chastity for the first time. Seduction is committed even where the woman had illicit intercourse with the accused before she was kidnapped. [P 1197 C 1]

F. Z. Vaz—for Appellant.

Judgment.—It is contended that P. W. 3 had illicit intercourse with the petitioner even before she was kidnapped from P. W. 4's house and that therefore the taking was not in order to seduce her to illicit intercourse. For this the decision in *Rex v. Frederick Moon, Rex v. Emily Moon* (1), is relied on. That was a decision under the English Children Act 1908 under which it was held that seduction was surrender or loss of chastity for the first time. In my opinion that decision has no application to S. 366, I. P. C., where the substantial offence is kidnapping or abduction. The conviction was therefore right.

As to the sentence the fact that P. W. 3 was not merely a consenting party but perhaps pressed the petitioner to take her away is to be taken into account. The petitioner is young, and on the whole behaved well, except that he broke the law listening to a young woman. The sentence is reduced to one month's simple imprisonment.

P. R. S./S. N. *Sentence reduced.*

(1) [1910] 1 K. B. 218.

* * 1930 Cr. Cases 1197

(Madras)

WALLACE AND JACKSON, JJ.

Muthu Reddi & another—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. No. 78 of 1930, Criminal Revn. Petn. No. 73 of 1930, and Criminal Misc. Petn. No. 133 of 1930, Decided on 14th March 1930.

* * Extradition Act (1903), S. 18—Magistrate in British India handing over persons on demand by French Governor of Pondicherry without further inquiry—His order is not illegal—Procedure to be followed in extradition proceedings between British Government and French Possessions in India is that provided in Art. 9 of the Treaty of 1815 which contemplates summary procedure.

The procedure to be followed in extradition proceedings between the British Government in India and the French Settlements in India is that which is provided in Art. 9 of the Treaty of 1815, the necessary legislative sanc-

tion for which is S. 18, Extradition Act. The Indian Dependencies of France were expressly excluded from the Extradition Treaty of 1876 and therefore they are not "Foreign State" as defined in the Extradition Act. They are therefore governed by Chap. 3 of the Act, to which S. 18 applies. Art. 4 of the Treaty of 1815 contemplates a summary procedure, and so where a Magistrate in British India, on demand from the French Governor of Pondicherry, handed over certain persons without further inquiry his order is not illegal: 47 Cal. 37, *Ref. on*; A. L. R. 1921 Cal. 273, *not Appr.* [P 1199 C 1]

K. S. Jayarama Ayyar and *K. R. R. Sastri*—for Petitioners.

Advocate General and *K. Venkataraghavachari* for Public Prosecutor—for the Crown.

Wallace, J.—The point raised in this criminal revision petition is of considerable importance, namely what is the procedure to be observed in extradition proceedings between the British Government in India and the French Settlements in India. The District Magistrate of South Arcot has on a demand from the Governor of the French Settlement of Pondicherry and on information from him that judicial proceedings are pending in Pondicherry against two British subjects, arrested these two men and proposes to hand them over without further inquiry to the French authorities. The two arrested men have put in this petition alleging that the action of the District Magistrate is illegal, inasmuch as he has under the Extradition Act of 1903 no authority to deliver them up in this summary fashion, but must first hold an inquiry and satisfy himself that there is a prima facie case against them, as provided for in Chap. 2 of that Act. The learned Advocate-General on behalf of the Government contends that Chap. 2 of the Act has no bearing on the case, and that the case is governed by the provisions of and procedure indicated in Art. 9 of the Treaty of 1815, the necessary legislative sanction for which has been provided by S. 18, Extradition Act. The petitioners rejoin that S. 18 has no application to cases where no procedure has been prescribed by the legislature, and that in any case its application is restricted to cases coming under Chap. 3 of the Act. They further urge that the extradition provision in the Treaty of 1815 had been abrogated by the Treaty of 1876 and by the English Extradition Acts of 1870 and 1873. They argue fur-

ther that any part or dependency of a Foreign State is for the purpose of the Indian Extradition Act a Foreign State to which Chap. 2 and not Chap. 3 will apply.

To take the last point first, a Foreign State is by definition in the Act a State to which the Extradition Acts of 1870 and 1873 apply. Whether or not a part or dependency of a Foreign State is itself a Foreign State need not be decided here, since I am of opinion that in any case the East Indian Dependencies of France were expressly excluded from the Extradition Treaty of 1876, and therefore they are not States or parts of a State to which the Extradition Acts of 1870 and 1873 apply. This is the view taken by a Bench of the Calcutta High Court in *Rahmat Ali v. Emperor* (1). In a subsequent case in Calcutta, *In re Celeste Cullington* (2), a single Judge, Buckland, J. differed, holding that Art. 16 of the Treaty of 1876 does not exclude the East Indian Dependencies of France, but was intended to preserve the provisions of the Treaty of 1815, and that the effect of the order in Council of 16th May 1878 was to put into operation as regards these Dependencies S. 25, English Extradition Act of 1870. The learned Judge admitted that he had not then before him the exact terms of the order in Council. That is a matter of regret since, if he had had these terms before him, I doubt, speaking with respect, if he would have differed from *Rahmat Ali v. Emperor* (1). The concluding terms of the order in Council are that the Extradition Acts of 1870 and 1873 shall after 31st May 1878 "apply in the case of the said Treaty," that is, the Treaty of 1876, "with the President of the French Republic." So that it is only in respect of that Treaty and not in respect of all Treaties then in force that these Extradition Acts apply; and unless that Treaty abrogated the Treaty of 1815 in respect of French Dependencies in East India the Extradition Acts of 1870 and 1873 do not apply to them and they would therefore not be Foreign States within the meaning of the Indian Extradition Act of 1908.

Article 16 of the Treaty of 1876 sets out

(1) [1930] 47 Cal. 37=20 Or. L.J. 739=5 I. C. 147.

(2) A. I. R. 1931 Cal. 273=63 I. C. 819=22 Or. L.J. 691=43 Cal. 323.

"the manner of proceeding in the colonies and foreign possessions of the two High Contracting Parties."

and ends up:

"The foregoing stipulations shall not in any way affect the arrangements established in the East Indian Possessions of the two countries by Art. 9 of the Treaty of 7th March 1815."

Now, as petitioners themselves argue, this Art. 9 contains no procedure strictly so called. Therefore what the saving clause at the end preserves and intended to preserve, is the 'Extradition arrangements' provided by that article. In other words that Article is in no way affected by Art. 16 of the Treaty of 1876, and extradition in the East Indian possessions of the two countries remains governed by the Treaty of 1815. This is the view which has been taken of this clause both in *Rahmat Ali v. Emperor* (1) and *In re Celeste Cullington* (2).

The petitioners urge that, as Art. 9 of the Treaty of 1815 provides no procedure it is in effect unenforceable. This argument I do not follow. If that Treaty provided no procedure such as was provided by the prior Treaty of 1802 or by the subsequent Treaty of 1876; that is clear indication that the High Contracting Parties did not agree upon or intend that there should be any formal procedure for extradition. I do not follow the argument that the Treaty cannot be brought into operation until the legislature has provided and sanctioned a procedure. That would obviously be exceeding its province. The legislature can only sanction a procedure if the Treaty provides for one. The procedure must be found or provided for in the Treaty itself before any legislature of either party can legislate about it. The legislature cannot alter either by addition or subtraction the essentials of a Treaty which is the contract between the High Contracting Parties, or impose upon one party conditions which do not form part of that contract. That would be tantamount to the subjects of one High Contracting Party forcing on its own Government a breach of the Treaty, or making it impossible for its own Government to keep its pledged word with the other party: see *The Queen v. Wilson* (3). S. 18, Extradition Act, lays down that nothing in this Chapter, that is Chap. 3, shall derogate from the pro-

(3) [1891] 8 Q. B. D. 42=26 W. R. 44=37 L. R. 354=13 Q. B. D. 632.

visions of any Treaty. That is, it incorporates in effect the provisions of such Treaty in the Municipal Courts of India. When therefore, the treaty says that offenders shall be extradited on demand, it is not open to a Municipal Court to say that they shall not be delivered up until some form of procedure initiated, prescribed and sanctioned by itself alone and not agreed upon by the High Contracting Parties is satisfied. There is, on this finding, no point here in emphasizing that S. 18, Extradition Act, refers to Chap. 3 alone, since, as already pointed out, the French possessions in India are not a Foreign State, and therefore, Chap. 3 is the only one which would apply to the present case.

Article 9 of the Treaty of 1815 which is therefore, in my view, the provision to be followed, contemplates summary delivery at the request of any authority of either High Contracting Party. That is the view which the Local Government itself has taken of its obligations as set out in the Extradition Manual, Chap. 3, S. 2 (a), and I think we may assume that that is the view authorized by the High Contracting Parties from whom this Government derives this authority. The procedure in the Manual, however, seems to be regarded as applicable to the case of "grave" offences, and neither side has been able to point us to any orders of Government under which the general provision of Art. 9 of the Treaty of 1815 has been so restricted. This question, however, does not arise here as theft is a "grave" offence. I find therefore that there is no substance in this petition and it is dismissed. The collateral petition (Criminal M.P. No. 133 of 1930) put in under S. 491, Criminal P. C., must also fail since the detention of the petitioners is not illegal or improper; and it is also dismissed.

Jackson, J.—I agree. Under the Indian Act 15 of 1903, a Foreign State means, a State to which the English Extradition Acts of 1870 and 1873 apply. The main Act is that of 1870 (Vol. 1, p. 443, Coll. Stat.). As provided in S. 2 of that Act the application of that Act to any Foreign State shall be by order in council. If the order in council has not applied the Act to French Possessions in India, the Act

does not apply and these possessions are not a Foreign State as defined in the Indian Act 15 of 1903.

The order in council applied the Act not generally to France, but in a restricted sense "in the case of the Treaty with the President of the French Republic." This is the Treaty of 1876 which in terms does not affect the arrangements in the East Indian possessions of the two countries (Art. 16). Therefore the Extradition Act of 1870 has not been applied to that part of France which is Pondicherry, and Pondicherry is not a Foreign State.

Therefore, Chap. 3, Act 15 of 1903, "Surrender in case of States other than Foreign States," applies to Pondicherry. S. 18, falling within Chap. 3, expressly preserves the provisions of any Treaty for the extradition of offenders and its procedure. This makes the provision of the Treaty of 1815 applicable to the present case, and gives statutory sanction to its procedure. There is therefore no room for an argument that the Treaty cannot affect individual rights in the absence of statutory sanction.

Buckland, J., in *In re, Celeste Cullington* (2), (at p. 335 of 48 Cal.) says:

"By an order in council, dated 16th May 1878, the Extradition Acts were made applicable to France."

It is here that with all respect I differ from him. I should have agreed, if the order in council stated "in the case of France "instead of" in the case of the said Treaty." I agree that as the Treaty of 1815 practically provides for surrender on demand, a more elaborate procedure cannot be superimposed by the unilateral act of one of the parties,

P.R.S./S.N.

Revision dismissed.

1930 Cr. Cases 1199 (Madras)

SUNDARAM CHETTY, J.

Ramaswami Tevar — Petitioner.

v.

M. Subban and others—Respondents.

Criminal Revn. No. 33 of 1930 and Criminal Revn. Petn. No. 31 of 1930, Decided on 29th July 1930.

Criminal P. C. (1898), S. 350 (1)—Sessions Judge sitting in revision directing further inquiry on same evidence and by same Magistrate—Eventually District Magistrate transferring case to another Magistrate who proceeded to summon witnesses afresh—

Sessions Judge's order is not quite in consonance with S. 436—Magistrate to whom case was transferred could take fresh evidence under S. 350 (1)—Criminal P. C. (1898), S. 436.

The Sessions Judge sitting in revision against an order of discharge directed further inquiry for finding out whether the offence was committed on the evidence already adduced and further directed that the inquiry should be made by the same Magistrate who originally tried the case. Eventually, however, the District Magistrate had to transfer the case to another Magistrate, who proceeded to examine the witnesses afresh.

Held (Obiter) that the order of the Sessions Judge directing inquiry by the same Magistrate was not quite in consonance with S. 436: 10 Cal. 207, *Rel. on.* [P 1200 C 1]

Held further: that the Magistrate to whom the case was transferred, could summon the witnesses afresh in the exercise of the discretion vested in him under S. 350 (1). [P 1200 C 2]

N. Somasundaram—for Petitioner.

K. S. Jayarama Ayyar—for Respondent 2.

Order.—This Criminal Revision Petition has been filed by the complainant against the order of the Sessions Judge of Tinnevely in Crl. Revn. Petn. 46 of 1929: Against an order of discharge passed by the Special Third Class Magistrate of Tinnevely, in C. C. 286 of 1929 the Complainant filed Cr. Revn. Petn. 27 of 1929 to the Sessions Judge, who directed a further inquiry into the case, for the purpose of finding out on the evidence already adduced, whether an offence under S. 424, I. P. C., can be brought home to the accused. In ordering a further inquiry for that purpose the learned Sessions Judge specifically directed that it should be made by the Sub-Magistrate of Nanguneri, as he was the person who tried the case originally, when he was the Special Third Class Magistrate, Tinnevely. Such an order is not quite in consonance with S. 436, of the Code, which does not authorize a Sessions Judge to direct further inquiry by a particular Magistrate subordinate to the District Magistrate. What the Sessions Judge can do is to direct the District Magistrate by himself, or by any of the Magistrates subordinate to him, to make the further inquiry, thus leaving the District Magistrate to exercise a discretion as to the selection of any Magistrate subordinate to him: vide *Chundishurn Bhuttacharjea v. Hem Chundar Bannerjea* (1).

Be this as it may, a situation not probably contemplated by the Sessions Judge when ordering further inquiry in that manner, seems to have arisen. This case has since been transferred by the District Magistrate to Second Class Magistrate, Tinnevely, for disposal. That Magistrate decided to proceed with the examination of the witnesses afresh, for some reasons. That order has been set aside in revision by the learned Sessions Judge, who says, that, in view of his former order, it is not open to the Sub-Magistrate to take evidence afresh, because the evidence already on record was taken by another Magistrate, who ceased to have jurisdiction over the case. Against this order the present revision petition has been filed in the High Court.

The main point for consideration is, whether the Second Class Magistrate of Tinnevely can now resumption the witnesses and re-commence the inquiry, in the exercise of the discretion vested in him under S. 350 (1) Criminal P. C. By virtue of Cl. (3) of this section, when a case is transferred under the provisions of this Code, from one Magistrate to another, the latter can exercise the powers mentioned in Cl. (1). That being so, the order of the Second Class Magistrate, Tinnevely, in exercise of the statutory power vested in him, cannot be interfered with by the learned Sessions Judge. Moreover, when further inquiry was ordered to be made in the case, on the evidence already taken the Sessions Judge directed the same to be made, by the very Magistrate who had recorded the evidence. In that case, S. 350 would have no application. Now that another Magistrate has come to have jurisdiction over this case, (which was not contemplated in the original order of the Sessions Judge, directing further inquiry) the restriction placed in that order can no longer hold good nor can the operation of S. 350 (1) of the Code be checked. The order of the learned Sessions Judge is set aside, and the order of the Second Class Magistrate, Tinnevely is confirmed though not for the reasons mentioned in his order.

P.R.S./S.N.

Order set aside.

* 1930 Cr. Cases 1201

(Allahabad)

KING, J.

* Emperor

v.

Radha Raman Mittra—Accused.

Criminal Reference No. 336 of 1930. Decided on 17th May 1930, made by Addl. Sess. Judge, Meerut, on 14th May 1930.

* (a) Criminal P. C., S. 540-A—No discretion is given to Judge to dispense with attendance of accused except for incapability of remaining before the Court.

Under S. 540-A the Court can dispense with the attendance of an accused person who is represented by a pleader and proceed with the trial in his absence only if the Court is satisfied that the accused is incapable of remaining before the Court. No discretion is given to dispense with the attendance of an accused upon any other ground. [P 1202 C 1]

(b) Criminal P. C., Ss. 540-A and 537—Wrongly dispensing with presence of accused—Accused represented by counsel and dispensation at request of accused—Irregularity can be cured.

Where the Judge wrongly dispenses with the presence of the accused at his own request, and the accused is represented by a counsel at his own request throughout the trial, the error is not such an illegality as to vitiate the proceedings or sentence against the accused and can be cured under S. 537: *A.I.R. 1923 All. 81, Rel. on.* [P 1202 C 1]

(c) Criminal P. C., S. 438—Scope.

Although it is unusual for a Judge to make a reference regarding the legality of his own order, yet there is nothing in S. 438 to preclude him from doing so. The words "or otherwise" are wide enough to cover such a reference. [P 1201 C 2]

Order.—This is a reference by the learned Additional Sessions Judge of Meerut, arising out of the following facts: The trial of P. Spratt and others under S. 121-A, I.P.C., commonly known as the Meerut Conspiracy Case, is proceeding in the Additional Judge's Court. One of the accused in that case, namely R. R. Mittra, applied to the Judge for permission to visit his widowed sister who was lying seriously ill at Calcutta. The Judge forwarded the application to the District Magistrate with the remark that if and when the Local Government or the Government of India should decide to send the applicant, or allow him to go to his house, then it would be for the Court to consider the question of dispensing with his attendance under S. 540-A, Criminal P. C.

On the afternoon of 26th April 1930 the Judge received, through the usual

official channels, an order from the Government of India stating:

"The Government of India agree that Radha Raman Mittra, an undertrial in the Meerut Conspiracy Case, may subject to the orders of the Court be permitted to visit Calcutta to see his sister who is ill, provided the Judge is satisfied that the absence of the accused during trial will not cause any delay or invalidate any part of the proceedings, that the accused is represented by counsel during the whole period of his absence, and he gives an undertaking that he will not attempt to engage in any kind of propaganda during his absence from Meerut."

R. R. Mittra thereupon petitioned the Judge to dispense with his attendance in Court for 15 days, so as to enable him to visit his sister, at Calcutta, and gave an undertaking that he would be represented during his absence by two advocates whom he named, and that he would not engage in any kind of propaganda during his absence. The Judge then passed an order on the same date, 26th April 1930, dispensing with the applicant's attendance under S. 540-A, Criminal P. C., for a period of 15 days subject to the conditions above mentioned. Subsequently the Judge had to reconsider the provisions of S. 540-A in connexion with a similar application for leave of absence made by another accused in respect of whom the Government of India had passed a similar order. R. R. Mittra's application had not been opposed by counsel for the Crown, and the Judge by his order of 26th April had allowed the application somewhat hastily. Upon further consideration he felt grave doubt whether that order was strictly justifiable under S. 540-A. If the order were held to be incorrect, then the question arose whether the error or irregularity was curable under S. 537, or whether he should recall the witnesses whose evidence had been recorded in Mittra's absence.

He has therefore made this reference under S. 438 asking for orders on two points:

(1) Whether the order of 26th April is correct; (2) if not, whether it is merely an irregularity curable by S. 537, or whether the witnesses examined in Mittra's absence should be re-examined in his presence.

Although it is unusual for a Judge to make a reference regarding the legality of his own order I see nothing in S. 438 to preclude him from doing so. The words "or otherwise" are wide enough

to cover the present reference. In the peculiar circumstances of this case I think the Judge was fully justified in stating his doubts and making the reference. In any case the High Court is clearly empowered under S. 439 to pass orders on this reference.

On the first point I think it is clear that the order of 26th April was not strictly justifiable under S. 540-A. Under that section the Court can dispense with the attendance of an accused person who is represented by a pleader, and proceed with the trial in his absence, only if the Court is satisfied that the accused "is incapable of remaining before the Court." No discretion is given to dispense with the attendance of an accused upon any other ground. The Judge took the view (in his order of 26th April) that:

"if an accused is sent to Calcutta under the order of Government . . . he is incapable of remaining before the Court."

I think this reasoning is fallacious. The Government of India granted permission for the visit to Calcutta "subject to the orders of the Court." i.e., subject to the Court's dispensing with the attendance of the accused under S. 540-A. The Court could only dispense with the attendance of the accused on being satisfied that he was "incapable of remaining before the Court." It is clear that Mittra was not "incapable of remaining before the Court" if the words are construed in their plain and ordinary meaning. I hold therefore that the order of 26th April was not correct.

The next question is whether the error or irregularity in procedure is curable under S. 537. I think the answer is clearly in the affirmative. The Judge was wrong in dispensing with the attendance of the accused, but the error is of minor importance. The accused was represented by counsel, at his own request, throughout his absence. There is no suspicion of any unfairness and it seems hardly possible that the accused could have been prejudiced in any way. The Court has been too indulgent in granting his request, but that is not a matter of which he can justly complain. The error obviously does not go to the whole root of the trial. No vital rule of procedure has been broken. On the principles laid down in *Emperor v.*

Bachu Chaube (1) the error is not such an illegality as to vitiate the proceedings against Mittra during his absence. I hold that S. 537 is applicable and that the error or irregularity in the proceedings will not vitiate any sentence or order that may be passed against Mittra unless it can be shown that such error or irregularity has in fact occasioned a failure of justice.

It follows that it is unnecessary to recall the witnesses examined in Mittra's absence, and to record their evidence over again in his presence, merely for the purpose of remedying a possible technical defect. The only question is whether the procedure adopted can be shown to have in fact occasioned a failure of justice. It seems *prima facie* unlikely that such an argument could be seriously advanced, but it is impossible for me to anticipate what points might be raised in support of such an argument. In my opinion it would be advisable for the Judge to question Mittra and his counsel on this point and if they can show that Mittra has in fact been prejudiced in any way by the evidence of any witness being recorded in his absence then that witness should be recalled and examined or cross-examined in his presence.

As Mittra must have availed himself of the concession granted by the order of 26th April it is unnecessary for me formally to set it aside. For the same reason I consider it unnecessary to issue notice to him under S. 439 (2) as my order cannot be held to be made "to the prejudice of the accused." My order regarding the legality of the order of 26th April, passed in his favour is purely of academic interest so far as he is concerned. He has already enjoyed the benefit of that order. The reference is accepted in the terms set forth above.

V.B./R.K. *Reference answered.*

(1) A. I. R. 1923 All. 81 = 71 I. C. 115 = 24 Cr. L. J. 67 = 45 All. 124.

1930 Cr. Cases 1202

(Allahabad)

BENNET, J.

Emperor—Applicant.

v.

Gaya Teli—Accused—Opposite Party.
Criminal Ref. No. 342 of 1930, Decided on 11th August 1930, made by Sess. Judge, Gorakhpur, D/- 15th May 1930.

Criminal P. C. (1898), S. 195 (1) (b) — Information to police about murder found false—No proceedings on this information—Order of commitment of informant to Sessions Court by Magistrate — Such commitment should be quashed and Magistrate should be asked to try case under S. 211 (part 1), I. P. C.—Penal Code, S. 211.

The accused had given false information about murder to the police and hence no proceedings were taken on this information. The Magistrate made an order of commitment to the Sessions, as the report related to a capital offence.

Held: that such commitment should be quashed as the case did not go further than a police inquiry on the information. The Magistrate is in such cases competent to try the case of the accused under S. 211 (part 1), Penal Code: 4 I. C. 812, *Foll.* [P 1203 C 2]

M. Waiullah—for the Crown.

Order.—This is a reference by the learned Sessions Judge of Gorakhpur against the order of commitment by a Magistrate, committing Gaya Teli for trial under S. 211, I.P.C. The accused Gaya Teli made a report in the thana against Gopal Singh and other persons of having murdered his father Krishna. The police found that that report was false, and no proceedings in Court were instituted on it. The commitment order states that as the report relates to a capital offence so the case is exclusively triable by the Court of Sessions and the Magistrate accordingly commits the accused to the Court of Sessions. It has been held by this Court in *Emperor v. Jagmohan* (1) that :

"where the offence under S. 211, I. P. C., consists in giving false information to the police and the case does not go further than a police inquiry the offence falls within para. 1, S. 211, I. P. C., and not within para. 2 even though the charge made in the report is one of murder. An offence under para. 2, S. 211, is triable by the Magistrate and the maximum penalty is two years' rigorous imprisonment, and that is a penalty which can be imposed by the Magistrate."

Accordingly following the ruling quoted I quash the commitment to the Sessions Court.

The next matter contained in the letter of reference, is that the Magistrate had no jurisdiction to take cognizance of the offence, because the offence had been committed in relation to a proceeding in Court within the meaning of S. 195 (b), and there was no complaint of such Court before the Magistrate, as contemplated by that clause. The Sessions Judge considered

therefore that without such a complaint the proceedings of the Magistrate were void. Now the offence charged under S. 211, I. P. C., relates to the making of a false report in the police station on 26th May 1929 against one Gopal Singh. No proceedings in Court took place against Gopal Singh. Accordingly it appears to me that it cannot be said that the offence was committed in relation to a proceeding in Court. Further without an application to the Magistrate it does not appear to me that the Magistrate would have been correct in acting under S. 476, Criminal P. C., and in sending for Gaya Teli for making an inquiry from him in regard to the report which Gaya Teli had made in the thana. It does not appear to me that the language of S. 476 contemplates such action on the part of a Magistrate. But even if the view of the learned Sessions Judge were correct and the case did come under S. 195 (b), then the Magistrate would have been acting correctly under S. 478 (1), because he is apparently the Magistrate who is now in charge of the Sub-Division in succession to the Magistrate before whom the case for murder was the subject of an inquiry, and he has made a commitment to the Sessions Court. But I do not consider that the case does come under S. 195 (1) (b), and accordingly it was correct for the Magistrate to proceed on the report of the prosecuting inspector, bringing to his notice the complaint which Gaya Teli had made to the police. I may note that the ruling *Emperor v. Jagmohan* (1) to which the learned Sessions Judge has made a reference was a precisely similar case in which Jagmohan was prosecuted for giving false information to the police, and there was no complaint mentioned under S. 195 (1) (b), but it is stated that the persons accused were charged before the Magistrate with the offence under S. 211, I. P. C.

Accordingly I pass the order in the present case that the commitment is quashed, and I direct that the Magistrate do proceed with the trial of this case under S. 211, I.P.C., part 1, against Gaya Teli according to law.

B.V./R.K. Order accordingly.

* 1930 Cr. Cases 1204

(Allahabad)

BENNET, J.

Sheo Pratap Singh and others—Accused—Applicants.

v.

Emperor—Opposite Party.

Criminal Revn. No. 355 of 1930, Decided on 4th August 1930, from order of Sess. Judge, Allahabad, D/- 9th July 1929.

* (a) Criminal P. C. (1898), S. 4 (h)—Complaint and information differentiated.

The essential difference between a complaint and information is that a Magistrate acts on a complaint because the complainant has asked him to act, but a Magistrate acts on information on his own initiative. In the case of a complaint the Magistrate is asked to prosecute the person named as accused and he has then to decide whether he will accede to the request or not. If he does not, then he must record his reasons under S. 202 (1), and may either make an enquiry himself or direct an enquiry or investigation or dismiss the complaint under S. 203 after recording his reasons. But in the case of receiving information, the Magistrate is not asked by anyone to issue process and if he does not choose to act on the information, he need not record any reason or pass any order. In the case of information there is no complainant to examine on oath. On a complaint the complainant is first examined on oath unless it has been made by a public servant acting in the discharge of his official duty: 1 C.W.N. 105; (1899) A.W.N. 201; 3 C.W.N. 65 and 43 Mad. 709, Ref. [P 1204 C 2; P 1205 C 1]

(b) Criminal P. C. (1898), S. 4 (h)—Complaint defined.

There is nothing in the definition of "complaint" which requires it to be made by the person aggrieved or only in a non-cognizable case: 18 All. 465, *Foll.* [P 1203 C 1]

(c) Criminal P. C. (1898), S. 190 (1) (a)—Complaint, meaning illustrated—Criminal P. C., S. 4 (h).

A Tahsildar alleged in writing to a Magistrate that three persons named in the document have committed an offence and had made a definite request that they should be tried under the Penal Code.

Held; that such a document sent by the Tahsildar to the Magistrate was a complaint: 12 C.W.N. 438; A.I.R. 1924 All. 190; 26 I.C. 148 and 11 Mad. 443, Ref. [P 1206 C 1]

Mahmudullah, A. M. Khwaja and Shyam Kishore—for Applicants.

M. Walliullah—for the Crown.

Order.—This is an application in revision filed on behalf of three persons, Sheo Pratap Singh, Gaja and Baram Din Singh, who have been convicted by a Magistrate under S. 353, I.P.C., and sentenced to one day's simple imprisonment each and fines of Rs. 100, Rs. 20 and Rs. 25 respectively. An appeal was made to the learned Sessions Judge and dismissed by him, and the application in revision is directed against that ap-

peal. In revision grounds 1 and 3 have been argued. Ground 1 alleges that "the conviction of the applicants is wholly void and illegal inasmuch as the learned Magistrate omitted to inform the applicants under S. 191, Criminal P. C., of their right to have the case tried by another Court."

This argument assumes that the Magistrate acted under S. 190 (1) (c). The record shows that the Magistrate issued process on receiving a writing from the Tahsildar forwarding a writing from the amin, who stated "that the accused had assaulted him in discharge of his duty. The question is whether the Magistrate acted on information under S. 190 (1) (c), or on a complaint under S. 190 (1) (a). If he acted on a complaint, S. 191, Criminal P. C., does not apply. A complaint is defined in S. 4 (h), Criminal P. C., which says:

"Complaint means the allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but it does not include the report of a police officer."

"Information" is not defined, but has been held to cover statements of witnesses: *Khudiram Mookerjee v. Empress* (1), communications by post: *Karim Bakhsh v. Adil Khan* (2), anonymous communications by post: *In the matter of Hari Narayan Biswas* (3), and may be received in another capacity than that of Magistrate: *Sundaresam, In re* (4). The essential difference between a complaint and information is that a Magistrate acts on a complaint because the complainant has asked him to act, but a Magistrate acts on information on his own initiative. In the case of a complaint the Magistrate is asked to prosecute the persons named as accused, and he has then to decide whether he will accede to the request, or not. If he does not, then he must record his reasons under S. 202 (1), Criminal P. C., and may either make an enquiry himself, or direct an enquiry or investigation, or dismiss the complaint under S. 203, Criminal P. C., after recording his reasons. But in the case of receiving information, the Magistrate is not asked by anyone to issue process, and if he does not choose to act on the

(1) [1897] 1 C.W.N. 105.

(2) [1899] A.W.N. 201.

(3) [1903] 3 C.W.N. 65.

(4) [1920] 43 Mad. 709=21 Cr.L.J. 348=55 I.C. 684.

information, he need not record any reasons or pass any order.

A Magistrate acting under S. 190 (1) (c) upon information or upon his own knowledge or suspicion, acts in each of these cases of his own accord and initiative. It is for this reason that S. 191 provides that he must inform the accused, that the accused may be tried by another Court. In the case of information there is no complainant to examine on oath. On a complaint the complainant is first examined on oath unless, as in the present case, the complaint has been made by a public servant acting in the discharge of his official duty: S. 200 (aa), Criminal P. C. Now the Tahsildar wrote a document in English on 12th March 1929 addressed to the S. D. M., that is, the Sub-Divisional Magistrate. In that document he states after setting forth certain facts:

"Sheo Pratap Singh and his servants have committed an offence described in S. 353, I.P.C. It is therefore requested that the three persons named overleaf be tried under the said section."

We have here in this document of the Tahsildar the allegation in writing to the Magistrate that the three persons named had committed an offence, and a definite request that they should be tried under S. 353, I.P.C. Accordingly all the ingredients of a complaint, as defined under S. 4 (h), Criminal P. C., are present. The document therefore is clearly a complaint. Some argument was made by the learned counsel for the applicants on the distinction between a complaint and information. He alleged, firstly, that a complaint can only be made in a non-cognizable case. There is no authority in the Criminal Procedure Code for this proposition. Secondly, he alleged that a complaint must be made by the person who is aggrieved. The contrary has been held in *Farzan Ali v. Hanuman Prasad* (5). There is nothing in the definition of "complaint" which requires it to be made by the person aggrieved. The third point was that a complaint must bear a court-fee stamp. It is not shown that a complaint by an official in an official capacity, requires a court-fee stamp. The learned counsel then referred to a ruling of the Punjab Chief Court in 1913, reported in *Makhan Singh v. Gunner Jepson* (6). In that

case the Cantonment Magistrate wrote a letter to an Assistant Commissioner suggesting that a person should be proceeded against for using abusive language to a gunner. It was held that the Magistrate addressed, in taking action, took cognizance under S. 191 (1) (c). But that case is distinguishable from the present case, because the Cantonment Magistrate had no official connexion with the gunner. Consequently in writing to the Assistant Commissioner the Cantonment Magistrate must have been acting in his private capacity and not in his official capacity.

The next case to which reference is made is reported in *Bansi Lal v. Emperor* (7). In that case an amin reported to the Collector, Mr. Foley, that he had erected eight boundary pillars on the western side of the village, and when he had gone to take his dinner the accused with 20 or 25 men went to the spot, destroyed the pillar and took away the materials with them. On this Mr. Foley passed the following order:

"See under what section Bansi Lal, Dasrathi Lal and their servants can be prosecuted, and prosecute them accordingly. Put up before Mr. Deb for the issue of necessary orders."

The case coming up before Mr. Deb he made the following order: "Summon Bansi Lal under S. 434." The accused was then put on trial before a Deputy Magistrate and convicted under Ss. 379 and 434, I.P.C., and Mr. Deb dealt with the appeal as District Magistrate. The Calcutta High Court held:

"It is now argued by the District Magistrate, Mr. Foley, in his letter showing cause that the amin filed a written complaint to him. This is contrary to the view taken by the Deputy Magistrate in his judgment, and it would not seem to us that the written report of the amin was a complaint, nor was it treated by Mr. Foley as a complaint but rather dealt with by him as Collector, as the Deputy Magistrate says it was, and hence Mr. Deb must be regarded as taking cognizance of the case under S. 190 (1) (c). So before hearing the appeal when he became District Magistrate he should have followed the procedure laid down by S. 191, because an appeal is part of the trial of an offence."

This passage shows that the Court considered that it would have been open to Mr. Foley to deal with the complaint as District Magistrate, but that Mr. Foley in fact did deal with the complaint as Collector. Their Lordships commenting on the order of Mr. Foley observed:

(5) [1896] 18 All. 465=(1895) A.W.N. 149.

(6) [1914] 15 Cr.L.J. 231=28 I.O. 439.

(7) [1903] 12 C.W.N. 433=7 Cr.L.J. 221.

"This is not the order which would be passed on a written complaint under S. 202 made to a Magistrate."

Therefore, so far as the ruling goes, it is authority for the proposition that a report by an amin to the head of the district might be treated by him as a criminal complaint, but that in the particular case before the Court the head of the district treated it in his capacity of Collector and not in his capacity of District Magistrate.

I may also refer to *Sarju Prasad v. Emperor* (8), in which there was the report of a Magistrate to the District Magistrate that an offence under S. 477, I.P.C., had been committed. This report was made after the Magistrate had ceased to exercise jurisdiction in the case, which had terminated. It was held that this was a complaint. In *Raja Ram v. Emperor* (9), a report by a District Judge was held to be a complaint. In *Queen-Empress v. Monu* (10) a report by a revenue officer to a Magistrate was held to be a complaint. I consider there is ample authority from the definition in the Code and from the rulings to which I have referred for the proposition that the document sent by the Tahsildar to the Magistrate in the present case was a complaint. Accordingly it was not necessary for the Magistrate to ask the accused under S. 191, Criminal P. C., whether they desired their case to be tried by another Magistrate. This disposes of the first ground of revision. The third ground of revision was that S. 353, I.P.C., has no direct application to the facts of the present case. In support of this the learned counsel referred only to the report of the amin. That report states that certain cattle were attached by the amin and that they were rescued by force (*ba zor chhin lia*). Evidence was given on the point and the finding of the Magistrate is:

"Baram Din Singh gave the peon, Mehdi Husain, a push and snatched away the string of the attached buffalo which he (Mehdi Husain) was holding. Gaja stopped the cattle from in front."

In the third definition of S. 349 force is said to be used

"by inducing any animal to move, to change its motion, or to cease to move."

In the present case therefore, when the accused caused the animals to cease to move, they were using force as in the definition of S. 349, I.P.C. I consider therefore that S. 353, I.P.C., does apply to the facts found.

B.V./R.K.

Revision dismissed.

1930 Cr. Cases 1206

(Calcutta)

CUMING, J.

Haripado Baidya and others—Accused—Petitioners.

Emperor—Opposite Party.

Criminal Revn. No. 1534 of 1929, Decided on 31st January 1930.

(a) Criminal Trial—Evidence.

It is open to a Magistrate to rely on the evidence of any particular person, be he interested or disinterested. [P 1207 C 1]

(b) Penal Code, S. 500—Person, not committing act—Still excommunicated by its imputation—Imputation is defamatory.

An imputation which leads to the excommunication of a person from his caste is defamatory to him if he had not been guilty of committing the act. [P 1207 C 1]

(c) Penal Code, S. 499, Exception 10—Exception 10 does not refer to case where one man says of another that he married a woman who was married before.

Exception 10, S. 499, deals with cases, for instance, where one man warns another against employing a third person in his service saying that he is a dishonest person and does not refer to the case where one man says of another that he married a woman who had been married before. [P 1207 C 1]

(d) Criminal P. C., S. 439—Findings of facts are not generally interfered with.

The High Court does not as a rule interfere in revision with findings of facts unless it can be said that these findings are based on no evidence or are obviously incorrect. [P 1207 C 2]

Sures Chandra Talukdar and Bhupendra Nath Dutt Roy—for Petitioners.

Prasantabhusan Gupta—for the Crown.

Judgment.—In the case out of which this rule has arisen the complainant brought a case against the three petitioners of having defamed him. The facts alleged were that at a certain meeting of the caste the petitioners were alleged to have stated that one Kamini, the complainant's wife had been married before to one Jogendra. The defence apparently was that the statement was true. Both the Courts found that the three petitioners had made the statement alleged and it was not true and found them guilty under S. 500, I. P. C., and sentenced them to

(8) A.I.R. 1924 All. 120=81 I.C. 595=25 Cr. L.J. 947.

(9) [1914] 15 Cr.L.J. 700=26 I.C. 148.

(10) [1888] 11 Mad. 448=2 Weir. 238.

pay a fine of Rs. 100 each and in default each to suffer rigorous imprisonment for four months.

The petitioners moved this Court and obtained what is described an open rule. The grounds that have been urged are grounds 3, 4 and 8 of the petition to this Court. Ground 3 is that the learned trial Magistrate's order was bad in law in so far as he relied solely on the evidence of interested persons unsupported by the testimony of independent witnesses. Certainly it was open to the Magistrate to rely on the evidence of any particular person, be he interested or disinterested.

The next point urged is that the order of conviction is bad in law in so far as the allegations do not disclose any offence under S. 500, I. P. C. It is quite clear to my mind that the allegations certainly do disclose an offence under S. 500, I. P. C. To say that the complainant married a woman who had been married before would obviously be to defame him, for it is admitted that one of the results of having done so would be the excommunication of the complainant from his caste. An imputation which leads to the excommunication of a person from his caste is certainly defamatory to him if he had not been guilty of committing the act. It has been suggested that the case comes within exception 10, S. 499, I. P. C. Exception 10 is as follows:

"It is not defamation to convey a caution, in good faith, to one person against another provided that such caution is intended for the good of the person to whom it is conveyed or of some person in whom that person is interested, or for the public good."

I admit I entirely fail to see how the present case comes within that exception. Now could Mr. Talukdar satisfactorily show how it comes within the exception? That exception I think deals with cases, for instance, where one man warns another against employing a third person in his service saying that he is a dishonest person. That is the class of cases which this exception might cover. I entirely fail to see how it covers the present case.

Mr. Talukdar then really argued on evidence and evidence only. The case has been considered by two Courts on the questions of fact and both of these Courts have come to the conclusion that the girl Kamini had not been married

to Jogendra before. It cannot be said that the Courts did not deal with the evidence before them. The learned Additional Sessions Judge who heard the appeal went so far as to order further evidence to be taken. Therefore it is quite clear that both the Courts had their mind directed to this particular point, and I see no reason to differ from them on the findings of fact. Neither does this Court as a rule interfere in revision with the findings of fact unless it can be said that these findings are based on no evidence or are obviously incorrect. But that is not the case here.

The rule must therefore be discharged.

The petitioners must now pay the fines imposed upon them.

P.N./R.K. Rule discharged.

1930 Cr. Cases 1207

(Patna)

COURTNEY-TERRELL, C. J., AND
MACPHERSON, J.

Emperor

v.

Fazlur Rahman—Accused—Respondent.

Government Appeal No. 6 of 1929, Decided on 20th December 1929, from decision of Sess. Judge, Patna, D/- 5th August 1928.

Penal Code, Ss. 43 and 385—"Illegal" has the same meaning as "unlawful"—Threatening to ask complainant in criminal trial scandalous and indecent questions amounts to offence under S. 385.

The word illegal has been given by S. 43 a very wide meaning and it has the same meaning as unlawful. To constitute an offence under S. 385 the threat need not only be of some conduct which might either constitute an offence in criminal law or which might be made the basis of a civil action. [P 1210 C 1]

F, a mukhtar who appeared on behalf of an accused S who was being tried for theft, threatened the prosecutor H to put questions to H and the ladies of his household in cross-examination which were entirely irrelevant to the matters at issue, which were scandalous and indecent and intended to insult and annoy H, unless H paid him some money, in which case the case would be withdrawn.

Held: that F was guilty under S. 385.

[P 1210 C 1]

Govt. Advocate and S. A. Sami— for the Crown.

Courtney-Terrell, C.J.—This is an appeal by the Local Government under S. 417, Criminal P. C., from a decision of the Sessions Judge of Patna setting

aside a conviction by a First Class Magistrate of one Fazlur Rahman under S. 385, I. P. C. and sentencing him to rigorous imprisonment for three months and a fine of Rs. 500. The facts are simple and are established by the evidence beyond all possibility of doubt.

On 8th March 1928, Mr. H who is a zamindar and a well-known barrister in this province lodged a first information charging one of his servants S under S. 379, I. P. C., with the theft of an article of jewellery, and a key. On 17th April the trial was begun before the Deputy Magistrate. The respondent in this appeal, Fazlur Rahman, who is a mukhtar practising in the Court of the Magistrate came into Court and stated that he had been instructed to appear on behalf of S. The Magistrate asked S if he desired to be represented by the respondent and the reply was in the affirmative. At the moment Mr. H, the prosecutor, was in the witness-box and he was subsequently cross-examined by the respondent. The Court Inspector who was conducting the prosecution requested that two witnesses, that is to say, Mrs. H and Madame L, a lady employed by Mrs. H as a governess for her child whom he intended to call, might be examined at Mr. H's house. The respondent objected saying that he did not wish to cross-examine the ladies at Mr. H's house because he feared that Mr. H would commit a breach of the peace. Mr. H protested against this suggestion which was both impudent and unfounded and thereupon the mukhtar said that he would put questions that would damage the high reputation of Mr. H in the province. He also said that he would put questions to the ladies that would damage Mr. H's reputation and it was for this reason that he feared that Mr. H might use violence towards him if the examination of the ladies were conducted at Mr. H's house. The Magistrate however directed that the examination of the ladies would be taken up on the afternoon of the 23rd at Mr. H's house and that Mr. H would be further cross-examined at the same sitting.

On the 21st however before this examination could take place the accused was brought into Court in order that

the charge might be amended from one under S. 379, I. P. C., to one under S. 381 and the charge was in fact so amended and the case was postponed to the 28th for the examination of the prosecution witnesses. On the same day the respondent on behalf of S filed a complaint against Mr. H under S. 336 charging him with having beaten him (S) to extort from him a confession. The complaint does no more than set forth the allegation of such beating. It is important to observe that the mukhtar on the 17th as he has admitted to us, had not received instructions directly from his client who had been in jail but from some relative or friend and the announcement by the respondent to the Magistrate on the 17th that he would put questions to Mr. H and the ladies which would damage Mr. H's reputation cannot have been made upon any instructions from his client and it is significant in view of subsequent events.

Now on the 24th April the respondent went to the house of a witness Leakat Hussain. This gentleman is a zamindar and an old friend of Mr. H. The respondent asked Mr. Leakat Hussain to tell Mr. H to give to him (the respondent) Rs. 500 to withdraw the case of S and further that if he did not pay, he (the respondent) intended to insult him grievously (*bahut zalil karenge*). Mr. Leakat Hussain went to Mr. H the next day and conveyed this message to him and he promptly refused to pay a pice. Mr. Leakat Hussain met the respondent the same day in Court and the respondent asked him if he had taken the message to Mr. H. The witness told him that he had done so and that Mr. H said that he would not pay a single pice whereupon Fazlur Rahman repeated the threat that he would greatly insult him (*bahut zalil karenge*). A little later on in the month a gentleman named Muhammad Mujtaba who is a pleader at Muzaffarpur and has known the respondent since 1915, and whose father had known the father and uncle of the respondent, met the respondent at the latter's house at Muradpur. The witness mentioned the case against S and the counter-case by this man against Mr. H. He enquired of the respondent how he had come to take part in it and wanted him to with-

draw from the case whereupon the respondent told him that if he was at all anxious for the reputation of Mr. *H* he should ask him to pay some money when the case would be withdrawn. The witness however had no opportunity of meeting Mr. *H* until the 15th December and so the threat was never conveyed by this witness to Mr. *H*.

On the 27th April, that is to say, on the day before the resumption of the proceedings, against *S* a gentleman named Saiyad Shaukat Ali, who is an engineer and contractor and has been employed by Mr. *H* as a consulting engineer met the respondent in the street at Muradpur. It was evening time and the witness who was acquainted with the respondent, got down from his phaeton and spoke to him. The respondent asked him whether he knew what was happening. The witness replied "I know what you are doing" by which I understand him to mean: "I know what you are up to." Then the respondent said that he was defending a poor mehtar (*S*) and after that he said that if Mr. *H* had any consideration for his reputation and if Rs. 1,000 or Rs. 1,500 were paid the whole matter (*mamla*) would drop. Next morning the witness went to Mr. *H* and told him of his conversation with the respondent. Mr. *H* said that he was already informed. The witness met the respondent subsequently but there was no conversation of any sort.

There was thus thrice repeated to independent and irreproachable witnesses, all of them friends of Mr. *H*, a very definite threat that the respondent intended to conduct his defence of *S* and his case for the prosecution of Mr. *H* by *S* in such a way as greatly to insult Mr. *H* and to damage his reputation and his meaning is quite clear from his attitude when resisting the application of the Court Inspector for the examination of the ladies at Mr. *H*'s house.

On 28th April the cross-examination of Mr. *H* was resumed as it appears that the Magistrate had acceded to the objection by the respondent to the examination of witnesses at Mr. *H*'s house which was to have been held on the 23rd. The very first question put to Mr. *H* in the renewed cross-examination by the respondent involved a suggestion of the grossest character against Mr. *H* and

against Mrs. *H* and it was promptly disallowed by the Magistrate. Nevertheless the respondent continued to cross-examine Mr. *H* for two whole days. Why the Magistrate did not exercise his discretion to stop this gross abuse is difficult to understand. It is much to be regretted, as I have often pointed out, that the Subordinate Courts do not properly control the proceedings before them. The conduct of the respondent in this cross-examination was outrageous. Before us the respondent has had the effrontery to attempt to justify questions of the kind that he asked as reasonable and proper in the circumstances.

On 2nd May Madame *L* was examined in Court and *S* was convicted. It may be noted that the Sessions Judge subsequently acquitted *S* on appeal, but still later the High Court set aside the acquittal and re-convicted the accused who was sent to jail.

The respondent has endeavoured, without the slightest success, to attack the credibility of the three witnesses who independently proved his attempt to obtain money from Mr. *H*. The learned Sessions Judge has however found that the threats were in fact made, and that they were made with the object of extorting money. He has however acquitted the accused of the offence charged against him holding that the facts established before him did not constitute an offence in law. The mistake made by the learned Judge, and it is a very clear and definite mistake, is due to the fact that he has not read with sufficient care the section of the Penal Code relevant to the case. S. 385 is as follows:

"whoever in order to the committing of extortion, puts any person in fear, or attempts to put any person in fear, of any injury, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

The word "injury" is defined by S. 44 of the same Code and is as follows:

"The word 'injury' denotes any harm whatever illegally caused to any person, in body, mind, reputation or property."

And the word "illegal" is defined in S. 43 as follows:

"The word 'illegal' is applicable to everything which is an offence or which is prohibited by law or which furnishes ground for a civil action"

The learned Judge appears to have been under the impression that in order to constitute an offence under S. 385 the threat must be of some conduct which might either constitute an offence in criminal law or which might be made the basis of a civil action for damages; but he has failed to observe that this does not exhaust the definition of the word "illegal" contained in S. 43 and has omitted to read the words therein "or which is prohibited by law." The word "illegal" has been given by the section a very wide meaning and it has the same meaning as "unlawful." Now as the learned Judge holds quite properly (and for this purpose I quote his words):

"He intended no doubt to convey to Mr. H that he would keep him as long as he could in the witness-box and would hector and badger and ask him as many insulting questions as he could until the Court stopped him"

and again :

"There are indications that Fazlur Rahman meant Mr. H to understand that he would set up some false defence on S's behalf which would reflect on the private life of Mr. H or some member of his family."

The learned Judge has apparently not reflected that such a course of conduct on behalf of an advocate is forbidden by law. A reference to the Evidence Act and to S. 138 would have shown him that the examination and cross-examination of a witness must relate to relevant facts only. Further, had he looked at Ss. 151 and 152 he would have seen that the Court may forbid any questions or inquiries which it regards as indecent or scandalous unless they relate to facts in issue or to matters necessary to be known in order to determine whether or not the facts in issue existed; and furthermore, that the Court is bound to forbid any question which appears to it to be intended to insult or annoy or which though proper in itself appears to the Court needlessly offensive in form. The respondent very clearly threatened, in order to extort money, to do an act prohibited by law. He threatened, and the meaning of his threats is beyond question, to put questions to Mr. H and the ladies of his household which were entirely irrelevant to the matters at issue, which were scandalous and indecent and which were intended to insult and annoy and such a threat with intent to extort is an offence under S. 385.

At the hearing before us we gave to

the respondent the widest latitude in conducting his argument having regard to the fact that he is an accused appearing in person. He repeated himself at inordinate length and we found it necessary to order him after he had addressed us for several hours to conclude his address. Using my best endeavours to discover what points he did or might have urged I have been able to find three only. The first was a contention that no appeal by the Government against an acquittal could be entertained by this Court unless the offence charged was a cognizable offence. This point is entirely concluded by the wording of S. 417, Criminal P. C., which places no such limit upon the Government's right of appeal.

Next he endeavoured to attack the credibility of the witnesses who proved the threats uttered by him. This attempt completely failed and was entirely unjustified. Their evidence was very properly accepted by the two lower Courts.

Lastly he urged the legal point upon which the case was decided in his favour by the learned Sessions Judge and this point I have already dealt with.

I now come to the question of sentence. The offence of blackmail, as this is commonly called, is one of the most despicable offences known to the law and it is particularly dangerous in India. A mere threat to expose some alleged fact in the private family life of a witness, however unfounded that allegation may be, is sufficient to deter a witness from going into the witness-box or make him part with money, and the prosecution of a person making such a threat requires the greatest moral courage on the part of the victim. The community has good cause to be grateful to the prosecutor in this case for having exposed and rendered powerless for the future a dangerous ruffian. The offence is the more grave in this particular case because it has been committed by a member of a hardworking and respectable profession in the course of professional activities. The profession itself needs to be protected from such activities. The sentence originally inflicted by the Magistrate was thoroughly inadequate. We have carefully considered the advisability of inflicting the maximum sentence but in view of the fact that the respon-

dent will never again be allowed to practise in the profession and in view of the fact that the eyes of the public have now been opened to the risks to which they are exposed by the existence of such a man, we are of opinion that the proper sentence should be one of rigorous imprisonment for 12 months and the fine inflicted by the Magistrate of Rs. 500 will be re-imposed: in default, the respondent will be sentenced to rigorous imprisonment for a further three months.

Macpherson, J.—I agree.

R.M./R.K. *Appeal allowed.*

1930 Cr. Cases 1211 .

(Oudh)

PULLAN, J.

Abdul Karim and others—Accused—Applicants.

Emperor—Opposite Party.

Criminal Revn. Appln. No. 93 of 1930, Decided on 8th September 1930, from order of Sess. Judge, Fyzabad, D/- 4th August 1930.

(a) Penal Code (1860), S. 107—Scope.

If no one commits an offence nobody else can be said to abet that offence. [P 1212 C 1]

(b) Penal Code (1860), S. 342—Police Sub-Inspector while investigating offence detaining person for asking some information—He does not commit any offence.

A Sub-Inspector conducting an investigation is within the law when he sends for a person to the police station who can in his opinion give information about a crime; and a constable and a chowkidar who did no more than bring such a person to the Sub-Inspector and tell him to sit down until the Sub-Inspector sees him are committing no offence whatever.

[P 1212 C 2]

(c) Criminal P. C. (1898), S. 162—Copies of Circle Inspector's report as to statement of accused not given to them as they were not reduced to writing—Accused are not prejudiced by this but report should have been placed on record if accused so desired.

Copies of the statements recorded by a Circle Inspector of Police were not allowed to be given to the accused as no statement was reduced to writing.

Held: that the accused could not be held to be prejudiced by not being given copies of the statements made before the Circle Inspector, but his report should certainly have been placed on the record if the accused so desired.

[P 1213 C 2]

J. N. Misra and R. P. Bahadurji—for Applicants.

Ali Muhammad—for the Crown.

Judgment.—This is an application in revision of an order of the learned Sessions Judge of Fyzabad passed in appeal from an order of a Magistrate of

the First Class of the same district. The case set for trial was despite the inordinate mass of irrelevant evidence recorded and the extremely lengthy judgments of the Magistrate and the Sessions Judge a very simple one. Sub-Inspector Abdul Karim is said to have called a man called Babu Ram first to the Zila of a leading zamindar and secondly to the police station and released him only on receipt of Rs. 40 which was paid to him by Mahadeo, Babu Ram's uncle. Two constables and a chowkidar are alleged to have assisted the Sub-Inspector in the matter and they also were charged with the offence of wrongful confinement. The Sub-Inspector himself was charged under Ss. 161 and 165, I. P. C., with accepting an illegal gratification. He was also charged with an offence under S. 347, I. P. C., namely wrongful confinement to extort property. The Magistrate found that the story told by Babu Ram and his witnesses was true and he convicted the Sub-Inspector of offences under Ss. 161, 165 and also under S. 347, I. P. C. He acquitted one of the constables but convicted Muneshar constable and Thakur Din chowkidar of offences under S. 342, I. P. C., namely, wrongful confinement. The learned Sessions Judge accepted the findings of the lower Court as to the offences committed by Thakur Din and Muneshar but as to the Sub-Inspector Abdul Karim he recorded the following finding:

"He is certainly not guilty of an offence under S. 165, I. P. C., as he did not take any valuable thing without consideration. I think the offence committed by him falls under Ss. 347 and 114 rather than under S. 161, I. P. C."

He accordingly set aside the conviction and sentence passed under Ss. 161 and 165 altered the conviction under S. 347/114 and upheld the sentence passed under that section. In revision one of the grounds stated is that

"the conviction under Ss. 161 and 165, I. P. C., having been set aside by the learned Sessions Judge the conviction under S. 347/114, I. P. C., cannot be maintained in law."

This is a sufficient ground for the admission of the application in revision but it raises something more than a mere technical question. The learned Sessions Judge by committing himself to the statement that Sub-Inspector Abdul Karim did not take any valuable thing,

must be held to disbelieve the story told by the witness Mahadeo that he gave the Sub-Inspector Rs. 40. If no money passed I can find no evidence that extortion was the object with which Babu Ram was confined if it can be held that he was confined, and the elements of an offence under S. 347 are wanting. Furthermore by importing S. 114 into the case the learned Judge implies that some other person, not Sub-Inspector Abdul Karim, committed the substantive offence under S. 347, for S. 114 applies only to the case of one who stands by while another commits an offence on his instigation. Had it been found that either the constable or the chaukidar had committed an offence under S. 347 I could have understood the conviction of the Sub-Inspector under S. 347 read with S. 114 but as there is no such finding I am of opinion that a conviction under S. 347 read with S. 114 is illegal. If no one committed the offence of wrongful confinement with a view to extortion, nobody else could abet that offence and on this simple question of law I would be prepared to set aside the conviction of Abdul Karim. But the matter must be taken further, because I have still to consider the question of the conviction of Thakur Din and Muneshar. These persons were convicted under S. 342, I. P. C., of the offence of wrongful confinement. Wrongful confinement is defined in S. 340, I. P. C., in the following terms:

"Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said wrongfully to confine that person,"

and there are two illustrations given:

(a) A causes Z to go within a walled space and locks Z in: Z is thus prevented from proceeding in any direction beyond the circumscribing line of the wall. A wrongfully confines Z. (b) A places men with firearms at the outlets of a building and tells Z that they will fire at Z if Z attempts to leave the building. A wrongfully confines Z. Now in this case the first act alleged against Thakur Din, chaukidar, is that he called Babu Ram to see the Sub-Inspector and told him to sit under a tree outside the zamindar's Zila. So far no circumscribing limits are mentioned and as far as I understand the evidence there is not even that element of voluntary ob-

struction which would amount to restraint within the meaning of the code. Secondly it is alleged that the chaukidar and the constable Muneshar took Babu Ram on the orders of the Sub-Inspector to the police station and told him to sit there until the Sub-Inspector interviewed him. Again there is not the slightest suggestion that any restraint was placed upon Babu Ram's movements. He was not placed in the havalat, and although he himself said that he was assaulted by Muneshar on the order of the Sub-Inspector this evidence "does not appear to have been believed by the lower Courts and does not form part of the charge. Apart from the fact that no offence under S. 342 was committed by Thakur Din or Muneshar I would point out that if a constable and a chaukidar are to be sent to jail for six months for taking a man to the police station in order that a Sub-Inspector conducting an investigation into a burglary might ask him some questions, it would be impossible for the police administration of the country to be carried on."

It is perfectly certain that Babu Ram was taken to the police station and that he was there questioned as to the whereabouts of one Ram Sewak who was suspected in a burglary case. Not only is this fact noted in the police diary but Babu Ram himself admits that he was asked these questions. Babu Ram may have supposed that he was himself under suspicion, but there is no evidence that this is the case; and it appears that both the Magistrate and the Judge believed that the Sub-Inspector had heard of the association between Babu Ram and Ram Sewak and wished to make inquiries from Babu Ram which might help him in the investigation of the burglary case. A Sub-Inspector conducting an investigation is within the law when he sends for a person to the police station, who can in his opinion give information about a crime, and a constable and a chaukidar who did no more than bring such a person to the Sub-Inspector and tell him to sit down until the Sub-Inspector sees him are committing no offence whatever; they are merely obeying the lawful order of their superior officer. Possibly, if the Court held that there was a conspiracy between the Sub-Inspector and his under-

lings to extort money as the price of the release of such a person, a conviction of all those concerned in the affair would be legal. But the Magistrate himself finds specifically that there is no evidence that the constable or the chaukidar had any intention of extorting money or that they were in league with the Sub-Inspector or that they had knowledge of the intention of the Sub-Inspector. Thus the conviction of Muneshar and Thakur Din of the offence under S. 342, I. P. C., is as erroneous as the conviction of Sub-Inspector Abdul Karim under S. 347 read with S. 114, I. P. C.

It is not necessary for me to consider whether the evidence in the case would have justified the conviction of any of these persons under some other section of the Penal Code, but as the point has been raised by the learned Government Advocate I think it proper to observe that in my opinion the whole of the evidence adduced for the prosecution was defective. Babu Ram said that he had been taken to the Zila, that Thakur Din remained with him the whole time, that the Sub-Inspector came out at 1 o'clock, that they then went to the thana, and that he was first questioned by the Sub-Inspector at 3 o'clock and subsequently at 8 o'clock in the thana. He also said that the Rs. 40 given to the Sub-Inspector was part of a sum of Rs. 50 which he had recently received from his father in Rangoon for the purchase of bullocks. Now the station diary of the police station shows that Thakur Din, chaukidar, came and made a report of the burglary at 2 o'clock in the afternoon in question, that the Sub-Inspector arrived at 5 o'clock and that he questioned Babu Ram later.

The lower Courts think it proper to doubt the genuineness of the police diary and the Magistrate in particular refers to what he calls interpolations and suggests pesh bandi. The Magistrate's own judgment is full of interpolations, but they do not arouse in my mind any suspicion that they were made subsequently with some sinister motive. The same applies to the interpolations in these diaries. It cannot be supposed that Abdul Karim set about making interpolations in his diary on the very day on which he had

exactd Rs. 40 from Mahadeo as believed by the Magistrate, but not by the Judge, for he could not foresee that proceedings were subsequently going to be instituted on an anonymous petition some weeks later. In my opinion the entries in the diary disprove part at least of the statement made by Babu Ram and they give full support to Abdul Karim's explanation of Babu Ram's visit to the police station. Both the Courts below agree that Babu Ram's statement that Rs. 40 was part of a sum of Rs. 50 which he had received from his father, is false because the sum of Rs. 50 was not received until some days after Babu Ram's visit to the police station. Thus wherever the statement of Babu Ram could be disproved by other evidence it has been disproved, and it is worthy of remark that the Circle Inspector of Police, who first inquired into the matter found the charges untrue, and a Deputy Magistrate who visited the village also discovered nothing against the Sub-Inspector.

One other point was raised in the grounds for revision, namely that the Magistrate did not allow copies of the statements recorded by the Circle Inspector to be given to the accused. Prima facie this was an inquiry made by a police officer into a criminal offence and if he recorded any evidence in writing copies of such statements should have been allowed to the accused under S. 162, Criminal P. C. The view taken by the Magistrate that this was merely a private inquiry, cannot be supported for a moment; but I find that in his order dated 2nd April 1930 he gave the best of all possible reasons for not giving copies of the statements and that was that no statement was reduced to writing. I cannot therefore hold that the accused were prejudiced by not being given copies of the statements made before the Circle Inspector, but his report should certainly have been placed on the record if the accused so desired.

In my opinion this is one of those cases in which the Courts have been too ready to believe allegations made against a police officer, which are not supported by reliable evidence and apart from the illegality of the convictions under the sections employed by the learned Sessions Judge, I am of opinion

that these persons deserve an acquittal, and this is emphatically not a case in which this Court should be deterred from proceeding by the provisions of S. 537, Criminal P. C. I allow this application, set aside the convictions and sentences of all the three applicants. Thakur Din and Muneshar will be released forthwith and Abdul Karim, who is on bail, will not be required to surrender. All fines if paid will be returned.

B.V./R.K.

Revision allowed.

* 1930 Cr. Case 1214

(Patna)

MACPHERSON AND DHAVLE, JJ.

Suchit Raut—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 127 of 1929, Decided on 29th April 1929.

(*) (a) Penal Code (1860), S. 211 — Practice that complainant should not be tried under S. 211, till disposal of his case is merely rule of safety and not based on any statute.

The practice that a complainant or first informant should not be prosecuted under S. 211 until his complaint or police case has been disposed of is not based on any statute and is merely a precautionary rule of safety in respect of a special class of criminal cases. While a prosecution under S. 211 might in certain circumstances be delayed or even set aside in accordance with this practice, the practice could per se be no ground for setting aside a conviction under S. 211 before disposal of the main case. [P 1215 C 1]

(b) Penal Code (1860), S. 420—Offence coming both under S. 420, Penal Code and S. 64, Post Office Act — Assuming latter to be minor offence, it is not illegal to try accused under major offence under S. 420, I. P. C., alone.

The proposition that where a particular set of acts or omissions constitute an offence under the general law and also under a special law the prosecution should be under the special law, is confined to cases where the offences are coincident or practically so.

Where an accused was charged both under S. 420, Penal Code and S. 64, Post Office Act, held that, assuming that S. 64, Post Office Act, is a minor offence as compared to an offence under S. 420, Penal Code, it would not be illegal to try the accused under the major offence under S. 420, Penal Code, only: 11 C. W. N. 100, *Ref.* [P 1215 C 2]

(*) (c) Post Office Act (1898), S. 64 — Person writing amount of article insured, on postal cover cannot be said to make a declaration within meaning of S. 64 in respect of the article.

• Though an article which it is proposed to insure must be presented at the post office with the amount, for which the sender wishes it to be insured, clearly written on the cover, that writing cannot be held to constitute the sending

a person who is required by the Post Office Act or even by the rules framed under it, to make a declaration within the meaning of S. 64 in respect of the article. [P 1215 C 2]

S. P. Varma—for Petitioner.

O. M. Agarwala—for the Crown.

Macpherson, J.—This rule has been issued to consider the conviction of and sentence upon Suchit Raut alias Bikramajitya who has been convicted by a Deputy Magistrate of Chapra under S. 420 read with S. 511, I. P. C., and sentenced to 18 months' rigorous imprisonment which term was reduced on appeal to one year.

The facts alleged were that on 23rd July last the petitioner made over to the Chapra Post Office a letter marked: "Insured for rupees nine hundred, Rs. 900," and addressed to Bikramajitya at Naihati, giving the sender's name as Ramlagan Raut, who is his father and insuring the letter for Rs. 900. According to the Post Office rule it was enclosed in another cover which two days later reached Naihati intact and on the 27th the petitioner went to the post office to take delivery. There he made difficulties in respect of signing a receipt until he should see the contents, and when eventually he opened the cover he pointed out that it contained nothing except three pieces of blank paper, accused the clerk and others of having stolen his money, despatched a telegram to the Sub-Divisional Magistrate of Barrackpore complaining that his remittance of Rs. 900 had been tampered with and only blank papers were found inside the cover and demanding an inquiry, lodged at the police station a case against two persons unknown of theft of Rs. 900 from this insured letter giving the details as three Government currency notes of Rs. 100 and 60 such notes of Rs. 10 and in addition made a long statement of claim to the Inspector of Post Offices. The Postmaster of Naihati meantime wired to Chapra and after communication among themselves the postal authorities eventually made over the matter to the police of Saran. It was alleged that the petitioner had not enclosed the notes for Rs. 900 in his letter and that his claim against the post office was entirely false. The Court framed charges under S. 420 read with Ss. 511 and 419, I. P. C., and S. 64, Post Office Act. The case against him of attempt to cheat is found by the lower Court

to have been conclusively established. A particularly strong point against the petitioner was that three notes of Rs. 100 and 60 notes of Rs. 10 would have weighed at least 60 rattis whereas the original which he presented weighed only 17 rattis and was sent at a postal charge of Rs. 1-2-0 whereas the postal charge for a cover containing 63 notes would have been much more. Palpably the intention of the accused was fraudulently to secure compensation of or at least not exceeding Rs. 900 from the post office for his alleged loss. He was acquitted by the trial Court of the second and third charges.

The only points which Mr. S. P. Varma has advanced in support of the rule are: (1) that before this prosecution was entered upon his first information of theft should have been inquired into; (2) that he should have been prosecuted only under S. 64, Post Office Act 6 of 1898, and not under the Penal Code for an attempt to cheat, in which case he would only have been liable to a fine extending to Rs. 500; and (3) that the sentence is excessive. In my opinion there is no substance in any of these pleas.

As regards the first contention, the fact as to the case of theft is that it has been kept pending until the disposal of the present prosecution. The practice in respect of prosecutions under S. 211 is referred to in support of the contention that the petitioner ought not to have been prosecuted until his own case had been disposed of. But in the first place, the practice that a complainant or first informant should not be prosecuted under S. 211 until his complaint or police case had been disposed of is not based on any statute and is merely a precautionary rule of safety in respect of a special class of criminal cases. Then, while a prosecution under S. 211 might in certain circumstances be delayed or even set aside in accordance with this practice, the practice could per se be no ground for setting aside a conviction. For there is no illegality in the trial. The practice itself is also one which should be subjected to the strictest limitation. In the second place, there is no real analogy between a prosecution under S. 211 and the prosecution to which the petitioner was subjected; for instance, where there are counter cases in respect of a riot one of the cases

must be taken up before the other and it is in the discretion of the Magistrate which is to be first inquired into. Similarly, whereas here the petitioner set out one version and the post office another it was in the discretion of the Magistrate to take up that case first which appeared to him to be true, from which it follows that the other may be kept pending. There is here no irregularity in any part of the trial and certainly there has been no resulting prejudice of failure of justice. The plea fails. As to the second point: it is based on the principle that where a particular set of facts or omissions constitute an offence under the general law and also under a special law, the prosecution should be under the special law and the decision in *Kuloda, Prosad Majumdar v. Emperor* (1) is quoted in support. But the proposition is confined to cases where the offences are coincident or practically so. The difficulty in the appellant's way is that S. 64, Post Office Act, merely makes punishable:

"a person who being required by the Act to make a declaration in respect of any postal article to be sent by post or the contents or value thereof makes in his declaration any statement which he knows, or has reason to believe to be false or does not believe to be true."

In the present case the charge of attempt to cheat contains additional ingredients supported by additional evidence beyond those required for a conviction under S. 64, Post Office Act. Assuming therefore that S. 64 is a minor offence to an attempt to cheat the post office it will not be illegal to try an accused for the major offence only. Furthermore, it is by no means clear that an offence under S. 64 has been committed. Reference has been made to the rules framed under S. 32, Post Office Act, with respect to the insurance of postal articles and in particular, to Rr. 118, 125, 130 and 132; but though an article, which it is proposed to insure, must be presented at the post office with the amount for which the sender wishes it to be insured clearly written on the cover, as was done by the petitioner, that writing cannot be held to constitute the sender a person who is required by the Post Office Act or even by the rules to make a declaration within the meaning of S. 64 in respect of the arti-

(1) [1907] 11 C.W.N. 100=4 Cr. L.J. 439=5 C.L.J. 47.

cle. The facts that currency notes being sent by post are compulsorily insurable and that articles cannot be insured beyond the real value of their contents have no significance in this regard. In any case, under S. 72, Post Office Act, a Court cannot take cognizance of an offence punishable under S. 64 except on complaint by the postal authorities and no such complaint was filed. For these reasons the second contention also cannot prevail.

As to the third contention: it is based upon the difference between the punishment under S. 64 of fine which may extend to Rs. 500 and the punishment which has been awarded. But S. 64 is obviously no criterion for the punishment of the completed offence of attempt to cheat. When he insured his letter at Chapra for the purpose of defrauding the Government the petitioner had proceeded but a little way in the execution of his purpose. The sentence of one year's rigorous imprisonment is by no means excessive, particularly having regard to the fact that it was reduced in the Sessions Court by reason of "an earnest appeal for leniency." The application is without merits and I would discharge the rule.

Dhavlé, J.—I agree.

B.V./R.K. *Application dismissed.*

1930 Cr. Cases 1216

(Madras)

PANDALAI, J.

(Palavallu) *Krishnayya*—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 26 of 1930 and Criminal Revn. Petn. No. 25 of 1930, Decided on 14th August 1930, from order of Panchayat Court, Hemavathi, D/- 5th December 1928, in Criminal Case No. 5 of 1928.

Madras Village Courts Act (1889)—Rules under R. 64—Conviction by panchayatdars in case instituted after they cease to be panchayatdars is invalid and not coverable by R. 64.

Where persons constituting Court of Panchayatdars cease to be panchayatdars, owing to efflux of the term of their office long before the case was instituted, they have no jurisdiction to try the case. Conviction by such panchayatdars is invalid and the defect cannot be covered by R. 64. [P 1216 O 2]

J. S. Narasimhachariar—for Petitioners.

K. Venkataraghavachariar for Public Prosecutor—for the Crown.

Order.—This is a petition to revise the conviction under Ss. 160 and 352, I. P. C., of the petitioner by the Panchayat Court of Hemavathi dated 5th December 1928. The short ground is that the gentlemen who formed the Court and recorded the conviction, namely Messrs. Thimme Gowd, Kurnam Ramappa and Hanumantha Gowd, had ceased to be panchayatdars by efflux of time long before the case was instituted. Ex. A, a copy of the Anantapur District Gazette for June 1925, shows that the above-named three gentlemen were notified as having been duly elected as panchayatdars of the Hemavathi Court. According to R. 17 of the rules framed under the Village Courts Act the term of office of panchayatdars commences from the date of the publication in the District Gazette. By S. 9 (4) the term of office is, three years, and therefore the term of office of these three gentlemen expired in June 1928. The case against the petitioner was instituted on 18th September 1928, and therefore long after the above said gentlemen had ceased to be panchayatdars. They were therefore functus officio and had no power to try or convict anyone. The Public Prosecutor referred to R. 64 of the rules made under the Village Courts Act which says that no proceeding or act of a panchayat Court shall be deemed to be invalid by reason only of any defect in the constitution of such Court or that any member of such Court was disqualified or disentitled to act as such or to hold any office in relation to such Court or by reason of any such proceeding or act having taken place during any vacancy in the office of president or member of such Court. The defect disclosed in this case is not any of the ones mentioned in this rule. But the proceeding was by a set of persons purporting to act as a Court and not having any power so to do. There was entire want of jurisdiction and the proceeding was from the beginning invalid. The conviction is set aside and the fine, if paid, will be refunded.

P.R.S./S.N. *Conviction set aside.*

N.B.—The High Court interfered under S. 107, Government of India Act.

* 1930 Cr. Cases 1217

(Lahore)

SHADI LAL, U. J., AND AGHA HAIDAR, J.

Indar—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 702 of 1930, Decided on 13th October 1930, from order of Sess. Judge, Karnal, D/- 14th June 1930.

* Evidence Act (1 of 1872), S. 33—Sessions Judge transferring the statement of witness in the Court of the committing Magistrate to his own record simply because Public Prosecutor made a statement before him that the witness could not be found—Procedure is illegal?

The Sessions Judge, before transferring the deposition of a witness in the Court of the committing Magistrate to his own record, ought to take evidence and record proceedings and if, as a result of the evidence thus taken, he arrives at the judicial decision that the witness could not be found or his presence could not be secured without an amount of delay or expense, which under the circumstances of the case the Court considers unreasonable, he can bring his former deposition on the record. But if the Sessions Judge transfers the statement of the witness to the record of the Sessions case simply because the Public Prosecutor makes a statement before him that the witness could not be found, the procedure is contrary to law and wholly irregular and the deposition of the witness thus brought on the record cannot be treated as evidence. [P 1218 C 1]

J. R. Agnihotri—for Appellant.

Des Raj Sawhney—for the Crown.

Judgment.—Indar, a Sansi, of Bir Badalwa in the District of Karnal, has been convicted under S. 302, I.P.C., and sentenced to death. His appeal and the record of the case are before us. On 7th January 1930, Bansi (P. W. 2), Chaukidar of Mauza Haibatpur, reported at the Butana Police Station at about 7 p.m. that a dead body was lying in a well within the area of his village. The Sub-Inspector proceeded to the village and recovered the body on the morning of 8th January 1930. The body was found to be that of a woman and, at the instance of the Sub-Inspector, a photograph of the said body was taken. The post-mortem examination was held on 10th January 1930, by the Civil Surgeon, Karnal, and a number of incised wounds and other injuries, including fractures, were found. Death in the opinion of the Civil Surgeon was due to the fracture of the vertebral column and severance of the spinal cord. According to the medical witness, the body was in an identifiable condition and death had

taken place at any time between four and seven days before the date of the post-mortem.

The photograph has been definitely identified by Kundan (P. W. 4) and several other witnesses as that of Mt. Mari, the deceased wife of Kundan. The case for the prosecution is that Mt. Mari, after the imprisonment of her husband, Kundan, in Saharanpur District, left the Reformatory where she had been living with her daughter Mt. Khazani, aged about two and a half years, and went with her husband's brother's wife Mt. Santi (P. W. 16) to a place called Kurak. Mt. Mari was accompanied by her infant daughter and, while Mt. Santi returned from Kurak with her child the following day, Mt. Mari and Mt. Khazani remained at the house of Mt. Hiran (P. W. 15) who was related to the accused. Some days afterwards Simal, the grandfather of the accused, took Mt. Mari and her daughter to Sirya (P. W. 8). Mt. Mari lived with Sirya for a week or so and thereafter Guga (P. W. 5), a cousin of the accused, and Mt. Chawli (P. W. 6), the wife of Nandu, the brother of the accused, brought Mt. Mari with her child to their house, their idea being to marry her to the accused. She lived in their house for a few days; but, when the family came to know that Mt. Mari was a married woman and her husband was alive, and further that she had run away from the Reformatory, they decided that Indar accused should not marry her. She was accordingly asked to leave their house. She accordingly left the house a day or so before the date of her murder and took her daughter with her. The accused accompanied her. When Nandu went to his fields the following morning he saw Mt. Mari in the company of Indar. Late at night the accused Indar came to his house and asked Nandu to light a fire for him as he was shivering with cold. Afterwards, within the hearing of Guga (P. W. 5) and Mt. Chawli (P. W. 6), the accused confessed to his brother Nandu that he had murdered Mt. Mari and Mt. Khazani and had thrown the corpse of the latter into the canal and the dead body of Mt. Mari was lying in the jungle. Nandu went with the accused to the spot where the dead body of Mt. Mari was lying near a well covered with some leaves, and in the presence of his

brother the accused threw the dead body into the well where, as already stated, it was found by the Sub-Inspector.

There is no direct evidence of the murders and the dead body of Mt. Khazani has not been recovered. The case depends mainly upon the confession which the accused made in the presence of his brother Nandu, Mt. Chawli, the wife of Nandu and his cousin Guga and also upon the recovery of certain ornaments which the deceased Mt. Mari and her daughter were wearing, in the manner detailed below. There is further the important circumstance that Mt. Mari was last seen alive in the company of the accused.

Nandu, who would have been a very important witness for the prosecution, was examined before the committing Magistrate, but the Sessions Judge, purporting to act under the provisions of S. 33, Evidence Act, has transferred his statement to the record of the Sessions case simply because the Public Prosecutor made a statement before him that Nandu could not be found, according to the report of the Superintendent in charge of the Criminal Settlement in Sheikhupura District and the telegram received from the Deputy Commissioner, Criminal Tribes, Lahore. This procedure is contrary to law and should never have been followed. The Sessions Judge, before transferring the deposition of Nandu in the Court of the committing Magistrate to his own record, ought to have taken evidence and recorded proceedings and if, as a result of the evidence thus taken, he had arrived at the judicial decision that Nandu could not be found or his presence could not be secured without an amount of delay or expense which, under the circumstances of the case, the Court considered unreasonable, he could have brought his former deposition on the record. In the absence of such evidence and a judicial finding in compliance with the requirements of S. 33, Evidence Act, the procedure adopted by the Sessions Judge was wholly irregular and we are not prepared to treat the deposition of Nandu thus brought on the record of this case as evidence.

But leaving this piece of evidence out of consideration, there is ample evidence on the record which shows that the guilt of the accused is fully established.

As already stated, we have the statements of Mt. Chawli (P. W. 6) and Guga (P. W. 5) within whose earshot the accused made a confession that he had killed Mt. Mari and her daughter. Again it is fully established that the accused disposed of the ornaments which had been removed from the person of Mt. Mari soon after the occurrence. Some of these ornaments he gave to Mt. Bishni (P. W. 13), who is related to him as his aunt, and others were traced at the instance of the accused, and as a result of his pointing out the spot where they lay concealed. It may also be mentioned here that shortly before the occurrence the accused had taken away a gandasa from his house, and, according to the medical evidence, the injuries were found to have been inflicted with some such weapon.

Furthermore, Mt. Bakhtawari (P. W. 12) says that the accused had given to her in the presence of Mt. Chawli and Guga a dulai, Ex. P. 16, somewhere about the time when Mt. Mari had been murdered. This dulai was found to be stained with human blood and was recovered from the possession of Mt. Bakhtawari by the police, accompanied by the accused. Guga (P. W. 5) and Mt. Chawli (P. W. 6) corroborate the statement of Mt. Bakhtawari (P. W. 12).

The defence set up by the accused in his statement before the Sessions Judge is not supported by any evidence and is worthless. Though the accused was charged both with the murder of Mt. Mari and of Mt. Khazani, yet as the dead body of Mt. Khazani could not be found the accused has been acquitted of the charge of Mt. Khazani's murder and we are not concerned with it any more. The guilt, however of the accused, so far as the murder of Mt. Mari is concerned, is fully established by the strong circumstantial evidence on the record, and having regard to the brutality of the murder, we do not see any extenuating circumstances for reducing the sentence. We accordingly confirm the sentence of death passed on Indar and order that the same be carried out according to law.

P.N./R.K.

Sentence confirmed.

1930 Cr. Cases 1219

(Lahore)

Jai Lal, J.

Mt. Zauhra Bi—Petitioner.

v.

Muhammad Yusaf—Respondent.

Criminal Revn. No. 794 of 1930, Decided on 13th October 1930, reported by Sess. Judge, Delhi, D/- 22nd May 1930.

(a) Criminal P. C. (5 of 1898), S. 488—Order made granting maintenance to Mahomedan minor son at instance of his mother living separate from husband—Mother going with boy to husband and again leaving him with the boy—Order is not cancelled.

Where an order is made granting maintenance allowance to a Mahomedan son aged 3 on the application of the mother who was living separately from her husband, the mere fact that the mother, since the date of the order, has taken the boy to live with his father and has again taken him away from his father, cannot lead to an automatic cancellation of the order but it must be taken to subsist.

[P 1219 C 2; P 1220 C 2]

(b) Criminal P. C. (5 of 1898), S. 488—Minor living with legal guardian—Condition imposed by father that he would maintain it if child resided with him, amounts to refusal to maintain (*Obiter*).

In the case of a minor who is living with its legal guardian, e. g. a Mahomedan boy aged 3 with his mother, the condition imposed by the father that he would maintain it only if the child went to reside with him is tantamount to a refusal to maintain the child: *A. I. R. 1928 Lah. 543, Foll.* [P 1221 C 2]

Madan Lal—for Respondent.

Facts.—Muhammad Yusaf and Mt. Zauhra Bi are man and wife and have a son Muhammad Salihon who is said to be about three years of age. The father and mother have been living separately and the mother applied under S. 488, Criminal P. C., for maintenance for her child. Maintenance at Rs. 7 p. m., was granted by order of Mian Jagdish Singh Magistrate, First Class, Delhi, upon 5th January 1929. Muhammad Yusuf's application for revision against this order was rejected by my order dated 24th January 1929. It appears that after this there was a reconciliation between the parents and Mt. Zauhra Bi went with the child to the father's house. She remained there some six months and she admits that the child was well-treated during those six months. Some further disputes arose between the father and mother and the latter again left with the child. She has again applied for maintenance; her application has again been heard by Mian Jagdish Singh who by order dated 16th April 1930, has dis-

missed it holding that Muhammad Yusaf never refused or neglected to maintain the child and never ill-treated his wife.

Grounds.—Having heard counsel for the parties I agree with the Magistrate's view of facts but revision is urged on the ground that a Mahomedan mother has the right of custody of her sons until they have completed their seventh year and that therefore if the mother elects to live away from the father she is entitled to keep the sons with her in which case an offer to maintain on condition that the child comes to the father's house is a conditional offer amounting to a refusal. The point involved is purely a legal one and divergent views have been expressed by various High Courts in India. As regards the Punjab and Lahore rulings I have been referred to *Man Singh v. Dharman* (1), *A. I. R. 1926 Lah. 536* and *A. I. R. 1927 Lah. 430*, on behalf of the father. The first and last of these deal with Hindus and are, therefore, distinguishable but *A. I. R. 1926 Lah. 536* very distinctly negatives the only principle upon which maintenance could be allowed in this case. On the other hand a latter ruling *A. I. R. 1928 Lah. 543* affirms that principle and it is to be noted that whilst the 1926 ruling is based upon 18 *P. R. 1894* and 22 *P. R. 1917*, the 1928 ruling refers to and dissents from those two rulings. I consider that an important legal point is in issue and that in accordance with the latest Lahore ruling, to which my attention has been drawn, the order of the Magistrate should be revised.

Another matter which has not been referred to by either counsel is that the order dated 5th January 1929, granting maintenance at Rs. 7 per mensem to Muhammad Salihon has never been cancelled. The mere fact that his mother, since the date of that order, had taken him to live with his father and has again taken him away from his father cannot in my opinion lead to any automatic cancellation of the order. For this reason also I am of opinion that maintenance at Rs. 7 per mensem should be continued to Muhammad Salihon through his mother Mt. Zauhra Bi. On these grounds I report the case to the High Court of Lahore under S. 438, Criminal P. C. with a recommendation that

(1) [1894] 18 *P. R. 1994*.

maintenance at the rate of Rs. 7 per mensem be awarded to the minor son Muhammad Salihon.

Order.—This reference has been made by the Sessions Judge of Delhi under S. 438, Criminal P. C. The facts are stated in detail in his order of reference and briefly are that Muhammad Yusuf and Mt. Zohra Bi are husband and wife and have a male child Muhammad Salihon aged about three years. An application was made by the mother as guardian of her minor child against Muhammad Yusuf for maintenance under S. 488, Criminal P. C. at a time when she was living separately from her husband and an order was made on 5th January 1929, that Muhammad Yusuf should pay Rs. 7 per month for the maintenance of his minor son. It appears that after this order was made the husband and wife made up their differences and the wife went to live with Muhammad Yusuf with the child and both were maintained by him. Later, however, they quarrelled again and separated. Consequently a fresh application under S. 488 was made by Mt. Zauhra Bi for maintenance for her minor son. This application has been refused by the same Magistrate on the ground that no maintenance could be granted to the minor so long as the mother and the child were living separate from Muhammad Yusuf who was prepared to maintain the child if he went to live with him. The learned Sessions Judge is of opinion that the previous order of maintenance made against Muhammad Yusuf is still in force not having been cancelled by the Court and that the position taken up by the Magistrate on the merits of the case needs scrutiny.

In my opinion the view of the learned Judge is quite correct and the previous order still subsists and the present reference must succeed on that ground alone. The learned counsel for Muhammad Yusuf has however contended that according to a judgment of the learned Chief Justice in *Jagan Nath v. Koshalia Devi*, A. I. R. 1927 Lah. p. 430, an order under S. 488 for a maintenance of a child cannot be passed against the father unless it is proved that he has neglected or refused to maintain it and that in this case the father has not refused to maintain the child. The learned counsel concedes that the view taken

by me in *Sarfaraz Begam v. Miran Bakhsh*, A. I. R. 1929 Lah. p. 543, is correct. In that case I held that in the case of a minor who is living with its legal guardian the condition imposed by the father that he would maintain it only if the child went to reside with him is tantamount to a refusal to maintain the child. Admittedly in this case the mother is the guardian of the child till he has attained the age of 7. My observations in that case fully apply to the circumstances of this case and therefore if it were necessary I would hold that there had been a refusal or neglect by the father to maintain his minor son in the present case but I have already held that the original order granting Rs. 7 per month as maintenance to the minor through its mother still subsists and is, therefore, enforceable at the instance of the mother. The Magistrate will on being moved enforce that order except for the period during which the maintenance has been paid by Muhammad Yusuf and also for the period during which the minor has been living with him and has been maintained by him. With these remarks I return the reference to the Sessions Judge.

P.N./R.K.

Reference allowed.

1930 Cr. Cases 1220

(Lahore)

HARRISON, J.

Emperor

v.

Abdul Qadir Kasuri and others—Accused.

Criminal Revn. No. 719 of 1930, Decided on 19th September 1930, reported by Dist. Magistrate, Lahore, on 29th May 1930.

(a) Penal Code (1860), S. 71 — Sentence where accused is charged under Ss. 143 and 341/149.

Where an accused is charged under both Ss. 143 and 341/149, there should not be two sentences but one. [P 1221 C 2]

(b) Penal Code (1860), S. 143—Number of persons charged more than five; some found to be absent from spot—Rest if less than five cannot be convicted under S. 143.

Where the number of persons charged is more than five, but some of them are found not to have been present on the spot, remaining persons if less than five cannot be said to have constituted an unlawful assembly. [P 1221 C 2]

R. C. Soni—for the Crown.

Facts.—The eight accused were charged, under Ss. 341 and 143, I. P. C., in

the Court of Mr. E. S. Lewis, Additional District Magistrate.

Chint Ram, accused, was acquitted, but the others were convicted as follows:

Maulana Abdul Qadir Kasuri, Pandit K. Santanam, Thakar Dass Kapur, and Muhammad Hayat were ordered, under S. 143 to undergo four months' simple imprisonment, and, under Ss. 341/149, I.P. C., to pay fines of Rs. 100 each, or, in lieu, to undergo a month's simple imprisonment.

The remaining accused, viz., Satyagraha volunteers Nos. 17, 45 and 97 were under S. 143, ordered to undergo a month's simple imprisonment, and under S. 341-I.P. C. they were ordered to pay fines of Rs. 20 each, or in lieu to undergo a week's simple imprisonment.

In both cases, if fines were not paid, the periods of imprisonment were to be consecutive.

This judgment was pronounced on 21st May 1930, and was reproduced in certain local papers on the 22nd. This led the Additional District Magistrate to examine the file, and the result was that he discovered that unfortunately a clerical mistake had crept in. The maximum sentence under S. 341, is simple imprisonment for a term of one month or fine of Rs. 500 or both, and it was the intention of the Court to order that four of the accused if they did not pay the fine of Rs. 100 each, were to undergo a week's simple imprisonment. The period given in the judgment has erroneously been entered as a month, and this sentence transgresses the provisions of S. 65, I. P. C.

No fines have been paid, as all the accused declined to take part in the proceedings, but, in any case, I have suspended the sentence pending confirmation of my order by the High Court. It is for this purpose that I am sending the English record to the Honourable Judges, under the provisions of S. 438, Criminal P. C.

Order.—The District Magistrate has reported this case with a view that the sentences of one month's imprisonment passed in default of payment of fine under S. 341, I. P. C., be changed to sentences of one week's imprisonment the maximum sentence under the section.

The Crown is represented by Mr. Soni who has pointed out to me other defects in the judgment of the Magis-

trate. Eight men were sent up for trial under various sections. They consisted of three picketing volunteers and five men who were accused of having directed operations and having committed offences under those sections. The finding is that of the five one Chint Ram was not proved to have been present on the spot and unless the three picketing volunteers are included with the remaining four as having constituted an assembly they cannot be said to have formed an unlawful assembly. The judgment is far from clear on this point and it is possible to find passages in support of the two different views that there was an assembly of seven and that there was an assembly of four only, the three picketing volunteers not forming part of that assembly. The latter view I think finds more support than the former in the judgment of the Magistrate. I find therefore that there being only four men no offence has been committed under S. 143. Sentences have been passed under both Ss. 143 and 341/149 and although there is authority for this procedure the rulings of this Court are definitely opposed to it, and it is clear, there should not be two sentences but one.

I quash the conviction under S. 143, and acquit the accused of having committed offences under that section.

As regards conviction under S. 341, the offence was committed and sentences of Rs. 100 fine or one month's imprisonment in the alternative are not unsuitable. The accused have however been in jail for three and half months and the best course, I think, will be to alter the sentence of fine to one month's imprisonment, which has already been undergone. I direct that the accused be set at liberty at once.

P.N./B.K. *Order accordingly.*

1930 Cr. Cases 1221

(Lahore)

TAPP, J.

*Azad Khan—Accused—Petitioner.**

v.

Emperor—Opposite Party

Criminal Revn. No. 1760 of 1929, Decided on 2nd May 1930, from Order of Sess. Judge, Attock, D/- 8th November 1929.

Penal Code (1860), S. 409—President of Co-operative Society retaining money drawn by him from Bank with permission of fellow

members—Such offence held to be of technical nature and even this was doubtful.

A President of a Co-operative Credit Society was authorized to draw a certain amount of money from a bank. After so doing, he himself retained the amount instead of crediting it to the society. It was proved that he did this with the permission of his fellow members of the managing committee, as he needed it for some work.

Held, that under the circumstances the offence committed may be said to be purely of a technical nature and even this was doubtful.

[P 1222 C 2]

Nand Lal—for Petitioner.

Tapp, J.—The petitioner Azad Khan, President of the Co-operative Credit Society of Dhok Kabli in the Attock District, has been convicted of criminal breach of trust under S. 409, I. P. C., and sentenced to one year's rigorous imprisonment and a fine of Rs. 100. The nature of imprisonment was altered to simple and his appeal was otherwise dismissed by the learned Sessions Judge. He has come up to this Court in revision chiefly on the ground that in retaining a sum of Rs. 600 out of Rs. 800 admittedly drawn by the petitioner for his society from the Central Co-operative Bank there was no dishonest intention on his part.

It appears from the evidence on the record that by a resolution dated 27th August 1927 the managing committee of the Co-operative Society mentioned above which consisted of the petitioner, Bahawal Din, P. W. 1, and one Mehr, Khan deceased it was decided to apply for a loan of Rs. 800 from the Central Co-operative Bank. A pro-note for this sum was duly executed and the petitioner was authorized or deputed to draw the amount from the Central Bank. This he did on 20th August and instead of crediting the amount to the society retained it for his own use. He repaid Rs. 200 to the Central Bank. On 9th November 1927, when the Sub-Inspector compared the account of the Central Bank with that of the society, he found that this amount of Rs. 800 had not been credited to the society whereupon he submitted a report on 11th January, with the result that the matter was taken up by Inspector Abdul Hamid Khan. The petitioner, on being questioned admitted the receipt of the money and promised to repay the rupees 600 by the middle of June but not doing so, he was prosecuted. During the investigation he paid the sum of Rupees

600, and I understand from his counsel that he has also paid interest on this amount for the period it remained with him.

The evidence in the case tends to show that the petitioner retained this money with the permission of his fellow members of the managing committee as he was in need of funds for certain purposes. It further appears that he is an old man of some 70 years of age and there has been no attempt on his part in any way to cover his act by making false entries in the books of the society. Having obtained the permission or agreement of his fellow members to retain and use the money drawn by him from the Central Bank he probably did not think that he was doing any dishonest act.

In view of all the above circumstances the offence, if any, committed by the petitioner seems to me to be purely of a technical nature and even this is doubtful. I would therefore, give him the benefit of the doubt and, accepting this petition for revision I set aside his conviction and sentence, acquit him and direct that the fine, if paid, be refunded.

B.V./R.K.

Petition accepted.

1930 Cr. Cases 1222

(Lahore)

ADDISON, J.

Hamid Ali—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 667 of 1930, Decided on 10th October 1930, reported by Sess. Judge, Karnal, on 27th May 1930.

Criminal P. C., (1898), Ss. 133 and 139-A—Respondent denying alleged right—Further proceedings without finding under S. 139-A are ultra vires.

In proceedings under S. 133 in respect of alleged public right of way, if the respondent denies the existence of the alleged right, subsequent proceedings under S. 137 are otherwise, ignoring the provisions of S. 139-A and without first coming to a finding under S. 139-A whether there is any reliable evidence in support of respondent's denial, are ultra vires: A. I. R. 1930 Pat. 199, *Ref.*

[P 1223 C 2, P 1224 C 1]

Ghulam Mohyuddin—for Petitioner.

Des Raj Sawhney—for the Crown.

Facts.—The Superintending Engineer, 2nd Circle, Punjab Public Works Department, Ambala, made a request to the Deputy Commissioner, Karnal, requesting him to take action under S. 13

Criminal P. C., in respect of an encroachment that constituted an obstruction to the public right of way. The Deputy Commissioner made over the case to Mian Mohammad Said, and he by order dated 26th August 1929 directed the petitioner to clear away the obstruction from the public way within one month, or appear before him on 2nd October and show cause as to why action should not be taken against him as provided for by law. On 2nd October, Hamid Ali appeared before the Magistrate and put in a written statement denying that the construction of the verandah by him had obstructed any public right of way. As no appearance was put in on behalf of the Public Works Department the case was adjourned to 14th October. On that day, the Magistrate recorded that he had visited the spot, heard the parties, and that they should produce their evidence on 5th November at Karnal. The case could not be proceeded with on 5th November and the Magistrate recorded an order that the case should come up before him at Panipat on 11th when he will fix some other day for evidence. On the 11th the petitioner Hamid Ali applied to the Magistrate for the appointment of the jury under S. 135, Criminal P. C. He nominated two jurors, and said that the jury should not go into the question of title, but should decide if the road to Panipat Railway Station had been so obstructed as to constitute a nuisance to the passers by. A jury was then appointed consisting of four jurors and one foreman and the order issued under S. 133 was made absolute on 18th December 1929, on the report of the foreman and the two jurors that had been nominated by the Court.

Order of Reference.—The Magistrate, as often happens in such cases, neglected entirely the provisions of the new S. 139-A, Criminal P. C., which enacts that, when an order is made under S. 133 for the purpose of preventing obstruction to the public in the use of a way, the Magistrate shall question the respondent as to whether he denies the existence of a public right in respect of the way. If the respondent does so, the Magistrate shall before proceeding under Ss. 137 or 138, enquire into the matter. It is further enacted that if in such enquiry the Magistrate

finds that there is any reliable evidence in support of such denial he shall stay the proceedings until the matter of the existence of such right has been decided by a competent civil Court while if he finds that there is no such evidence he shall proceed as laid down in S. 137 or S. 138 as the case may require. In the present case nothing like this was done. When the petitioner appeared before him, the Magistrate did not put to him the relevant question under S. 139-A, and overlooked its provisions in spite of the fact that the petitioner had denied the existence of the alleged public right in his written statement. He did not take the trouble to consult the law and passed an order for the production of evidence presumably under S. 137. The petitioner thereafter presented an application for the appointment of a jury when as has been stated above, a jury was appointed but all this was done without taking any action under S. 139-A.

The case has thus been decided without first coming to a finding under S. 139-A, whether there was any reliable evidence in support of the petitioner's denial, and the proceedings were therefore entirely without jurisdiction. It has not been urged before me, but it may be argued that as the petitioner himself applied for a jury, he waived his rights under S. 139-A, but I do not think that there can be a waiver of a mandatory provision such as is contained in S. 139-A of the Code: vide *A. I. R. 1930 Pat. 199*. This is all the more so as the petitioner had clearly denied the alleged right in his very first written statement.

Apart from the above the petitioner has urged that he presented an application to the Magistrate under S. 526, Criminal P. C., on 18th December; that the Magistrate returned it to him after perusing it, directing him to make it over to his counsel to produce the same when the case was called; and that the Magistrate did not call up the case thereafter, and pronounced the orders hurriedly in order to deprive him of his right of applying to the High Court for transfer of the case. The petitioner as also the Crown have produced evidence on this point, but I am not quite satisfied that the case was not called up and it may be that the petitioner's counsel was busy somewhere else, and could not

put in appearance when the case was called. I do not therefore make this an additional ground for forwarding the petition for revision to the High Court.

But as the provisions of S. 139-A were ignored, the proceedings that followed thereafter were ultra vires and I submit the record to the Honourable High Court with the recommendation that the order of the Magistrate dated 18th December, 1929 be set aside and the case be remitted to the successors of Mian Mohammad Said who has since been transferred, with the direction that he should proceed with the case as laid down in S. 139-A, Criminal-P. C. and as explained above.

Order.—For reasons given by the learned Sessions Judge, I set aside the order of the the Magistrate, First Class, dated 18th December 1929, and remit the case to his successor for disposal in accordance with law.

V.B./R.K.

Order set aside.

1930 Cr. Cases 1224

(Lahore)

JAI LAL, J.

Emperor

v.

Wazir Singh—Accused.

Sardar Khan—Petitioner.

Criminal Revn. No. 675 of 1930, Decided on 10th October 1930, reported by District Magistrate, Ferozepore, on 19th May 1930.

(a) Criminal Trial—Duty of Courts—Magistrate should not make remarks imputing perjury and incompetency to official except in clear cases—Official must be given opportunity to explain his conduct.

Magistrates should avoid making remarks imputing perjury and incompetency to an official in the discharge of his official duties which tend to affect his future prospects except in very clear cases and after giving the official concerned an opportunity during the trial of explaining his conduct. Such remarks should not ordinarily be made except after careful consideration of the entire material on record. [P 1226 C 1]

(b) Criminal P. C. (1898), S. 561-A—Jurisdiction under S. 561-A should be exercised sparingly and in rare cases to prevent injustice.

Where the jurisdiction of the High Court under S. 561-A is invoked by a District Magistrate for the purpose of expunging certain remarks imputing perjury and incompetency to an official from the judgment of the trial Court, the jurisdiction of the High Court being in such case of an exceptional nature should be exercised sparingly and in very rare cases to prevent injustice. [P 1226 C 2]

Qabul Chand for *Zafarullah Khan*—for Petitioner.

Mohammad Amin—for Respondent.

Report.—I forward herewith under S. 438, Criminal P. C., for the orders of the High Court the file of a case, *Crown v. Wazir Singh*, under S. 9, Opium Act 1 of 1878, which has been brought to my notice by the District Excise Officer in his note dated 22nd April. On the advice of the Public Prosecutor I am not recommending an appeal against the acquittal of *Wazir Singh*, but venture to suggest that the High Court might exercise its inherent power under S. 561-A, Criminal P. C., to expunge certain remarks against *Sardar Khan*, *Excise Sub-Inspector Murksar*, and *Mohammad Yakub*, Head Constable, which occur in the judgment of the trial Court.

The remarks against the *Excise Sub-Inspector* to which objection can be taken are as follows :

I discuss them seriatim below :

(1) "And yet *Sardar Khan* has the audacity to say that he obtained a receipt from *Dalip Singh* at the time of giving the money. In face of the clear contradiction by *Dalip Singh*, *Sardar Khan* has spoken a palpable falsehood."

The statement of the *Excise Sub-Inspector* in evidence was that he made a farad, Ex. P G, of giving the marked and other rupees to *Dalip Singh*. The witness does not say when the farad was made and there is no suggestion that it was a receipt. It is a document necessary to complete a case. The alleged remark on which the Magistrate has based the charge of falsehood therefore has not been made by the witness at all.

(2) "I therefore hold that the statement of *Sardar Khan*, *Ishar Singh* and *Hazara Singh*, that they saw *Dalip Singh* paying the money to the accused, is an utter falsehood."

While there is a definite discrepancy here between the evidence of *Dalip Singh* and the other witnesses mentioned, this discrepancy does not justify the imputation of lying against *Sardar Khan*, etc. On the contrary if there is to be any such allegation, it should surely be against *Dalip Singh*, as the balance of evidence is the other way.

(3) "I cannot hold a man guilty on the evidence of *Dalip Singh*, an enemy of the accused and *Sardar Khan*, etc., who have uttered gross falsehood."

This is a general statement presumably based on the two specific instances

quoted above, and if these are expunged this must follow them.

(4) "Before I close, I cannot help commenting on the conduct of Sardar Khan P. W. 1 which has appeared throughout to me as not altogether understandable. He behaved in a very perplexing way in the whole affair. The unsatisfactory manner in which the whole affair was executed from beginning to end, coupled with the inaccuracies and untruths uttered by the witness, leave an idea that he was out to get the accused somehow or other. It may be true that his suspicions regarding the accused were well founded. But I should have expected a prompt and a better thought out plan of work from him rather than the present one full of flaws and absurdities."

These words are against a very general allegation and do not appear to be wholly called for. In fact I would say that the Magistrate has gone out of his way here to make these allegations against the Excise Sub-Inspector. Much of this comment deals with the technical execution of a piece of work in a specialized branch of the administration, which is not quite a fit matter for comment by the Court. So far as the Magistrate is concerned with the legal aspect of the affair or its common sense implications, any comment is fully justified, but this remark will not apply to technical defects in the Excise Sub-Inspector's work, which are for the excise authorities to detect and remove.

So much for the comments on the conduct of the Excise Sub-Inspector. I turn now to the Magistrate's remarks against Mohammad Yaqub, Head Constable, which are as follows :

"He says that there are no houses between the house of Maghar Singh and the accused except unoccupied baras. I satisfied myself in local inspection on this point and found no less than eight or nine residential houses in the way."

It is possible, as the Excise Officer suggests, that the Magistrate was not conducted by the same way as the Excise party went. In fact the whole inspection of the spot is open to objection. The Magistrate's order of 27th March 1930 (a hearing at which the Crown was not represented) is that the accused should produce his defence at the spot on 29th March 1930. There is no mention of any formal inspection of the spot or any kind of notice to the parties, as required by S. 539-B, Criminal P. C. It is true that the Crown was represented on 29th March 1930, when the inspection of the spot took place but this does not cover the defect in law as the

Prosecuting Sub-Inspector could expect only to cross-examine defence witnesses and not to make representations about the conditions at the spot. He was not the officer who investigated the case, nor was he present at the raid ; nor was he instructed for this inspection. On this day the Magistrate took no defence evidence although his order of 27th March 1930 specified that purpose only. Apart from the principle I think the Magistrate's inspection is defective in detail as in the last paragraph of his note which is relevant to the present question, he refers to a way (which is not shown on the sketch) from a house (which is also not shown on his sketch). I would submit therefore that the evidence on which the Magistrate has remarked about the perjury of the Head Constable is utterly insufficient and indeed technically inadmissible.

For the reasons given in detail above, I forward the file and connected papers for the orders of the High Court with the recommendation that the remarks referred to above should be expunged from the Magistrate's judgment.

Order.—This is a reference made by the District Magistrate of Ferozepore recommending that certain remarks made by S. Jaswant Singh Uppal, a Magistrate of the First Class, in the District of Ferozepore, in his order dated 31st March 1930, in the case *Crown v. Wazir Singh* under S. 9, Opium Act of 1878, be expunged by this Court in exercise of its inherent powers recognised by S. 561-A, Criminal P. C..

The remarks in question were made against Sardar Khan, Excise Sub-Inspector, and Mohammad Yakub, Head-Constable of Police, who both appeared as witnesses for the prosecution in the case against Wazir Singh. The remarks objected to are specified in the order of reference passed by the District Magistrate and except one, I do not consider it necessary to quote them here in extenso. The one remark which however must be noticed is as follows:

"And yet Sardar Khan has the audacity to say that he obtained a receipt from Dalip Singh at the time of giving the money. In face of the clear contradiction by Dalip Singh, Sardar Khan has spoken a palpable falsehood."

Now, this remark against Sardar Khan is based on the assumption that, in his testimony in Court, he stated that he had obtained a receipt from Dalip Singh,

when he gave him money to be paid to Wazir Singh in order to purchase opium.

I have referred to the statement of Sardar Khan recorded by the Magistrate and am unable to find anywhere a statement by him that he obtained a receipt from Dalip Singh. All that he says is that he prepared a farad recording the fact of payment of Rs. 12 to Dalip Singh. This remark of the Magistrate therefore appears to have been made under a misapprehension as to the exact nature of the statement made by Sardar Khan and is not therefore justified by the record.

So far as the other remarks against Sardar Khan are concerned, they impute to him perjury and incompetence in the discharge of his official duties. The remarks, no doubt, are couched in strong language and, having regard to the fact that, if justified, they may seriously affect the future prospects of the official concerned, should not ordinarily be made except after careful consideration of the entire material on the record. It is desirable that Magistrates should avoid making such remarks, except in very clear cases and after giving the official concerned an opportunity of explaining his conduct. I do not of course suggest that the Magistrate should hold an independent enquiry but such an opportunity should be given when the statement of the official concerned is being recorded at the trial or when he is recalled after the charge has been framed.

The other remarks objected to in the present case are based on the fact that there was at least one definite discrepancy between the statement of Sardar Khan and other prosecution witnesses. The Magistrate has chosen to accept the version of the other witnesses disbelieving that of Sardar Khan. I am therefore unable to hold that, on his finding the Magistrate was not justified in imputing falsehood to Sardar Khan. Whether the Magistrate was justified in disbelieving Sardar Khan is a matter which I do not propose to discuss for reasons which I will give hereafter. Whether Sardar Khan should have acted "in a prompter and a better thought-out manner than the present one full of flaws and absurdities," remarked by the Magistrate, is a matter of opinion. I have already stated that ordinarily Magistrates should avoid expressing opinion on

matters like these unless the ends of justice necessitate such a course, but I do not feel called upon to differ from the conclusions of the Magistrate in the present proceedings and on the material before me.

Regarding the remark against Muhammad Yakub, Head-Constable, the Magistrate has practically remarked that the statement of this witness that "there are no houses between the house of Maghar Singh and the accused, except unoccupied bars" is false.

This remark is based on a local inspection by the Magistrate. He found no less than eight or nine residential houses in the way. The learned District Magistrate says that this remark is based upon an inspection of the spot at which the investigating officer was not present as he had no notice of the proposed inspection. It is however conceded that the Prosecuting Inspector was present when the inspection took place and there seems to be no force in the suggestion of the District Magistrate that the Magistrate might have gone to the house of the accused by a different route. If that happened it was the business of the Prosecuting Sub-Inspector to correct him and to take him by the proper route. On the material before the Magistrate therefore he was justified in making the remark. Indeed the learned counsel for the Crown did not seriously urge that this remark was not, under the circumstances, justified.

Now, I turn to the nature of the inherent jurisdiction which vests in this Court and which is recognized by S. 561-A, Criminal P. C., to make such orders as may be necessary to prevent abuse of the process of any Court, or otherwise to secure the ends of justice. It has been laid down by the learned Chief Justice of this Court, in a case decided a few years back, that the jurisdiction of this Court invoked by the learned District Magistrate in this case is of an exceptional nature and should be exercised sparingly and in very rare cases to prevent injustice. Applying this test to the facts of the present case, I am unable to hold that, with the exception of the first remark made by the Magistrate against the Sub-Inspector of Exoise, Sardar Khan, which is not supported by anything on the record, I would be acting in the spirit of the rule laid down for the

exercise of this Court's inherent jurisdiction if on the present reference I were to revise the opinion of the Magistrate which opinion involves the question of appreciation of the weight of evidence and of inferences to be drawn from such evidence. It was within the province of the Magistrate to decide which of the two contradictory statements he would accept to be true, if at all, and, in the present case, I do not think I would be justified in examining the reasons given by him for disbelieving the statement made before him by Sardar Khan and Muhammad Yakub. It is for these reasons that I have decided not to expunge the remarks complained against, except the first remark which, for reasons already given, must be expunged from the record.

From what I have stated above however it must not be understood that I endorse the conclusions and opinions of the Magistrate contained in the remarks objected to. I have simply declined to express any opinion, whether they are justified or not, owing to the nature and scope of my jurisdiction in the matter.

R.M./R.K.

Order accordingly.

1930 Cr. Cases 1227

(Lahore)

AGHA HAIDAR, J.

Ahmad Ali—Accused—Petitioner.

v.

Emperor—Opposite Party.

Criminal Revn. No. 445 of 1930, Decided on 26th August 1930.

(a) Criminal P. C. (1898), S. 439—Judgments of lower appellate Courts should be self-contained, giving full analysis of evidence with clear findings so that High Court accepting findings may consider questions of law and procedure only.

The High Court in criminal revisions, as a rule, depends mainly upon the findings arrived at by the lower appellate Courts on questions of evidence. It is therefore the duty of such Courts to see that their judgments are self-contained and give a full analysis of the evidence, and that their findings are clear, so that the High Court accepting those findings may be able to direct itself to the considerations of the questions of law and procedure only.

It is not proper for the Magistrate in the lower appellate Court to say that as the trial Magistrate has discussed the evidence under several heads, he need not repeat what has been said in the judgment of the lower Court. This method of dealing with evidence of a case in appeal is highly unsatisfactory.

[P 1227 C 2 ; P 1228 C 1]

(b) Criminal P. C. (1898), S. 110—Accused is entitled to expect that his case would be thoroughly considered and proper finding recorded on evidence produced by him.

The Magistrate in the lower appellate Court bound down the accused under S. 110, remarking that he agreed with the trial Court in its analysis of evidence produced in defence and that it was insufficient to rebut the strong and reliable prosecution evidence, in which some of the witnesses stated specific instances where the accused was suspected.

Held: that this was a very unsatisfactory way of dealing with the defence evidence in a case under S. 110. The accused was entitled to expect that his case would be thoroughly considered and proper findings would be recorded in evidence produced by him in defence.

[P 1228 C 1]

(c) Practice—Precedents—Application of—In absence of ruling by local High Court on a point, rulings of at least other High Courts should be considered for coming to proper decision—Plea should not be rejected simply because there is no ruling on it by local High Court.

If there is a conflict of judicial opinions on a particular point, the Courts are bound to follow the decisions, if any, of the local High Court. In absence of any pronouncement by the said High Court, it is the duty of the Courts to study the law as laid down at least by two other High Courts for the purpose of coming to a proper decision. It is very undesirable to reject a plea simply because there is no ruling on it by the local High Court.

[P 1228 C 2]

(d) Criminal P. C. (1898), S. 110—Where evidence for defence is at least as good as that for prosecution order under S. 110 should not be passed.

Where the evidence for defence is at least as good as that for the prosecution, then the order under S. 110 should not be passed, more specially so when the evidence for defence coupled with evidence of several of the prosecution witnesses is decidedly superior to the rest of the evidence for prosecution.

[P 1230 C 1]

(e) Criminal P. C. (1898), S. 110 (f)—Scope.

The mere fact that a man happens to be of a litigious disposition does not bring his case under Cl. (f), S. 110 : 46 I. C. 701, *Rel. on.*

[P 1230 C 1]

(f) Criminal P. C. (1898), S. 110—Scope.

The mere fact that the accused is caught committing a felony does not bring his case under S. 110 (f) : 33 Cal. 308, *Foll.* [P 1230 C 1]

Gokal Chand Narang—for Petitioner.

Des Raj Sawhney—for the Crown.

Judgment.—Ahmad Ali, Sufedposh, has been bound down under S. 110 read with S. 118, Criminal P. C. and ordered to execute a bond for Rs. 10,000 in default of which he is to suffer rigorous imprisonment for a period of two years. He appealed to the District Magistrate and I regret to say that the appellate judgment leaves much to be desired. The High Court in criminal revisions, as a rule, depends mainly upon the findings

arrived at by the lower appellate Courts on questions of evidence. It is therefore the duty of such Courts to see that their judgments are self-contained and give a full analysis of the evidence and that their findings are clear so that this Court, accepting those findings may be able to direct itself to the considerations of the questions of law and procedure only. The assurance contained in the judgment of the District Magistrate that he has heard the counsel at length and had very carefully gone through the record of the case, can hardly be considered a substitute for the judicial determination of the questions of evidence involved in the case. Such a judgment is not likely to inspire confidence in the trial of the appeals in the Courts below. The District Magistrate also observes that the trial Magistrate has discussed the evidence under several heads and therefore he need not repeat what has been said in the judgment of the lower Court. This method of dealing with the evidence in the case in appeal is highly unsatisfactory.

As regards the fairly voluminous evidence recorded on behalf of the defence, the District Magistrate in appeal has disposed of it in the following way :

"I entirely agree with the lower Court in its analysis of the evidence produced in defence. It is not sufficient to rebut the strong and reliable prosecution evidence. Some of the defence witnesses are near relations of the appellant. The majority of them are money-lenders, and it is not difficult for the appellant to produce such witnesses. Some of them, no doubt, are lambardars, but their evidence is that the appellant is of good character whereas the prosecution witnesses state specific instances where he was suspected."

This is a very unsatisfactory way of dealing with the defence evidence in a case under S. 110. The accused was entitled to expect that his case would be thoroughly considered and proper findings would be recorded on the evidence on which he relied in his defence.

A certain legal plea was taken on behalf of the accused and the attention of the District Magistrate was invited to certain reported decisions of at least two High Courts in India in support of that plea. He disposed of the matter by observing that :

"No ruling of the Lahore High Court has been produced and in the absence of any such ruling from the High Court of this province I overrule this objection."

This means that if a question of law

arises on which there is no authority of the Lahore High Court, then the authorities of the other Courts should simply be ignored. In other words the District Magistrate is of opinion that he need not look into the exposition of law to be found in the decided cases of the other High Courts when the point is not covered by any judgment of the Lahore High Court. This method of dealing with a question of law may be calculated to save trouble and may therefore be convenient ; but it is open to serious objection. Of course if there is a conflict of judicial opinion then the Courts below are bound to follow the decisions if any of the Lahore High Court. But in the absence of any pronouncement by the said High Court it was the duty of the Magistrate to study the law as laid down by at least two other High Courts for the purpose of coming to a proper decision. The method adopted by the District Magistrate of dealing with the whole case is deplorable to a degree. In view of what has been stated above I was at one time inclined to send the case back to the District Magistrate for writing out a proper judgment, but on further consideration I thought that this would only have the effect of prolonging the proceedings. I therefore decided to go through the whole record in order to satisfy myself on the evidence whether the order under S. 110 was well founded or not. This procedure, however, should not be considered as a precedent in such cases.

Now coming to the revision itself Mr. Gokal Chand Narang raised a point that no proper notice was served upon his client under S. 112, Criminal P. C. I have read the original notice and in my judgment it substantially complies with the requirements of S. 112 in that it sets forth fairly clearly the substance of the information received against the applicant as well as other particulars.

The second objection repeated in this Court by Mr. Gokal Chand Narang was that the accused was not given an opportunity of further cross-examining the prosecution witnesses at the close of the prosecution evidence. The District Magistrate observes that as no charge was framed there was no necessity of affording the accused a further opportunity of cross-examining the witnesses.

There is authority to the contrary in *Tirlok v. Emperor*, A. I. R. 1927 All. 660. It was this judgment which the learned Magistrate refused to look into. I need not however, express an opinion on this question of procedure one way or the other as I propose to dispose of the present application for revision on its merits and not on any technical legal objection.

As already stated Ahmad Ali occupies the somewhat important position of a Sufedposi. The prosecution produced 17 witnesses against him, two of whom are Sub-Inspectors, one is a zaildar, seven are lambarbards, two are contractors and five may be described as miscellaneous. Ahmad Ali is admittedly a well-connected man and himself owns considerable landed property. Out of the prosecution witnesses Sheikh Muhammad Din, Sub-Inspector, P. W. 15, says that while he was the Sub-Inspector of the locality he was investigating a case under S. 379, I. P. C. and during the course of the investigation he came to know that the accused was responsible for the theft of a certain mare. But he says, at the same time, that the accused was not challaned and it was a mere suspicion. He further says that during the time (from February to July 1928) when he was the Sub-Inspector the accused was never suspected except in the case of the mare. Now one Budha had lost his mare and according to this witness the accused was suspected of having stolen it. Budha appears as P. W. 9 and says that he did not know if the accused had got the theft committed and that he did not suspect him. Chaudhari Khuda Bakhsh, P. W. 17, is another Sub-Inspector. He was the officer in-charge of the place from 1924 to 1926. He states that he never made a written report against the accused, that he did not find any material to start proceedings against him and that he does not remember if he ever summoned him on suspicion. Some of the prosecution witnesses have stated that five bullocks belonging to Sheo Nand, P. W. 7, had been stolen and that the accused had been suspected. But Sheo Nand (P. W. 7) gives the accused a good character and in fact his whole evidence supplies a good refutation of the case set up by the prosecution against him. He clearly

says that about a year ago he had suspected the accused when five of his bullocks had been stolen. He admits that he had suspected the accused because there was enmity between him and the accused at the time and that afterwards an oath was taken on behalf of the accused that he had not stolen them. He is quite emphatic that he had not seen the bad character of the accused. In cross-examination he says that he had been living in mauza Wahn for a period of 10 or 11 years and that during this period, with the exception of the case of the theft of the bullocks, he had never heard any complaint against the accused and that on the other hand the accused associated with respectable people and not with bad characters. He also says that he personally satisfied himself that the accused had not committed the theft of his bullocks. This evidence being of an important prosecution witness against whom no allegation of hostility has been put forward, goes a long way to demolish the case for the prosecution.

Khuda Bakhsh, P. W. 2, is a lambarbardar. He says that he did not know of any suspicion against the accused. It is true that several of the prosecution witnesses have stated that the accused has a bad reputation, but beyond these vague statements nothing definite has been brought out against him. Witnesses like Des Raj P. W. 3 and Baha-wal P. W. 14 are men of no position and their evidence is worthless.

On the side of the defence after eliminating the evidence of Nazir, Ahmed, D. W. 1, Ahmad Bakhsh, D. W. 7 Nur Ilahi, D. W. 8, and Raja Mahmud, D. W. 9, who are related to the accused and are big landed proprietors, there still remains the evidence of 29 witnesses. Six of these witnesses are lambarbards or sarbrah lambarbards, eight are sahlukars and the rest are fairly substantial zamindars. The learned Magistrate has, as already stated, brushed aside the evidence of these witnesses in a perfunctory manner. I cannot however imagine why all these witnesses, coming from the various sections of society and belonging to different communities, should come forward and falsely give a good character to the accused if he is really a man of bad character. I find a number of Hindu

sahukars paying income-tax who say that the accused enjoys a good reputation. I have read the evidence of all these witnesses and need not reproduce it in this judgment in extenso. It is certainly both on account of its quality and quantity, sufficient to rebut the case for the prosecution. I have already noted that several of the prosecution witnesses also give the accused a good character and do not support the accusation against him. It has been laid down in many judgments that when the evidence for the defence is at least as good as that for the prosecution, then the order under S. 110 should not be passed. In this case in my judgment, the evidence for the defence coupled with the evidence of several of the witnesses for the prosecution already noted is decidedly superior to the rest of the evidence for the prosecution.

The District Magistrate observes that "the remaining suspicions against the accused do not relate to theft or receiving stolen property, or to other matters mentioned in Cls. (a) to (e), S. 110, Criminal P. C., but they clearly show that he is a man of desperate and dangerous nature."

He then refers to certain incidents, one of which was that the accused was caught while committing adultery with a Mussalli woman and got a beating. The District Magistrate refers to several alleged false cases brought against various persons by the accused in one of which he is said to have extorted a large sum of money. The District Magistrate on these materials was apparently of opinion that the case against the accused fell within the purview of Cl. (f), S. 110, Criminal P.C. The Public Prosecutor who appeared to support the Magistrate's order did not attempt to elucidate these general observations of the Magistrate by anything on the record. Besides, the mere fact that a man happens to be of a litigious disposition does not bring his case within Cl. (f), S. 110 and if any authority were needed it would be found in *Ishwari Dutt v. Emperor* (1). The same remark applies to the incident of the accused's misconduct: *Arun Samanta v. Emperor* (2). This case is a clear authority that such a behaviour, even if it is established, does not bring the case against

the accused under Cl. (f), S. 110, Criminal P. C.

After a perusal of the entire evidence on the record I am satisfied that the order under S. 110, read with S. 118, Criminal P. C., against the accused cannot stand. I therefore allow the application for revision and set aside the order of the Courts below.

The accused is a Sufedposh and therefore occupies a position of some importance and responsibility. In view of the observations of the District Magistrate, that he was caught flagrante delicto while committing adultery with a Mussalli woman and received a beating, the desirability of his continuing to hold the position of a Sufedposh may be considered by the proper authorities. This however is a matter which does not directly arise out of the application and I am not concerned with it.

R.M./R.K.

Revision allowed.

1930 Cr. Cases 123C

(Lahore)

HARRISON, J.

Mahomed Bakhs and others—Accused—Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Petn. No. 1123 of 1930, Decided on 20th September 1930, from order of Dist. Magistrate, Jhelum, D/- 18th August 1930.

(a) Criminal P. C. (1898), S. 367—Judgment consisting of few notes on arguments and somewhat vague conclusions is no judgment.

A judgment which does not comply with the provisions of S. 367, but consists of a few notes on the arguments of counsels and a somewhat vague conclusion, is no judgment. [P 1231 C 1]

(b) Penal Code (1860), S. 325—Grievous hurt by stone thrown from unknown distance—Extra punishment is not called for.

Where two or more persons are tried for simple hurts, and a grievous hurt caused by a stone thrown from an unknown distance, even were it definitely held that a certain man was identified as the person who threw the stone, no extra punishment would be called for unless the stone is thrown, at very close quarters. For mere throwing of stone is not as serious an offence as the wielding of a lathi.

[P 1231 C 1]

Yusaf Mukhtar — for Petitioners 1 to 3.

R. C. Soni—for the Crown.

Judgment.—In this case ten men have been convicted under Ss. 147, 149 and 325, and in the cross case nine persons, with whom they are said to have fought, have also been convicted. These

(1) [1918] 19 Cr. L. J. 781 = 46 I. C. 701.

(2) [1903] 40 Cal. 366.

nine are said to have inflicted twenty-two injuries, whereas the accused in this case are said to have inflicted six. Five of these were simple; one was grievous and was caused by a stone thrown from an unknown distance, striking Ghulam Muhammad, an old man, in the eye and blinding him. The sentences passed were two months rigorous imprisonment and fines of Rs. 10 on eight of the accused, and on two four months' rigorous imprisonment and Rs. 5 fine. On appeal to the District Magistrate the sentences on the seven were upheld and the sentences of three were reduced to the terms already undergone.

The judgment is most unsatisfactory, in fact it is no judgment at all in that it does not comply with the provisions of S. 367, Criminal P. C., and consists of a few notes on the arguments of counsel and a somewhat vague conclusion. I draw the special attention of the District Magistrate to S. 367 and the many rulings based thereon which are summarized at p. 314, Sohoni's Code of Criminal Procedure. Only three men have come up on revision. The two who have been found guilty by the trial Magistrate of causing grievous hurt to Ghulam Muhammad, and a third Khuda Bakhsh, who is undergoing imprisonment in default of payment of his fine. The finding as regards the two is that they caused the grievous hurt, but only one stone struck Ghulam Muhammad in the eye and two men cannot have thrown it. The finding is very unsatisfactory and even, were it definitely held that a certain man was identified as the person who threw the stone, the extra punishment would not I think be called for; for unless the stone is thrown at very close quarters mere throwing of a stone is not, in my opinion, as serious an offence as the wielding of a lathi. The sentences are also unsatisfactory in that they inflict fines in addition to sentences of imprisonment without there being any reason for them. In the case of the two principal accused, Mozam and Muhammad Bakhsh, I reduce the sentence to the amount of imprisonment already undergone, and taking up the case of all the accused, I remit all the fines. Those which have been paid will be refunded.

V.B./R.K.

Order accordingly.

1930 Cr. Cases 1231 (Lahore)

HARRISON, J.

Chuhar and others—Accused — Petitioners.

v.

Emperor—Opposite Party.

Criminal Revn. Petn No. 493 of 1930, Decided on 19th September 1930, from order of Sess. Judge, Jullundur, D/- 17th February 1930.

Criminal P. C. (1898), S. 403 — Charge under S. 291, Penal Code — S. 403 is no bar to subsequent proceedings under S. 188, Penal Code, as they cannot be taken without complaint under Criminal P. C., S. 195.

Where a person has been proceeded against under S. 291, Penal Code, for flagrant disobedience of an order of the Court, to discontinue a nuisance, and acquitted before anything can be done against such person under S. 188, Penal Code, a complaint is necessary under S. 195, Criminal P. C., and S. 403 is no bar to such proceedings. [P 1231 C 2]

Zafarullah Khan—for Petitioners.

R. C. Soni—for the Crown.

Judgment.—Ten men have been convicted under S. 188 and their appeals have been dismissed by the Sessions Judge. The order which forms the subject-matter of the case was passed by Sardar Autar Singh and was to the effect that they were to discontinue slaughtering cattle within a certain area. They are all butchers. They are held to have continued to do so, a flagrant disobedience of the order, and action was taken against them and they were convicted under S. 291 of continuing the nuisance. Their appeal was dismissed, but their application for revision was accepted in this Court.

Proceedings were then taken against them under S. 188 and they were convicted under that section and their appeals were dismissed. They have now presented an application for revision and the first point made by counsel is that S. 403, Criminal P. C., is a bar to the present proceedings which would, I think, be quite true were it not for S. 195 to which my attention has been drawn by Mr. Soni. Under that section a complaint is necessary before anything can be done under S. 188 and in the absence of that complaint the charge could not have been framed to cover that section. This objection therefore fails.

On the merits counsel has taken various objections, such as that the Sessions Judge has apparently not relied

upon the prosecution evidence in that he has not referred to it and has relied upon an admission, which was not made by the accused. This is correct in that the Sessions Judge did not refer in so many words, as he should have done, and however briefly, to the evidence for the prosecution. I have therefore examined the judgment of the trial Court and have read portions of the evidence. I find that on the merits the conviction is good although it is not proved when each butcher slaughtered an animal; but I am satisfied on the evidence, and especially on that of Mr. Pool, who went to the spot and actually saw what was happening, that each of the accused who has been convicted did disobey the order of Sardar Autar Singh and did slaughter animals within the prohibited area after that order had been passed. The sentences are not, in my opinion, excessive. I dismiss the application and confirm the sentences.

V.B./R.K. *Application dismissed.*

1930 Cr. Cases 1232

(Allahabad)

BENNET, J.

Mt. Ram Kunwar—Applicants.

v.

Emperor—Opposite Party.

Criminal Ref. 181 of 1930, Decided on 4th August 1930, made by Sess. Judge, Etah, D/- 20th March 1930.

Criminal P. C. (1898), S. 526 (8) and (1)—S. 526 (8), applicable only when party notifies his intention to apply for transfer—Onus is on applicant to prove it.

Section 526 (8) applies only where the complainant or the accused notifies to the Court, before which his case is pending, his intention to make an application for transfer to the High Court. The onus lies on the applicants to show that the information required by S. 526 was given to the Magistrate. [P 1232 C 2]

L. W. Roy—for Applicants.

M. Waliullah and Nanak Chand—for the Crown.

Order.—This is a reference by the learned Sessions Judge of Etah recommending that the convictions of five persons under Ss: 147, 352 and 447, I. P. C., and sentences of one month's rigorous imprisonment and fines should be set aside. The ground of the recommendation is that the Honorary Third Class Magistrate before whom the accused were tried did not comply with the provisions of S. 526 (8), Criminal P. C., because he did not grant a sufficient ad-

journment for the accused to apply for a transfer. This subsection applies only where the complainant or the accused notifies to the Court before which the case is pending his intention to make an application under S. 526. S. 526, sub-S. (1) refers to the High Court, and the whole section deals only with applications for transfer made to the High Court. It has to be shown therefore by the applicant in revision that the Honorary Magistrate was informed that the accused intended to make an application to the High Court for transfer. Two applications are relied on by the learned counsel for the applicant in revision. The first application is dated 21st December 1929 and merely states that the accused want their case to be transferred to another Court and ask that the case should be postponed for 15 days. The second application of 23rd December merely refers to the first application. In neither of these applications is there any statement that the accused intended to apply to the High Court for a transfer under S. 526. The applicants in revision have not furnished any evidence by way of affidavit or otherwise to show that they had any such intention.

So far as the record goes it is apparent that their intention was merely to apply to the District Magistrate, and the learned Sessions Judge notes that an application to the District Magistrate by the accused dated 20th December 1929 was shown to him. He states that he is forwarding this application to this Court, but neither counsel nor the Peshkar could discover this application on the record. Its (contents) therefore are uncertain, for on the one hand the Sessions Judge states that it was not an application for transfer and on the other hand the Honorary Magistrate stated that it was an application for transfer. Be that as it may, the onus lies on the applicants in revision to show that the information required by S. 526, sub-S. (8) was given to the Honorary Magistrate. They have failed to show that such information was given. Accordingly, there is nothing illegal in the trial, and there is no ground on which this Court could interfere in revision. Therefore the reference is not accepted. Let the record be returned.

B.V./R.K.

Reference disallowed.

1930 Cr. Cases 1233

(Rangoon)

BROWN AND BAGULEY, JJ.

U Ko Ko Gyi—Applicant.

v.

U San Mya—Opposite Party.

Civil Misc. Appln. No. 5 of 1930, Decided on 24th June 1930, from order of Dist. Judge, Sagaing..

Legal Practitioners Act, S.13 — Duty of barrister allowing a client to give his version of case in full without warning him that he had not yet accepted the case and that other side had approached him to represent them in the matter, and that he had not declined their offer — Barrister subsequently engaged by other side — Though there is no misconduct Court is justified in refusing to allow barrister to appear for other side.

A, a barrister, allowed a client S to see him and to give his version of the case in full without warning him that he had not yet accepted the case and therefore could not regard himself as his advocate, and without warning him that the other side had approached him to represent them in the matter, and that he had not declined their offer. Subsequently A was engaged by the other side.

Held: that there could be no doubt that S reposed confidence in A by discussing the case in the way he did. [P 1236 C 1]

Held further: that the conduct of A could not be regarded as professional misconduct but the case came within the ambit. "Counsel ought not to accept a brief against a party even though the party refuse to retain him, in any case in which he would be embarrassed in the discharge of his duty by reason of confidence reposed in him by that party." And the Court is justified in holding that it would not be fair to S to allow A to appear for the other side. (1897-01) 2 U. B. R. 368; (1910-13) 1 U. B. R. 50; 26 Bom. 423 and A.I.R. 1917 P. C. 80, Ref; 12 Bom. 85, Dist. [P 1235 C 2; P 1237 C 1]

Lutter—for Applicant.

Chatterjee—for Mandalay Advocates Association.

Baguley, J.—This is an application filed by U Ko Ko Gyi, Bar-at-Law, an advocate of this Court, asking that an order passed by the District Judge of Sagaing refusing to allow him to appear in a certain civil regular suit in his Court may be set aside. The facts of the case have to be sought in affidavits filed by U Ko Ko Gyi himself, by San Mya, the respondent and by one U Sein, a pleader who apparently is in the habit of acting as a junior with U Ko Ko Gyi. San Mya is the husband and authorized agent of one Ma Ma Gale, who is interested in the partition of the estate of Paw Shan, deceased. The partition of this estate has been referred to arbitration, and it would appear

that some of the parties concerned took exception to the arbitrator's award and desired to file a suit to have the award set aside. Ma Ma Gale was one of the dissatisfied heirs, and San Mya was charged with the task of seeing to the filing of the suit. On 3rd May 1929 he saw U Sein and asked him to introduce him to U Ko Ko Gyi. U Sein took him to U Ko Ko Gyi's house and, leaving him in the sitting room, went into an inner room to see U Ko Ko Gyi. According to U Ko Ko Gyi's affidavit, U Sein came in to him and told him that San Mya was waiting outside to see him in connexion with Paw Shan's estate, and at the same time told him then that he had already been approached by one of the other heirs to retain U Ko Ko Gyi if litigation arose in connexion with the estate. U Ko Ko Gyi expressed an unwillingness to see San Mya if that were the case, but on U Sein saying that San Mya was a gentleman of some standing, out of courtesy he went to see him with the intention of speaking to him about fees only. He did not mention to San Mya that he had already been approached by the other side. Nevertheless he allowed San Mya to give him an outline of the case, and on U Sein intervening, saying that the fees should be settled first, he said that he would have to know the amount of labour that the case would involve. U Sein or San Mya said that the papers should be shown to U Ko Ko Gyi in order to enable him to settle the fees. The affidavits filed by both sides agree on this point. San Mya left the house in entire ignorance of the fact that U Ko Ko Gyi was considering appearing for the opposite party.

On 5th May San Mya returned again with all the connected papers. He says that when he saw U Ko Ko Gyi, he showed him the file of papers; U Ko Ko Gyi went through the award and some side notes of his and also the deed of submission to arbitration and other papers, and said that they had good grounds. He says that he told U Ko Ko Gyi that he had studied the facts of the whole case and showed him the notes taken by him in the course of his preparation for the B. L. Examination with regard to the law of arbitration. He discussed with U Ko Ko Gyi the terms of the deed of reference and some im-

portant aspects of the award and also told him the line of attack and the probable line of defence coupled with his reasons and arguments. After this U Sein suggested that they had better settle the question of fees as U Ko Ko Gyi had spent about an hour over the case already, and a discussion, with regard to fees took place.

Then U Sein advised him to consult the other plaintiffs; so he left the house. U Ko Ko Gyi's version of this interview is not exactly the same; he says that San Mya started the conversation by talking about the case without making any reference to fees. In the course of the conversation, he admits San Mya showed him the reference to arbitration and the award, which he glanced over and read in parts. He says he did not read the side notes, and in fact, he does not remember seeing any. He says that San Mya brought out four points against the award, which is obviously his way of referring to what San Mya speaks of as "the facts of the whole case the line of attack and the probable line of defence." U Ko Ko Gyi says that the discussion was with regard to the four points generally and not with reference to the particular facts of the case. It is difficult to understand exactly how this could be discussed without reference to the facts of the case, as two of the points, which U Ko Ko Gyi says San Mya brought out were the fact that the arbitrator took Rs. 10,000 as remuneration without the heirs agreeing to it, and further the fact that he misappropriated some valuable articles. U Ko Ko Gyi says that he did not stop San Mya in his expounding of the case, out of delicacy and because of his position, but he did not allow himself to be committed by any statement. He says that he told San Mya that he might have some good points, but that it was difficult to get an award set aside and he admits that he referred San Mya to a ruling in the Rangoon series of Law Reports. He then agrees with San Mya in saying that U Sein, who was present except for a short while, politely stopped San Mya and asked him to settle the fees first; whereupon he felt relieved. He says that he named certain amounts as the fees which he would accept, but San Mya made no offer, and finally went away. After this U Ko Ko Gyi accep-

ted the brief of the other side, and it is because of this that the District Judge has refused him permission to appear.

It will be noted that right up to the time that San Mya left the house on the second occasion there is no suggestion that anyone had given him the least inkling of the fact that the other side had intimated their intention to engage U Ko Ko Gyi on their behalf and that he was considering accepting the brief for the other side.

An affidavit has been filed by U Sein, but it really does not throw much further light on what has happened, and as this affidavit was not filed by U Ko Ko Gyi before the District Judge; it is, to say the least, doubtful whether it ought to be accepted now. The affidavit however is really of little value.

It seems quite clear therefore that U Ko Ko Gyi allowed San Mya to see him and to give him his version of the case in full without warning him that he had not yet accepted the case and therefore could not regard himself as his advocate, and without warning him that the other side had approached him to represent them in this matter and that he had not declined their offer. There can be no doubt whatsoever that U Ko Ko Gyi's action in this matter was not correct; he should never have allowed San Mya to disclose his case in the way in which he did; he should have held him down to a discussion of the terms on which he would accept the brief, and after getting a rough outline of the facts of the case to enable him to see what figure he was prepared to accept for the brief, he should have named his terms and either accepted the brief or rejected it completely. Mr. Lutter who argued this application on behalf of U Ko Ko Gyi admitted that it was unfortunate that his client acted as he did. Mr. Chatterjee who appeared on behalf of the Advocates' Association, Mandalay, went further and said the whole blame lay on San Mya, and that if anything has happened to his detriment he had only himself to blame for disclosing the case before he had briefed U Ko Ko Gyi, paid him his fees and so made him his advocate. This view I am quite unable to accept. San Mya may be a Myook and may have studied for the degree of B. L. but in litigation he was acting as a private party; and in such

a case an advocate has no right to attribute his own mistakes to his client and, as I have stated, his own counsel in this Court did not attempt to do so. I hope Mr. Chatterjee is using his own views in this argument and is not advancing the view as the considered opinion of the Mandalay Bar.

U Ko Ko Gyi's statement that he allowed San Mya to go on out of a feeling of delicacy and because of his position, I am unable to comprehend. San Mya is a Myook and a Township Officer. U Ko Ko Gyi is a Barrister-at-Law of many years standing and for some years occupied the position of a District Judge, and I am unable to understand such a hypersensitive sense of delicacy; it was his duty to prevent him from discussing the case until he had accepted the brief, more particularly when he had it fresh in his mind; for he was warned by U Sein only a minute or two before the first interview, that the other side had already intimated their desire to retain him for the same litigation.

The learned District Judge has refused U Ko Ko Gyi permission to appear following the dictum laid down in *Maung Mya U v. Sun Singh* (1), a case in which, it seems to me, the facts were considerably weaker than the facts disclosed by the affidavits in the present case. It is true there is a foot-note by the learned Judicial Commissioner who passed the order to the effect that it had been brought to his notice that the dictum was an obiter, but he states that he could not reconsider the matter till it came judicially before him, but that, as at present advised, the rule seemed to him to be an obvious one.

Mr. Lutter for U Ko Ko Gyi drew our attention to *Mr. — v. Tin Byu U* (2), in which an advocate who had appeared on behalf of a client in a certain litigation appeared against that client in another suit connected with the same facts seven years later. It is to be noted however that the head-note merely says that the circumstances did not warrant an order prohibiting the advocate from appearing, showing clearly that this is a ruling on the facts of the case.

Another ruling with regard to advo-

(1) [1897-1901] 2 U. B. R. 368.

(2) [1910-13] 1 U. B. R. 50 = 8 I. O. 1174 = 12 Cr. L. J. 57.

cates is to be found in *Pallonji Merwanji v. Kallabhai Lallubhai* (3), but in this case the facts are somewhat different: it was one in which an advocate appeared on behalf of two clients who had subsequently fallen out; and the question decided was whether he could subsequently appear for one of them. As an addendum to this ruling, there is a judgment passed by West, J., as a Judge of Sadar Court in Sind, which gives reference to a large number of English cases which I am unable to consult in original here.

The principle that emerges from all these cases appears to be that if an advocate had appeared on behalf of a client, and had in the course of his employment been made acquainted with any secrets of his client, he is not permitted to appear against that client after the termination of his employment if he might utilize those secrets to his former clients' prejudice.

The difficulty in the present case is that U Ko Ko Gyi was never actually retained on behalf of San Mya, but he did discuss the case to a certain extent when San Mya was under the impression that he might succeed in persuading him to accept the brief. There is authority for saying that a barrister consulted as a friend is not in the same position as a barrister consulted professionally: vide *Halsbury's Laws of England*, Vol. 2, p. 396; but it cannot be said in this case that San Mya was consulting U Ko Ko Gyi as a friend: he had never met him before the 3rd May and his interview with him was solely with a view to retain him in this case.

On p. 93 of the Bombay ruling before mentioned, it is stated in connexion with the question of whether a barrister may or may not accept a brief:

" the barrister must in this as in other matters often be left to the guidance of that sense of duty which Erle, C. J., thought would preserve its sensitiveness more unimpaired the less it was affected by any idea of legal obligation."

It seems to me that this case comes within the ambit of a statement to be found in *Halsbury's Laws of England*, Vol. 2, para. 661.

"Counsel ought not to accept a brief against a party, even though the party refuse to retain him, in any case in which he would be embarrassed in the discharge of his duty by reason of confidence reposed in him by that party."

(3) [1888] 12 Bom. 85.

The same principle is laid down in para. 618, p. 407. The present case is not identical, it is rather the converse; but I think the converse of the principle will apply. There can be no doubt that San Mya did repose confidence in U Ko Ko Gyi by discussing the case in the way in which he did and in the way in which U Ko Ko Gyi allowed him to do, and although in para. 680, before quoted, it is further laid down:

"... there can be no duty towards a person who has not been the client of the counsel, unless the fact of confidence having been reposed is clearly made known to the counsel," in this case, it must be held that the fact that confidence had been placed in him was known to U Ko Ko Gyi despite his assertion that he allowed San Mya to go on talking without paying any attention to what he was saying. This he certainly had no right to do, and even though he may not now be aware of all that San Mya said to him. San Mya remembers what he said to U Ko Ko Gyi, and if, in the course of the case, U Ko Ko Gyi by a process of independent thought, did seize upon a point which San Mya had mentioned to him as one of his weak points, San Mya would never be able to get out of his mind the idea that U Ko Ko Gyi got that point from him, and the sense of grievance would certainly remain.

It is true that, judged by the standard laid down in *Damodar Venkatesh v. Bhavanishankar Mangesh* (4) U Ko Ko Gyi's conduct in this case does not come below what is described as "the extreme low-water mark of professional conduct" and therefore cannot be regarded as professional misconduct, but these are not disciplinary proceedings, and I think that even when an advocate has not overstepped the line, the Court can still refuse to allow him to appear in the case. The Full Bench in that case definitely laid down that they did not expect this extreme low-water mark of professional conduct to be the standard by which the pleaders of their presidency should regulate their professional behaviour, and with this expectation I am in entire agreement. For these reasons I would dismiss this application. No order as to costs as the respondent has appeared in person and filed a written argument.

Brown, J.—The District Judge during the pendency of a case before him refused to allow the appellant to appear as an advocate for some of the respondents. The present appeal or application against that order is made, not by any of the parties to the case, but by the advocate personally. It is not clear to me how we have power to issue any order to the District Judge on such an application. Possibly the power is exercisable under the provisions of S. 107, Government of India Act. But however that may be, I do not think it is necessary to decide on this point as I am not satisfied that any case for interference has been made out.

As to the exact details of what happened the parties are at variance, but on certain of the main facts there is no dispute. On 3rd May 1929 the respondent approached the appellant and had an interview with him with regard to the case now pending before the District Court. At that time the appellant knew that there was a probability of his being approached by the other side to represent them in the litigation. He did not however inform the respondent of this fact and heard from him a general outline of the case. The question of fees arose and the appellant said he could not name any amount unless he knew the amount of labour the case might require and he then suggested that he should see some of the papers and settle the fees. Two days later U San Mya came back with certain papers and had another conversation with the appellant over the case. The question in issue between the parties was whether a certain award by arbitrators should be set aside. The respondent's case was that it should be set aside. At this second interview with the appellant he produced the reference and the award. The appellant read the reference and also some part of the award. There was obviously a somewhat lengthy interview and the appellant admits that U San Mya brought out four points which he said would vitiate the award. Firstly that the arbitrator took Rs. 10,000 as his remuneration without the heirs agreeing to it; secondly, that he had misappropriated some valuable articles; thirdly, that he refused to examine witnesses; and fourthly, that his award was not in accordance with the Buddhist

law. U San Mya says that he told the appellant the probable line of attack and the probable line of defence coupled with his reasons and arguments. The appellant does not admit this but he does admit that U San Mya had some discussion with him on the four points generally that he mentioned. He admits that he told him that there might be some good points but that it was rather difficult to get an award set aside and that he referred him to a ruling in the Rangoon series. Finally the question of fees was discussed and the consultation ended. Subsequently, the appellant was engaged by the other side. I do not wish to suggest that the appellant has not to the best of his ability described what took place at the two interviews; but, it is clear that the second interview, at any rate, was of some duration and that various points in connexion with the case were discussed at some length. It is impossible for either side to have an exact recollection of all that passed. But after such consultation it seems to me impossible to hold that the appellant was in a position to take up the case for the other side without making use of what he had heard from the respondent.

The learned District Judge relied on the Upper Burma case of *Maung Mya U v. Sun Singh* (1) in which it was held that

"it is misconduct from a professional point of view for an advocate after being consulted in his capacity of advocate about a case and after learning particulars of the case as stated by one side, to undertake the case in the interest of the opposite party. The fact that there was no definite engagement by the first party makes no difference."

I do not consider that it can be held that the action of the applicant in this case amounts to professional misconduct, but I think that in the circumstances of the case the trial Judge was justified in holding that it would not be fair to the respondent to allow the appellant to appear. It is laid down in para. 661, Halsbury's Laws of England, Vol. 2, that:

"Counsel ought not to accept a brief against a party even though the party refuse to retain him, in any case in which he would be embarrassed in the discharge of his duty by reason of confidence reposed in him by that party."

In the case of *Mary Lilian Hira Devi v. Kunwar Digbijai Singh* (5) (at p. 1442

of 21 C. W. N.), their Lordships of the Privy Council remarked:

"Before concluding, their Lordships must express their complete assent to the observations of the learned Judges of the High Court on the impropriety of a legal practitioner who has acted for one party in a dispute, such as there was in this case, acting for the other party in subsequent litigation between them relating to or arising out of that dispute. Such conduct is, to say the least of it, open to misconception, and is likely to raise suspicion in the mind of the original client and to embitter the subsequent litigation."

It is true that it has been held that a strong case must be made out before a Court could grant an injunction restraining a pleader from appearing on behalf of a party in a particular case. That was the view taken in the case of *Pallonji Merwanji v. Kallabhai Lallubhai* (3). But that was a case for an injunction. The question we have to consider here is not whether we should issue an injunction but whether we should interfere with the action of the District Court in refusing to allow the appellant to appear in that Court. The real test appears to be whether confidential information was acquired by the appellant as the result of the interviews with the respondent which might be of use to him in conducting the case for the other side. The appellant says that there was no such confidential information acquired by him, and I do not wish in any way to question the bona fides of his belief to that effect.

As I have said the interviews between the parties must have been a fairly prolonged one and various points in connexion with the case were clearly discussed at some length. The respondent has not perhaps proved any particular item of confidential information that was imparted, but that would be a difficult matter for him to prove. In the first place, if he did attempt to prove it the confidential information would cease to be confidential; and, in the second place, it would be difficult for him to remember the exact details of all that occurred.

It has been suggested by Mr. Chatterjee who appeared on behalf of the Advocates Association, Mandalay, that the position of advocates will be a difficult one if they are not allowed to hear anything from their respective clients about their cases before accepting a brief on the penalty of being debarred from appear-

ing for the other side. I do not think it is necessary to lay down any such rule for the purposes of this case, nor would I wish to lay down such a rule. But in the present case the appellant at the time he was consulted by the respondent knew that he was likely to be approached by the other side. It would have been an easy matter for him, to warn the respondent that this was the case and that the respondent should be careful not to disclose anything confidential to him. He did not give this information but he interviewed the respondent twice and on the second occasion heard the respondent at considerable length. In fact he does not really himself say that it was necessary for him to hear so much about the case in order to decide whether he should accept the brief. What he says in his affidavit is that:

"Out of delicacy and for his position I did not stop him, but I did not allow myself to commit to any statement or answer."

In all the circumstances of the case, although there is no direct proof of any confidential information having passed, I think it is a fair presumption that some such communication did pass from the respondent to the appellant. The respondent's action in objecting to the appellant's appearance was taken very promptly. The appellant appeared on 12th September 1929 and the respondent filed this application on 14th September. I am not satisfied that the action taken by the District Judge in the matter was wrong and I therefore agree that this application must be dismissed.

P.N./R.K. *Application dismissed.*

*** 1930 Cr. Cases 1238**
(Rangoon)

CUNLIFFE, J.

Chit Hlaing Maung—Applicant.

v.

Emperor—Opposite Party.

Criminal Revn. No. 407-B of 1930, Decided on 24th September 1930, from order of First Addl. Magistrate, Thaton, in Criminal Trial No. 97 of 1930.

* Criminal P. C. (5 of 1828), S. 403—Person acquitted of charge of abduction—His subsequent prosecution for alleged rape of same female during the abduction is barred.

Where a person has been acquitted of the charge of abduction, he cannot be subse-

quently prosecuted for the alleged rape of the female involved in the abduction prosecution during the abduction in question. On the grounds of public policy too, non-success in a prosecution for abduction, ought not to entitle the prosecutrix to bring further evidence to support a rape alleged to have been committed during the pendency of the abduction, even when further evidence is relied upon: *A. I. R. 1928 Rang. 252, Appl. [P 1288 C-2]*

K. N. Damgali—for Applicant.

Sutherland—for the Crown.

Order.—This is an application to quash a prosecution. The circumstances are as follows. The petitioner together with others was originally put on his trial for abduction. He was acquitted. The present prosecution relates to the alleged rape of the female involved in the abduction prosecution, during the abduction in question. In effect, the argument in the petitioner's behalf is based on the plea of "autrefois acquit." I have already expressed my opinion in the case of *Yeek Kuk v. Emperor* (1) that as far as the Criminal Procedure Code is concerned the test of the success of the plea of "autrefois acquit" lies in the similarity of the offences under consideration. I went so far as to say that only distinct offences could be considered to defeat the plea.

Applying the test I do not consider that the offences of the abduction and rape of the same woman are so distinct that an acquittal on the first charge will not bar subsequent proceedings on the second. On the grounds of public policy too, I cannot see that non-success in a prosecution for abduction, ought to entitle the prosecutrix to bring further evidence to support a rape alleged to have been committed during the pendency of the abduction in question, even when further evidence is relied upon. It seems to me that such a proceeding is contrary both to good law and good sense. I therefore accede to the application and order the rape proceedings to be quashed.

P.N./R.K.

Revision allowed.

(1) *A. I. R. 1928 Rang. 252=111 I. C. 850=29 Cr. L. J. 930=6 Rang. 386.*

1930 Cr. Cases 1239

(Allahabad)

BOYS AND KISCH, JJ.

In the matter of A Vakil of Beawar.

Misc. Case No. 168 of 1930, Decided on 29th April 1930.

(A) High Court.— Courts at Ajmere are not subordinate to Allahabad High Court except in two comparatively rarer matters.

Broadly speaking the Courts at Ajmere are not subordinate to the High Court of Allahabad except in two comparatively rare matters. [P 1240 C 2]

(b) Legal Practitioner— Allahabad High Court can take action against vakil or advocate on its roll but practising at Ajmere even though Ajmere Court does not choose to deal with him— Regulation 9 of 1926— (Obiter.)

Obiter.— The mere fact that the Ajmere Court might have power to deal with a legal practitioner practising there and did not choose to exercise that power would in no way whatever prevent Allahabad High Court, if it thought fit taking action against that legal practitioner if he was on the rolls of Allahabad High Court as a vakil or an advocate. [P 1240 C 1, 2]

(c) Bar Councils Act (38 of 1926), S. 9, R. 1, Proviso (a)—Scope.

The clause "practised in one or more of the Courts of the Court subordinate to the Allahabad High Court" as used in the rules framed under S. 9 means "practised in one of the Courts in this province." [P 1240 C 2]

Pearl Lal Banerji—for Bar Council.

Shabd Saran and Binod Behari Lal—for Applicant.

Judgment.—This is a case in which the Bench has been constituted to hear an objection by the Bar Council, to enrolling a gentleman as an advocate of this Court who is already enrolled as a vakil of the Court. The applicant for enrolment, Mr. Raj Narain, took his degree of Bachelor of Laws at Lucknow University in 1928. On 24th July 1928, he was enrolled as a vakil of this Court. He subsequently went to Ajmere. His counsel, Mr. Shabd Saran, cannot inform us in virtue of what authority Mr. Raj Narain began to practise in Ajmere, but we have little doubt that we are right in assuming that he applied to be enrolled as a pleader entitled to practise in Ajmere, under Regn. 9 of 1926. He now has applied for the entry of his name as an advocate on the rolls of this Court by virtue of the rules made under S. 9, Bar Councils Act (38 of 1926), and in particular, of R. 1, Proviso (a) which reads as follows :

" Provided, firstly, that a person who is a graduate in law of any such scheduled University and has been enrolled as a vakil prior to 31st March 1929, may be admitted to the roll of advocates on presenting a certificate that he has bona fide practised in one or more of the Courts subordinate to the Allahabad High Court for a period of not less than one year."

The only contention that has arisen in this matter is as to whether the Courts at Ajmere can be regarded for the purposes of enrolment as an advocate here as Courts subordinate to the Allahabad High Court. It is clear that generally speaking the Ajmere Courts are not subordinate to this Court in the matter of civil jurisdiction: see S. 3 (2), Regn. 9 of 1926 (published in the Government of India Gazette on 2nd October 1926 and which came into force on 23rd December 1926). For the applicant it has been urged that in certain special matters the Ajmere Courts are subordinate to this Court. In respect of two of these matters we do not think that the contention is well-founded. We have been referred to the fact that in certain cases of disputes as to income-tax, the income-tax officer can or must refer the matter under S. 66 (a) to this Court. But the fact that an income-tax officer must refer a matter to this Court can have no bearing on the question whether the Courts of Ajmere are subordinate to this Court or not. Similarly reference has been made to the fact that the repealed Press Act, 1 of 1910 (which it is suggested has been embodied in a recent Ordinance) provided in certain cases for this Court considering the propriety of an order of Government forfeiting a press in Ajmere. This again can manifestly have no bearing on the relations between the Courts in Ajmere and this Court. There is, however, greater force in the argument for the applicant in reference to two other cases where this Court does exercise jurisdiction in matters arising in or dealt with by the Courts in Ajmere.

Regulation 9 of 1926, S. 27, expressly saves jurisdiction over European British subjects from the provision which declares the Judicial Commissioner to be the High Court in matters on the criminal side, and another notification declares this Court to be the High Court in such matters. Similarly in certain matters this Court is the High Court for

purposes of matrimonial jurisdiction. Further on behalf of the applicant we have been referred to three cases in which a man practising in Ajmere has been admitted to the rolls of this Court as an advocate on the strength of his having practised in Ajmere. But those three cases are irrelevant to the one before us for in all three of them the one year's practice which was relied upon was prior in date to the coming in force of Regn. 9 of 1926, and therefore such practice was at the time of the practice capable of constituting a good qualification, the Courts in Ajmere being at that time subordinate to this Court.

There is only one of the contentions before us on behalf of the Bar Council with which we think it necessary to deal. It has been urged that the present rules framed under Regn. 9 of 1926 make full provisions for dealing with offences of the nature of professional misconduct committed by a vakil practising in the Ajmere Courts; and it is suggested that it would be undesirable to admit anybody to the rolls of the advocate here if he could not be dealt with by this Court. If there were any force in that argument it would be a good reason for striking anybody off the rolls of vakil of this Court on the ground that the Court had no jurisdiction to deal with him. But in fact we think it is desirable to put plainly on record our opinion that the mere fact that the Ajmere Court might have

power to deal with a legal practitioner and did not choose to exercise that power, would in no way, whatever prevent this Court, if it thought fit, taking action against that legal practitioner if he was on the rolls of this Court as a vakil or as an advocate.

The only consideration, then, which are really material to the decision of this application are, in our opinion, firstly, that broadly speaking the Courts at Ajmere are not subordinate to this Court; and, secondly, that in two comparatively rare matters those Courts are subordinate. It remains for us to interpret the word "subordinate" as used in the rules framed under S. 9 in the spirit in which we think there can be no doubt that it was used. There is no reason whatever for supposing that in using the word "subordinate" the framers of the rules had in mind the very exceptional cases in which the Ajmere Courts are subordinate to this Court. We think therefore that the right way of interpretation of the proviso with which we are dealing is that "practised in one or more of the Courts subordinate to the Allahabad High Court" means "practised in one of the Courts in this province." We think, therefore, that the application for enrolment as an advocate was rightly refused. The applicant will be informed that his application is refused.

R.M./R.K.

Application refused.

END

